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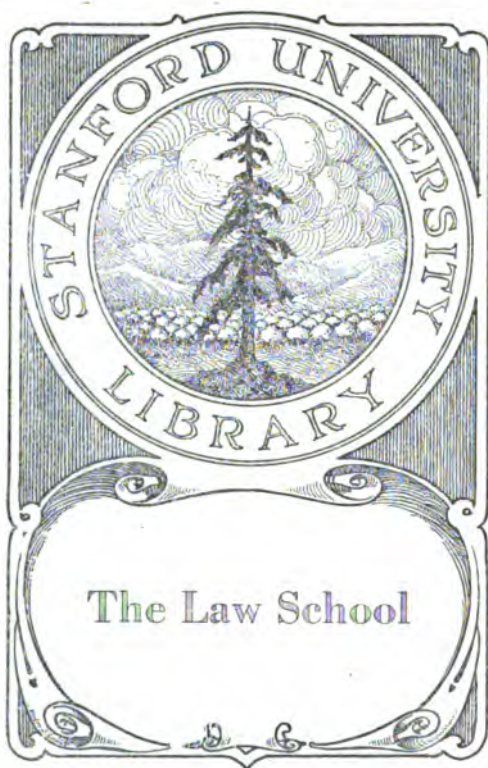
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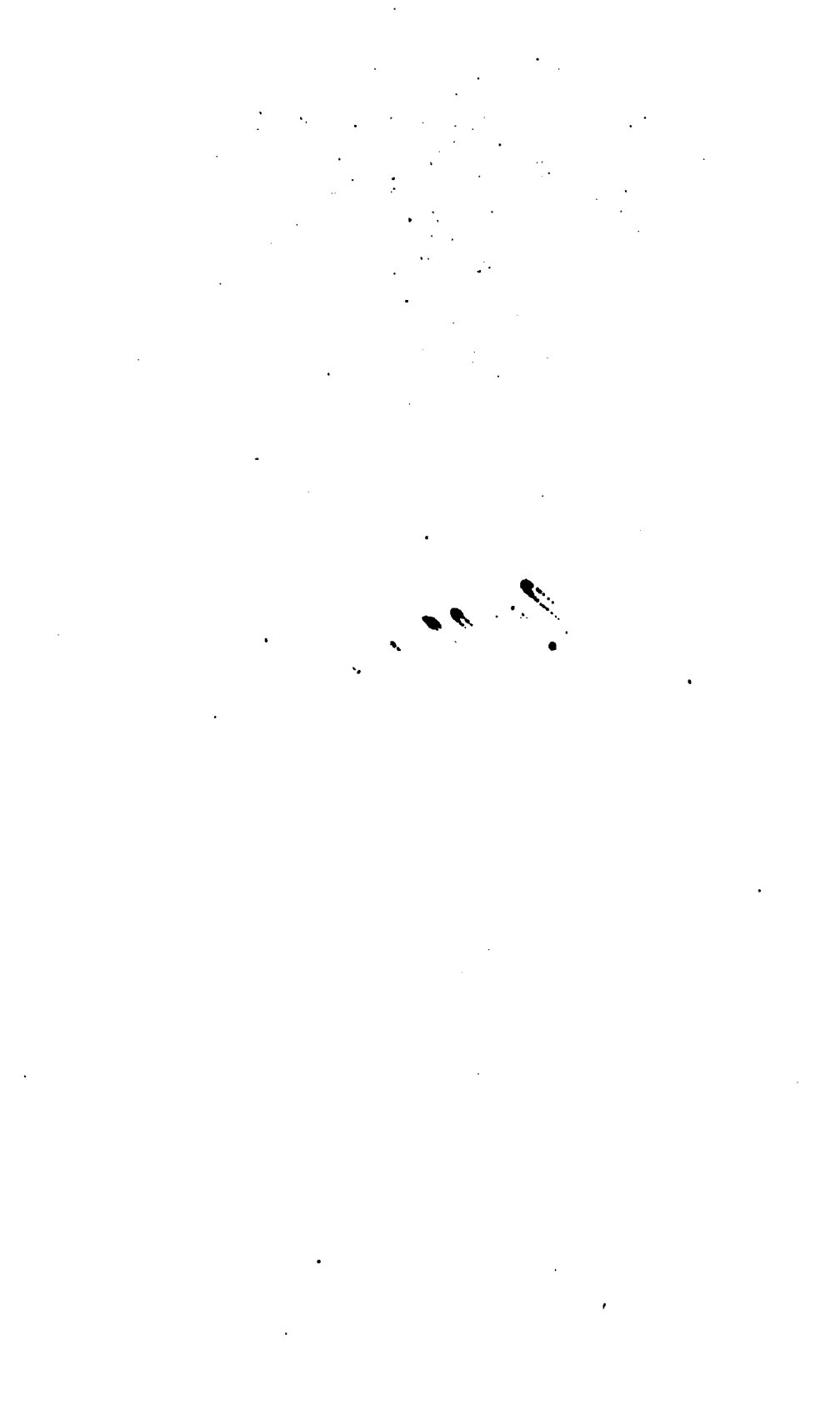
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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

Gillaspie

HERETOFORE CONDENSED BY
THOMAS SERGEANT AND JOHN C. LOWBER, Esqrs.,
Now Reprinted in full.

VOLUME XIV.

CONTAINING CASES DECIDED IN THE COURTS OF KING'S BENCH, IN TRINITY,
MICHAELMAS AND HILARY TERMS, 1827-8, AND AT NISI PRIUS, IN THE
KING'S BENCH, COMMON PLEAS, AND ON THE CIRCUIT, 1827-9.

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R E P O R T S
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH.

**WITH TABLES OF THE NAMES OF THE CASES
AND THE PRINCIPAL MATTERS.**

BY
RICHARD VAUGHAN BARNEWALL, OF LINCOLN'S INN,
AND
CRESSWELL CRESSWELL, OF THE INNER TEMPLE, ESQs.,
BARRISTERS AT LAW.

VOLUME VII.
CONTAINING THE CASES OF TRINITY, MICHAELMAS, AND HILARY TERMS, IN
THE EIGHTH AND NINTH YEARS OF GEORGE IV. 1827-8

PHILADELPHIA:
T. & J W. JOHNSON & CO., LAW BOOKSELLERS,
NO. 535 CHESTNUT STREET.
1872.

J U D G E S
OF THE
COURT OF KING'S BENCH,
DURING THE PERIOD OF THESE REPORTS.

CHARLES LORD TENTERDEN, C. J.
Sir JOHN BAYLEY, Knt.
Sir GEORGE SOWLEY HOLROYD, Knt.
Sir JOSEPH LITTLEDALE, Knt.

ATTORNEY-GENERAL.
Sir CHARLES WETHERELL, Knt.
Sir JAMES SCARLETT, Knt.

SOLICITOR-GENERAL.
Sir NICHOLAS C. TINDAL, Knt.



A

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CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,
IN TRINITY TERM,

IN THE EIGHTH YEAR OF THE REIGN OF GEORGE IV.

Phillips

MEMORANDA.

In the course of the last term Mr. Serjeant *Bosanquet* took his seat within the bar as King's serjeant; and on the first day of this term, the following gentlemen took their seats within the bar:

Serjeants *Taddy*, *Cross*, and *Wilde*, as King's serjeants.

Henry Brougham, of *Lincoln's Inn*, Esq., to whom a patent of precedence had been granted to rank immediately after *Charles Pepys*, Esq., the latter having taken his seat within the bar as King's counsel, on the first day of last *Michaelmas* term.

As King's counsel, *Thomas Crosby Treslove*, of *Lincoln's Inn*, Esq.; *George Rose*, of the *Inner Temple*, Esq.; *Henry Bickersteth*, of the *Inner Temple*, Esq.; **John Williams*, of the *Inner Temple*, Esq.; *John Campbell*, of *Lincoln's Inn*, Esq.; *Frederick Pollock*, of the *Inner Temple*, Esq.; *Horace Twiss*, of the *Inner Temple*, Esq.

DOE on the demise of PEMBERTON et al. v. ROE. June 16.

A tenancy for years, determinable on lives, is not a holding for "any term or number of years certain" within the 1 G. 4, c. 78, s. 1.

R. V. Richards moved for a rule to show cause why the tenants in possession should not enter into a rule for giving up possession, and a recognizance with two sureties for payment of costs, as required by the 1 G. 4, c. 78, s. 1. It appeared that the tenants held under a lease granted in the year 1762 "for ninety-nine years, if *R. G.*, *W. G.*, and *R. G.*, junior, or any or either of them should so long live."

Lord TENTERDEN, C. J. The statute only applies to cases where the holding is for "any term or number of years certain, or from year to year." I think that under the lease in question, there was not a holding for any term or number

of years certain; the case, therefore, does not come within the operation of the act of parliament, and we cannot call upon the tenants to give security.

Rule refused.

**REX v. The Justices of Buckinghamshire. June 16.*

[*3

Where a county rate was made under a local act, 54 G. 3, c. 103, giving a certain right of appeal: Held, that nevertheless a party aggrieved had the larger right of appeal given by the 55 G. 3, c. 51, s. 14, which applies to all acts relating to county rates theretofore passed, whether local or general.

By a local act of parliament, 54 G. 3, c. 103, the justices of *Buckinghamshire* were authorised to make an equal county rate; and in order to effect it they were empowered to call for certain returns, and were required at the next quarter sessions after those returns were made, to assess and tax every parish, &c. rateably and in due proportions. By section 10 it was enacted, that if the churchwardens and overseers of the poor within any of such parishes, &c. or any other persons, should think themselves aggrieved by any act, matter, or thing, to be done in pursuance of that act, they might appeal at the general quarter sessions for the county, to be holden next after any such cause of complaint should arise, upon giving a notice therein specified. Soon after the act passed the returns were called for and made, and the proportion which each parish should in future pay towards the county rate was fixed. At the *Epiphany* sessions in *January* 1827, the justices ordered a rate to be levied according to the proportions so fixed, and assessed a certain sum upon the parish of *Iver*; and at an adjourned sessions on the 15th of *February*, they ordered another county rate to be levied, and assessed a certain other sum upon the parish of *Iver*. The churchwardens and overseers, at the next *Easter* sessions for *Bucks* entered an appeal against these rates, on the ground that the parish of *Iver* was thereby assessed in a much larger proportion than the parish of *Langley* [*4
**Marish* in the same county. Fourteen days' notice of the appeal, and the grounds of it, had been given to the churchwardens and overseers of the poor of *Langley Marish*, and to the clerk of the peace for the county, and to the high constable of the hundred within which the parishes of *Iver* and *Langley Marish* are situate. The justices at sessions thought, that as a county rate had been made, and the proportion to be paid by each parish fixed in pursuance of the 54 G. 3, c. 103, they had no power to alter those proportions, either by virtue of the appeal clause in that act, or the 55 G. 3, c. 51, s. 14, and they refused to hear the appeal.

In *Easter* term a rule nisi was granted for a mandamus to the justices of the county of *Buckingham*, commanding them to enter continuances and hear the appeal.

The *Solicitor-General* and *Malby* now showed cause. The decision of the justices at sessions was correct; they had no power to entertain the appeal. By the 54 G. 3, c. 103, directions were given for making an equal county rate for *Buckinghamshire*, and sect. 10 gave to any person aggrieved a right of appeal to the quarter sessions next after the cause of complaint should arise. The time for appealing against the proportions of the rate in question had, therefore, elapsed long before the appeal. It will be contended that another right of appeal is given by the 55 G. 3, c. 51, s. 14. The words of that clause are certainly large, for they give to the churchwardens and overseers of the poor power to appeal, if they have at any time reason to think their parish aggrieved by any rate whether on account of the parishes being assessed in unequal proportions, or on account of their parish being rated at a higher proportion than some other [*5

parish. But s. 21 gives to the justices, where a local act applicable to their county has been passed, power to act, either under that or the general act at their election; and the rate in question was made under the local act.

Munro contra. The 21st section of the 55 G. 3, c. 51, gives the justices power to act under the local act or general act, at their election, only where the provisions of the latter are not inconsistent with those of the former. Now if, according to the 55 G. 3, c. 51, s. 14, the churchwardens and overseers had a right of appeal which did not exist under the local act 54 G. 3, c. 103, as to that the statutes are inconsistent, and the justices were not warranted in acting under the local act. By the general act the churchwardens and overseers of the poor of the parish aggrieved have at any time, when the grievance is felt, a right of appeal. The proportions of the rate in question might be perfectly fair at the time when they were fixed, but might afterwards become very unequal; and as soon as that was the case, a right of appeal existed, *Rex v. Justices of the city of York* (a).

Lord TENTERDEN, C. J. I am of opinion that the appeal in question was made in good time, considering it as made under the 55 G. 3, c. 51, s. 14. It is true that the rate was made under the local act. But the general act in the appeal clause refers to acts and rates of a prior date. It gives a right of appeal "to the churchwardens and overseers of any parish who shall at any time have *6] reason to think that such parish is "aggrieved by any rate *now existing*, or hereafter to be made, either in pursuance of this act, or of any act or acts *now in force*." That applies to all statutes, general or local; the words are clearly large enough to include both. But section 21 is referred to as showing that the 14th section ought not to receive so large a construction. The 21st section, however, relates only to the authority of the justices in assessing, levying, collecting, and enforcing the payment of the county rate. All those powers may well be exercised under the local act, if the justices think fit, and yet the right of appeal given by the 14th section of the general act may remain; and I think we ought not to put a more limited construction upon that clause, for it is very convenient that the right of appeal should be the same in all counties. The parties aggrieved may have a difficulty in ascertaining whether the rate is made under the general or local act, and may, therefore, upon the narrower construction, without any fault in them, lose the opportunity of appealing.

Rule absolute.

(a) 2 B. & C. 771.

REX v. The Justices of the Borough of Leicester. June 18.

The 54 G. 3, c. 81, which enacted, that the *Michaelmas* quarter sessions shall be holden in the week next after the 11th of *October*, is merely directory, and those sessions may notwithstanding that enactment be legally holden at another time.

Where the high constable of a borough, by the direction of the justices, employed and paid a number of special constables to suppress riots at an election, and the ordinary constables were also constantly employed by him during the same period in endeavouring to keep the peace, for which service he made them a compensation: Held, that the justices were warranted in considering the monies so expended as "extraordinary expenses incurred by the high constable in case of riot," within the meaning of the 41 G. 3, s. 78, s. 2, and in making an order upon the treasurer to reimburse him those expenses.

By an order of two justices of the borough of *Leicester*, made on the 10th of *October* 1826, after reciting that G. O., high constable of the borough, had *7] made "application to them for the extraordinary expenses incurred by him in the execution of his duty as such high constable in several cases of tumult,

riot, and felony occurring within the said borough, as well before as during the continuance of a contested election for members of parliament recently had therein, and that they had examined into and considered the same, they, the said justices, did thereby allow and adjudge to him, *G. O.*, the sum of 1343*l.* 17*s.*, as and for the reasonable and necessary allowances to be made to him for his extraordinary expenses upon the occasion aforesaid, and did thereby, in pursuance of the statute in that case made and provided, order and direct the treasurer of the borough to pay to *G. O.*, the said sum of 1343*l.* 17*s.* By an order of the general quarter sessions, holden on the 12th of *October* in the same year, this order of the two justices was confirmed. In last *Hilary* term a rule nisi for a certiorari to remove these orders was obtained upon affidavits suggesting that the expenses of the high constable were not bona fide incurred in keeping the peace; and, also, upon the ground of several objections appearing on the face of the orders, viz., first, that they did not state the nature of the riots, nor when they took place, nor what allowances were made; secondly, that the order of confirmation was not made at the sessions holden next after the riots were alleged to have taken place; thirdly, that this order was made at a time when the sessions were not duly holden according to the statute 54 *G. 3, c. 84*, which requires that the *Michaelmas* quarter sessions shall be holden in the first week after the 11th of *October*, whereas the sessions in question were holden in the same week, the 11th being on *Friday*, and the sessions *holden on the following day. The [*8 affidavits as to the expenditure were answered by others which showed that during the election in the month of *June* 1826, there were several serious tumults and riots at *Leicester*, and that the high constable, by the direction of the justices, procured a large body of special constables to be sworn in, who, together with the ordinary constables and headboroughs, were actively employed during the whole of the election, in endeavouring to preserve the peace, and that the whole sum allowed to the high constable had been bona fide paid by him to the ordinary and special constables. Upon these affidavits another objection to the order was raised, viz., that the money allowed was not for the personal expenses of the high constable, but for payments made by him to special constables selected by him at the suggestion of the justices, and for payments made to the ordinary constables for assisting in suppressing the alleged riots.

The *Attorney General* and *Parke*, in showing cause against the rule, were desired by the Court to confine their observations to the third and fourth objections, inasmuch as the affidavits as to the application of the money had been answered, and the orders did sufficiently state the nature and occasion of the riots, and the order appeared to have been confirmed at the quarter sessions next after it was made.

Before the 54 *G. 3, c. 84*, for regulating the time of holding the *Michaelmas* quarter sessions, was passed, all the quarter sessions were holden under certain ancient statutes, which were deemed merely directory, and quarter sessions holden at other times than those specified in *the statutes were always con- [*9 sidered good. (a). The 54 *G. 3, c. 84*, merely changes the time for holding the *Michaelmas* quarter sessions from the week after *Michaelmas* to the week after the 11th of *October*: it should therefore receive a construction similar to that which has been put upon the earlier statutes made in *pari materia*, viz. that it is directory only, and not imperative. As to the next objection, viz. that the 41 *G. 3, c. 78, s. 2*, authorising the justices to make a reasonable allowance to the high constable for any extraordinary expenses incurred by him in case of riot, only applies to his *personal expenses*, it is difficult to understand what is meant by the expression *personal expenses*. This, however, is clear, that when a high constable, in order to preserve the peace, when there is a riot, finds it necessary to have the assistance of special constables, and pays them for their services that is an extraordinary expense incurred by him in case of riot and

the justices are authorised to award him a reasonable allowance in respect of it. The magistrates may by virtue of the 1 G. 4, c. 37, swear in special constables and compel them to serve, and then the magistrates may pay them out of the county rate; but if special constables serve voluntarily at the instance of the high constable, and he pays them, he is entitled to be reimbursed. Lastly, it appears that the ordinary constables were compelled to perform extraordinary duties, for which it was reasonable that some recompense should be made; it might be absolutely necessary that some expense should be incurred in providing refreshment for them; this also was an extraordinary expense incurred by the high constable in case of riot, and therefore within 41 G. 3, c. 76, s. 2.

Campbell contra. The statute 54 G. 3, c. 84, is imperative, that the *Michaelmas* quarter sessions shall be holden in the first week after the 11th of *October*. By section 1, after reciting that the time then appointed for holding the quarter sessions for the *Michaelmas* quarter might be altered, so as to render the attendance at the same more generally convenient than it then was, it was enacted, that in future the quarter sessions for the *Michaelmas* quarter shall be holden for every county, &c. in the first week after the 11th day of *October*, instead of the time then appointed for holding the same; and by section 2 it was provided that the act shall not extend to alter the time of holding the sessions for *London* and *Middlesex*. This latter clause is altogether unnecessary if the former be merely directory; nor is it easy to discover the use of the first section if the justices may, notwithstanding that enactment, still hold the quarter sessions whenever they please. Admitting the former acts to have been directory, this seems to take away the discretionary power of the justices, for it appoints a new time instead of that formerly fixed. This language precludes the justices from holding the sessions at the old time, and must therefore (if any language can) be considered imperative. Then, as to the remuneration given to the high constable in respect of monies paid by him to the other constables, it seems clear that the 41 G. 3, c. 78, s. 2, cannot apply to such payments. They were not made by him in the execution of his duty as high constable, and the statute applies to such payment as he is bound to make, or expenses that he is bound to incur in that character. Besides, there is another specific mode, fixed by the 1 G. 4, c. 37, for remunerating special constables in cases of riots, and it applies equally to past and to apprehended riots. By the first section, the justices are authorised to call upon, nominate, and appoint special constables. In this case the special constables were employed by direction of the justices; they come, therefore, expressly within this enactment. By the third section, the justices at sessions are empowered to order a reasonable compensation to the special constables so employed. If then the special constables on the occasion in question were employed under the powers given by that act, they should have been remunerated in the manner pointed out by the legislature; if they were not so employed, there is no legislative provision for paying them, and no attempt should have been made to do that indirectly, which could not be done directly. And this applies as well to the ordinary as to the special constables. In various instances the legislature has provided some remuneration for their services, but where that has not been done they cannot claim it. The Court cannot take notice of the quantum of service done by a constable; the law imposes that duty, and however burthensome it may be, the subject must discharge it.

Lord TENTERDEN, C. J. I am of opinion that this rule must be discharged. The matter has been fully discussed; and if we see that the only effect of granting a certiorari to remove the orders, would be to impose upon us the duty of sending them back to the justices, instead of quashing them, we ought not to take that fruitless step. The first material objection to the order was, that the quarter sessions at which it was made were not legally holden, and that, therefore, the acts done at those sessions were void. Looking at the earlier statutes upon this subject, we find that by the 12 R. 2, c. 10, the justices are

required to keep their sessions in every quarter of the year at least, but no particular days are specified. By the 2 H. 5, st. 1, c. 4, it was enacted, that they "shall make their sessions four times in a year, viz., in the first week after *Michaelmas*, *Epiphany*, *Easter* and the translation of *St. Thomas* the martyr, and oftener if need be." The modern statute 54 G. 3, c. 84, merely substitutes the week after the 11th of *October* for the week after *Michaelmas*; the question must, therefore, receive the same consideration, as if that statute had never passed. Now we find that so long ago as the time of Lord *Hale*, the earlier statutes to which I have referred were considered as directory only. After pointing out what, according to a strict construction, would be required by those statutes, Lord *Hale* adds (a), "yet it is very plain that the quarter sessions are variously held in several counties, some at one day some at another, yet it hath been ruled that these are each of them good quarter sessions within the several acts that relate to quarter sessions; for these acts, especially that of 2 H. 5, is only directive and in the affirmative; and, therefore, though the sessions are held at another day, according to the general direction of the statute 12 R. 2, yet they are quarter sessions." It has been asked, what language will make a statute imperative, if the 54 G. 3, c. 84, be not so? Negative words would have given it that effect, but those used are in the affirmative only. This brings me to the question as to the remuneration given to the high constable. It is said that the 41 G. 3, c. 78, s. 2, merely authorises the justices to make an allowance for his personal expenses; but that would be a very narrow construction of a statute authorising them to reimburse him the expenses incurred in suppressing a riot; and I think that if special constables are sworn in and act under him, he may in the first instance make them a reasonable compensation, and afterwards receive from the justices an allowance in respect of that expense. This is perfectly consistent with the provisions of the 1 G. 4, c. 37. If the high constable, when called upon by others, or upon his own view thinking it necessary, appoints certain persons to assist him, it is proper that his should be the hand to pay for their services; but if special constables are sworn in by the justices without the intervention of the high constable, they should likewise pay them according to the directions of the statute. With respect to the ordinary constables, I think that as far as any general principle can be collected from the statute 41 G. 3, c. 78, it is in favour of the payment to them for their extraordinary exertions, and that the justices were well warranted in considering such payment as an extraordinary expense incurred by the high constable, for which they might make him an allowance under the second section of that statute. Upon the whole, then, I am of opinion that the order of sessions, confirming the order of the two justices, is good, and that this rule ought to be discharged.

The rest of the Court concurring

Rule discharged.

(a) 2 *Hale's P. C.* 50.

*HARE v. TRAVIS. *June 19.*

A policy, in the usual form, was effected on pearl ashes on a voyage at and from *Liverpool to London*. The captain took in goods at *Liverpool* for *Southampton* as well as *London*, intending to go first to the former place. He accordingly went into *Southampton*, and delivered the goods shipped for that place, and afterwards proceeded to *London*. The termini of the voyage being the same as those described in the policy, it was held to be the same voyage until the vessel reached the dividing point, and that the policy attached, although putting into *Southampton* was a deviation.

The goods insured received considerable damage from sea-water. But they were not examined at *Southampton*, nor until they reached *London*, when the damage was found to amount to 60 per cent. Before the vessel reached the dividing point of the two voyages she had met with bad weather, and had made much water, and on one occasion, the water pumped up appeared to hold the pearl ashes in solution. On the voyage from *Southampton to London* there were no heavy seas, and the weather was tolerably fair. Under these circumstances, it was held, that it was a question for the jury, whether the pearl ashes had sustained damage to the amount of 3 per cent before the deviation; and they having found that they had sustained damage to that amount, the court refused to disturb the verdict.

THIS was an action on a policy of insurance on pearl ashes on board the ship *Smyrna*, on a voyage at, and from *Liverpool to London*. The policy contained the usual clause, that all goods were to be free from average under three per cent., unless general, or the ship were stranded. At the trial before Lord *Tenterden*, C. J., at the *London* sittings after last term, it appeared that the captain had taken in goods at *Liverpool* for *Southampton* as well as *London*; the vessel, on the 23d of *September*, sailed from *Liverpool*, having on board the pearl ashes, which were stowed in the lower tier; she was compelled by bad weather to put twice into *Holyhead*, and upon a survey had there, it appeared she made much water. On the 30th of *October* the *Smyrna* left *Holyhead*, and from that time the hold of the ship was never free from water; while she was in the *Bristol* channel, the water pumped up took the colour out of the captain's clothes, which he attributed to its having the pearl ashes in solution. On the 1st of *November* the vessel arrived at *Southampton*, and the captain there delivered the goods shipped for that place, but the pearl ashes were not unloaded or examined *15] there. The vessel left **Southampton* on the 4th of *November*, and arrived in *London* on the 10th. On her voyage from *Southampton* there were no heavy seas. The weather was tolerably fair, but the ship made water, although not so much as she had previously done.

The pearl ashes, on their arrival in *London*, appeared to have sustained so much damage by salt water, as to be depreciated in value upwards of 60 per cent. They were in a state of solution, and it was proved by persons conversant with the article, that that could not have happened, from coming in contact with salt water, in less time than three or four weeks, certainly not in three or four days. Upon this evidence it was contended, that the plaintiff ought to be nonsuited, inasmuch as the vessel did not sail from *Liverpool* on the voyage insured, viz., a voyage to *London*, but on a voyage to *Southampton*. That was the first port of destination; for the captain having taken in goods for *Southampton*, must have cleared out for that place. That was the voyage contemplated and performed. Secondly, assuming that the putting into *Southampton* was a mere deviation, there was no evidence of the amount of the damage caused by the perils of the sea before the deviation took place. Lord *Tenterden*, C. J., was of opinion, that the vessel did sail on the voyage insured, the captain having an intention to deviate, which intention was afterwards executed by his going into *Southampton*, and that the underwriters, therefore, were not liable for any damage which occurred after that period: therefore, it was a question for the jury upon the evidence, whether, before the vessel put into *Southampton*, the assured had sustained damage to the amount of three per cent. by a peril of

the sea? *The jury found that the damage done to the pearl ashes before the deviation exceeded three per cent. [*16]

Campbell now moved to enter a nonsuit, on the ground that the vessel did not sail on the voyage insured, for the captain intended, in the first instance, to go to *Southampton*. In all the cases on the subject, a total loss has happened before the vessel reached the dividing point, and there is no case where underwriters have been held liable after a deviation. Secondly, the underwriters were clearly discharged from all responsibility after the deviation. The pearl ashes were not examined at *Southampton*, and all goods being warranted free from average under three per cent., it was incumbent on the plaintiffs to show distinctly that before the vessel deviated by going into *Southampton*, the pearl ashes had been injured to that amount by a peril of the sea. But there having been no examination of the cargo at *Southampton*; that became impossible. *Parkin v. Tunno* (a) is an authority to show there must be distinct evidence that the goods were damaged to that amount while they were protected by the policy, and that the evidence in this case was not sufficient for that purpose. From the 1st to the 10th of *November* the vessel was on her voyage from *Southampton*, and was frequently pumped. The damage may have occurred during that period.

Lord TENTERDEN, C. J. It appeared at the trial, that the captain took in goods for *Southampton*, and also for *London*. Having loaded his vessel with goods partly *for one place and partly for the other, I thought it was to be [*17] inferred that he sailed on a voyage to both places, and that so long as the vessel continued in that course, which was common to a voyage either to *Southampton* or *London*, she was sailing on the voyage insured. But as the policy did not contain any clause giving liberty to the vessel to put into *Southampton*, I thought the putting into that port was a deviation, and that the underwriters were not responsible for any loss which accrued subsequently. It appeared, however, that the vessel met with very bad weather in the early part of her voyage; that she put into *Holyhead*, and that after she left *Holyhead*, and before her arrival at the dividing point of the voyage, when the water was pumped up, it changed the colour of the captain's clothes; and it appeared further, that in the voyage from *Southampton* to *London* the weather was fair. When she arrived in *London*, it was found that the pearl ashes had sustained damage to the amount of two-thirds of their value. Under these circumstances, I left it to the jury to say, whether before the vessel came to the dividing point, *Southampton*, the assured had sustained a loss by the perils of the sea amounting to three per cent? The jury found that they had; and I think there was evidence to support that finding.

BAYLEY, J. Where the insurance is on a voyage to a given place, and the captain when he sails does not mean to go to that place at all, he never sails on the voyage insured. But where the ultimate termini of the intended voyage are the same as those described in the policy, although an intermediate voyage be contemplated, the voyage is to be considered the same *until the vessel arrives at the dividing point of the two voyages. The departure from the course [*18] of the voyage insured then becomes a deviation; but before the arrival at the dividing point, there is no more than an intention to deviate, which, if not carried into effect, will not vitiate the policy. In *Kewley v. Ryan* (b) the policy was at and from *Grenada* to *Liverpool*. The ship sailed for *Liverpool*; but the captain, before the commencement of the voyage, had formed a design to touch at *Cork* on her way. She was totally lost before she arrived at the dividing point; but the termini of the intended voyage being really the same as those described in the policy, the Court held that it must be considered the same voyage; and that a design to deviate, not effected, would not determine the policy; and they observed that the ship was bound for *Liverpool*, although she had also clearances for *Cork*. That case, therefore, is an authority to show,

that until the captain in this case departed from his course towards *London*, the voyage may be considered as a voyage to *London*. Upon the other point, I agree with my Lord, that under the peculiar circumstances of this case there was evidence to go to the jury that a loss to the amount of 3 per cent. had been sustained before the deviation, and that no fault is to be found with their verdict.

HOLROYD and LITTLEDALE, Js., concurred.

Rule refused.

*19]

*SMITH et al. v. FERRAND. June 21.

Where the seller of goods received from the purchaser an order upon his banker for the price, and the latter (with whom money had been deposited to meet that and certain other demands) offered to pay in cash, deducting discount for the period of credit, or by a bill upon a third person, which the seller elected to take: Held, that although the bill was afterwards dishonoured, he could not sue the purchaser for the price of the goods.

ASSUMPSIT for goods sold and delivered. Plea, non assumpsit. At the trial before *Park, J.*, at the Summer assizes for the county of *York* 1826, the following appeared to be the facts of the case: The plaintiffs carried on business at *Gomersal*, near *Leeds*, in *Yorkshire*, under the firm of the *Gomersal Mill Company*, and employed one *Kaye* to sell goods for them, and to receive the money, in *September* 1825 *Kaye* sold to the defendant, who resided at *Almondbury*, near *Huddersfield*, a quantity of worsted yarn for the sum of 193*l.* The yarn was afterwards delivered. *Kaye* was called as a witness by the plaintiff; and he stated that the yarn was sold to be paid for on delivery by a bill at two months, which was considered money payment, and that the defendant on the 11th of *October* gave him a note in writing which he was to carry to his bankers at *Huddersfield*, Messrs. *Dobson* and Co., "Please to pay the *Gomersal Mill Company* 193*l.*, equal to six months." This order had neither signature, address, nor date. On presenting this order to *Dobson* and Co., *Kaye* received a bill of 100*l.* drawn on a person in *London*, which had three months to run, and 89*l.* 11*s.* in banker's notes; 3*l.* 9*s.* being deducted for discount, which was the discount for three months on the 100*l.*, and for six months on the 89*l.* 11*s.* He was told at the time that he might have the whole in cash, allowing discount. *Kaye* afterwards called at *Ferrand's*, and wrote on the invoice of the goods the

*20] word "settled;" but he said that he, at the *same time, told the clerk he would not give credit for more than he had received. The bill was dishonoured on the 13th of *January*; *Dobson* and Co. had failed in *December*. On the part of the defendant it was proved, that it was the usual course of trade at *Huddersfield* to sell goods of this description to be paid for by a bill at six months; and that *Kaye*, on the day he received the order, admitted that he had agreed to allow six months' discount. It was also proved that the defendant had deposited with his bankers a 2000*l.* bill (which was duly paid), and sent to them a paper containing the names of several persons to whom different payments, amounting in the whole to 1600*l.*, were to be made, and in the list was that of "*John Kaye, Gomersal, 193*l.**" It was further proved that when *Kaye* presented the order, he was asked, how he wished to be paid? He said he would take a bill for 100*l.* at three months, and the rest in banker's notes. The discount was deducted, to which *Kaye* made no objection. The learned Judge was of opinion, that as *Kaye* might have received cash from *Dobson* and Co., and thought fit, for the convenience of himself or the plaintiffs, to take a bill, the taking of that bill discharged the defendant; and as to the sum deducted for discount, the right of the plaintiff to recover that depended upon a question of

fact, viz., whether *Kaye* had agreed to allow six months' discount or not, and he left that question to the jury; and he told them to find for the defendant, if, upon the whole evidence, they thought *Kaye* had so agreed, otherwise for the plaintiffs. The jury found a verdict for the defendant. A rule nisi for a new trial was obtained by *Cross*, Serj't., in last *Michaelmas* term, on the ground that the paper in *question was not a check, and that the payment by *Dobson* [*21 and Co. who were the agents of *Ferrand*, was in effect a payment by [*21 him; and the bill which was given in part payment having turned out unproductive, did not operate as a discharge of the original debt.

The Attorney-General and *Campbell* now showed cause. It must now be taken, after the finding of the jury, that the plaintiffs sold the yarn, to be paid for either on a credit of six months, or in ready money, allowing six months' discount. The plaintiff's agent, *Kaye*, having elected to receive, instead of bank notes or money, a bill having three months to run, took it at his own peril, and the original debtor is discharged, although the parties to the bill failed before it became due.

Parke contra. The order in question was not a check. It was not directed to the bankers, nor signed by any one. It was a mere ticket to identify the party entitled to payment, according to the list. *Dobson* and Co. were the agents of the defendant, and as such gave the bill, which was dishonoured. The act of *Dobson* and Co. was, therefore, his act; and it is clear, that if he had given the bill to *Kaye*, it would not have been a discharge. Where there is an antecedent debt, and a bill given for it, without any indorsement by the debtor, the law implies a contract that the bill shall be paid when due, and if it is not, the original debt remains; per Lord *Eldon*, *Ex parte Blackburn* (a). In this case, the bill was given in payment by the defendant, through the intervention of his agents, *Dobson* and Co.; it has not *been paid, and, therefore, the [*22 original debt pro tanto remains. *Everett v. Collins* (b), is an authority expressly in point. There the plaintiff had employed the defendant to sell cattle for him, and on demanding the money produced by the sale, the defendant took the plaintiff's son to *Mingay, Nott*, and Co., and they offered to pay him in bank notes, but he preferred a check on their bankers. The check was dishonoured. It was held, that this did not discharge the debtor, although *Mingay, Nott*, and Co. failed with a balance of the defendant's in their hands. That was decided on the ground, that *Mingay, Nott*, and Co. were considered as the defendant's agents or servants, and that their offer to pay by notes or their check, was tantamount to an offer to pay by notes or his check. But assuming that this was a check, the effect of it was to give to *Kaye* the option of having a bill at six months, or at any less time, or money, allowing discount. An unproductive check operates as a payment of a debt, when the party taking the check receives payment in a mode not warranted by the order. Thus, where *A.* sold goods to *B.*, for which the latter was to pay by a bill at three months, and *B.* gave *A.* a check on his bankers (who were also the bankers of *A.*), requiring them to pay *A.* on demand, or by a bill at three months; and *A.* paid the check into the bankers, and took no bill from them, but the amount was transferred in the bankers' books from *B.*'s account to *A.* with the knowledge of both, and the banker failed before the check became due; it was held, that *A.* not having taken any bill, had not pursued the order contained in the check, and could not recover the value of the goods, *Bolton v. Richard* (c). *But where the [*23 taking of a bill is warranted by the order, then the taking of an unproductive bill does not operate as a payment, *Ex parte Dickson* (d). In this case, the holder of the check had an option given by the check itself, either to take money or bills. He elected to receive part in cash and part in a bill, but that was a mode of payment warranted by the check itself, and therefore was no

(a) 10 Ves. jun. 206.

(c) 6 T. R. 139.

(b) 2 Campb. 515.

(d) 6 T. R. 142.

satisfaction unless the bill was paid. There is no case precisely in point. In all the cases bearing upon the subject where an unproductive check has been held to operate as payment, the party receiving the check has not received payment in a mode warranted by the order.

Lord TENTERDEN, C. J. I think this rule ought to be discharged. It appears by the report of the learned Judge, that the defendant, being indebted to the plaintiffs and other persons in various sums of money, had deposited in the hands of his bankers, *Dobson and Co.*, a 2000*l.* bill (which was afterwards paid) to provide for payments which they had to make on his account; and he notified to *Dobson and Co.* that the plaintiffs' agent, *Kaye*, was to be paid 193*l.* When *Kaye* applied to the defendant for payment, he gave him the following order on *Dobson and Co.* "Please to pay the *Gomersal* mill company 193*l.*, equal to six months." I am clearly of opinion, looking at the terms of this instrument, that *Kaye*, when he went to *Dobson and Co.*, had a right to insist on payment in ready money on allowing six months' discount; and if they had refused to give him that, he or his principal might have taken his remedy against *Ferrand*.

*24] Whether the order on *Dobson and Co.* assumed the form of a regular check or not is wholly immaterial. It appears clear from the evidence, that *Kaye* might have had cash if he would, but he chose to take in part payment a bill for 100*l.* which had nearly three months to run. He therefore took a security very different from that which was taken from *Mingay, Nott*, and *Co.*, in *Everett v. Collins (a)*. There the party took nothing but a check or order on a banker to pay the money immediately. But here the plaintiff's agent took a bill of exchange accepted by a stranger, and having a certain time to run. That was not an order for instant and immediate payment, as the check was in the case cited. Besides, *Dobson and Co.* were not merely agents in the common meaning of that term, but agents entrusted with funds for the specific purpose of paying these demands. It seems to me, that as the plaintiffs or their agent *Kaye* thought fit to waive the right to immediate payment, and to take the security, they must bear the loss which has happened through their own default. The rule for a new trial must therefore be discharged.

BAYLEY, J. I consider *Dobson and Co.* in this case as debtors to the plaintiffs for the amount of this bill. I take it to be clear, that if a creditor refer a third person to his debtor for payment, intending the third person to take payment in money, and the latter, instead of taking payment in money, takes payment in any other way, he does it at his peril. In a case before Lord *Kenyon* in 1796, it was decided that if a debtor refer a creditor to a third person for payment, and the creditor gives that third person indulgence without the *25] knowledge and *consent of the debtor, and the third person becomes insolvent, the loss must fall on the creditor, because, as between himself and the debtor, the giving indulgence without notice operates as an agreement on his part to look to the third person, and discharge the debtor. In this case, *Kaye* received an order for 193*l.* upon *Dobson and Co.*, who stood in the condition of debtors to *Ferrand* for 193*l.*, and at that moment *Kaye* might have demanded and received payment in cash. Instead of requiring payment in cash, he took this bill at three months. To this arrangement *Ferrand* was no party; he was not even apprized of it. The taking of the bill was an act of *Kaye's*, and an act of indulgence given to *Dobson and Co.*, and then the loss arising from the insolvency of *Dobson and Co.* must fall upon *Kaye*, or upon the plaintiffs, his principals, with whom he is identified. The case of *Everett v. Collins (b)* is distinguishable from this, because in that case the check taken was an order for prompt and immediate payment, and was equivalent to payment; for when a party is offered the option of having either a check on a banker or a bank note, it is in effect an offer to pay in one species of cash or another. For these rea-

sons, I am of opinion that the verdict for the defendant ought not to be disturbed. This rule must, therefore, be discharged.

LITTLEDALE, J.,(a) concurred.

Rule discharged. (b)

(a) *Holroyd, J.*, was absent in the Bail Court.

(b) See *Marsh v. Pudder*, 4 *Campb.* 257, *Strong v. Hart*, 6 *B. & C.* 160.

*GOODE v. LANGLEY, BAILEY, RANGER, and WEDDELL. [*26

A. agreed with B. to make a gig for a given price. The body of the gig and wheels were selected by B., and A. promised to deliver it in a few days. The full price was paid. Before it was finished, it was seized by the sheriff under a fi. fa. issued against A. The gig was afterwards finished, and delivered to B. with the assent of the judgment creditor. The sheriff afterwards retook it to secure his poundage: Held, that he had no right to do so, and that B. might maintain trover for the gig.

Query, Whether the property in the gig vested in the purchaser before delivery?

TROVER for a gig. Plea, not guilty. At the trial before *Park, J.*, at the Summer assizes for the county of York 1826, the following appeared to be the facts of the case. The defendant *Langley*, in 1826, was sheriff of the county of York; *Bailey* was a sheriff's officer; *Weddell* was a coachmaker, living at *Knarborough*; and *Ranger* was a plasterer, and the step-father of *Weddell*, with whom he resided at the time in question. On the 11th of April, 1826, *Weddell* agreed to make, for the plaintiff, the gig in question for 87*l.*, against which sum an old debt of 20*l.* 12*s.* 6*d.* due from *Weddell* to the plaintiff, was to be set off. The body of the gig and the wheels were selected by the plaintiff at *Weddell's* shop, and he promised that the gig should be completed and delivered in a few days. The plaintiff afterwards, and before the gig was finished, paid a further sum of money, which, together with the old debt, amounted to 87*l.*, the price of the gig. On Thursday the 11th of May, the plaintiff went to *Weddell's* premises for the gig; *Ranger* was there, and assisted *Weddell* in drawing it out of the yard and putting in the horse, and it was then delivered to the plaintiff. On the 5th of May, a fieri facias on a judgment at the suit of *Ranger* against *Weddell* had issued against the latter, directed to the defendant *Langley*, who made out a warrant to *Bailey* on the same day, which was endorsed to levy 45*l.* The sheriff took possession of *Weddell's* goods on the 6th of May, at which time the gig was upon his premises in an unfinished state; but after the seizure by *Bailey*, *Weddell* was permitted to work up the materials on the premises, [27] and he completed the gig. On the 13th of May, *Bailey* hearing that the gig had been taken away, went to the plaintiff's premises and took it back again; and this action was brought by the plaintiff, after a demand and refusal, to recover the value of the gig. *Ranger* and *Weddell* were living together before and after the judgment and execution, and *Ranger* looked after the workmen, and gave them directions. There were other circumstances to show that the judgment and execution were collusive. The learned Judge left the question to the jury whether the judgment and execution were fraudulent, and the jury found that they were. A rule nisi for a new trial was obtained on the ground that trover was not maintainable, the property in the gig not having vested in the plaintiff at the time when the sheriff took possession under the fieri facias.

The Attorney-General and *E. H. Alderson* now showed cause. The jury have found that the judgment and execution were fraudulent, and that being so the plaintiff was clearly entitled to recover even if the gig was not completed a

the time when the sheriff seized it under the fieri facias. But assuming that the property in the gig did not vest in the plaintiff before the seizure, in consequence of its not being completed, and waving the fraud, still it vested in him by the delivery of it in a complete state, with the assent of the judgment creditor, on the 11th of May. It is true, generally speaking, that a sheriff may maintain trover for goods which he has seized in execution; but the reason of that is, that *28] he is answerable to the plaintiff in the execution for the value of the goods so seized. But it is quite clear, that as the judgment creditor concurred in delivering this gig to the plaintiff, he could not maintain any action against the sheriff; and if so, it would seem to follow that the sheriff himself could not have maintained trover against the present plaintiff; and as to his being entitled to poundage, that right only gave him a lien upon the goods and the proceeds. It was his duty to take care not to part with the possession. By so doing he lost his lien.

Purke contra. This action is not maintainable, for the seizure was made on the 6th of May, and at that time the gig was not completed. It is clear that the plaintiff did not acquire any property in the article until it was finished and delivered to him, *Mucklow v. Mangles (a)*. The right to recover the price on the one hand, and the right of property on the other, are co-relative. Until the article was completed and was delivered, the maker could not have recovered the price, nor could the person for whom the article was made maintain trover. It makes no difference that the particular materials were selected by the plaintiff, for that would give him no property in them, but a right of action only against the maker for not using those particular materials. Nor does it vary the case that a part or the whole of the price is paid by way of advance; for if part be paid, no certain portion of the article can be said to become the property of the purchaser, unless where it is so stipulated expressly or by implication, as in *29] *Words v. Russell (b)*; nor if the whole sum is paid, does the property in the whole vest. If, where there is no such stipulation, the article is destroyed by fire before it is finished and delivered, the part or the whole of the purchase-money paid must be refunded to the purchaser, and the vendor must bear the loss. The subsequent delivery on the 11th of May could not vest the property, for neither the sheriff nor his officer concurred in it; and though the execution creditor did, his act could not defeat the lien which the sheriff had for poundage; and the fraud in the judgment and execution could not affect the sheriff or his officer, for they were bound to act according to, and were protected by the writ, and they would have been so protected if there had been no judgment; and a fraudulent judgment cannot place them in a worse situation.

LORD TENTERDEN, C. J. Without entering into the question whether the property in the gig had passed to the plaintiff before it was seized by the sheriff on the 6th of May, it seems to me that there was sufficient evidence to support the verdict in this case. The sheriff's officer entered the premises of *Weddell* by virtue of a fi. fa. issued on the 5th of May, at the suit of *Ranger*, and seized the property. *Ranger* afterwards continued to reside on the premises and manage the concerns, and he and his debtor afterwards concurred in delivering the gig to the plaintiff. As against them, therefore, the plaintiff is clearly entitled to retain it; but the sheriff afterwards retook it, and it is said that he had a right to do so in order to receive his poundage; but I think it was his duty not to permit it to go out of his possession. When he left it in the care of the *30] judgment creditor, and the latter delivered it to the plaintiff, he was placed in the same situation as if he had expressly consented to that delivery himself. I think the sheriff had no right to take it a second time in order to secure a debt of his own, and it is quite clear that he had no right to take it on behalf of the judgment creditor or the debtor. The rule for a new trial must therefore be discharged.

Rule discharged

BRIGGS v. WILKINSON and Three Others. June 22.

Where *A.*, the managing owner of a ship, mortgaged his share to *B.*, who procured the transfer to be duly indorsed on the certificate of registry, but *A.* continued in the management as before, and *B.* did not take possession or interfere in the concerns of the ship: Held, that he was not liable for repairs and necessities done and supplied in pursuance of *A.*'s orders.

ASSUMPSIT for work and labour and materials, goods sold and delivered, &c. *Wilkinson* pleaded the general issue, the other defendants suffered judgment by default. At the trial before *Hullock B.*, at the *Carlisle* Summer assizes 1826, it appeared that before, and in 1823, the defendants, who suffered judgment by default, together with *H.* and *J. Bowman*, were owners of the brig *Bolton* of *Maryport*. *H. Bowman* resided at that place, and was managing owner. In the month of *November* 1823, the vessel being then at sea, *H.* and *J. Bowman*, by bill of sale reciting the certificate of registry, did, in consideration of 280*l.* before then advanced to them by *Wilkinson*, bargain, sell, assign, &c., to him, their share of the *Bolton* habendum to him and his executors, &c., for ever, upon trust that he should at any time after the 13th of *January* then next, either with or without the concurrence of *H.* and *J. Bowman*, sell and absolutely dispose of the said share of the vessel for the best price that could be obtained, and with the purchase-money first pay the expenses of the sale, and *of carrying [*31 into effect the trusts and powers of that deed, and of effecting insurances, together with all such other sums of money as he (*G.W.*) his executors, &c., should or might thereafter pay, disburse, or become liable to as the registered owner of the vessel, or for or on account of the ship or vessel, and then to retain the sum of 280*l.* and interest; and then upon trust to pay the surplus, if any, to *H.* and *J. Bowman*, or as they might direct. This bill of sale was delivered to the proper officer at *Maryport* on the 19th of *December* 1823. The *Bolton* returned from sea on the 23d of *January* 1824, and on the 27th of that month the transfer was indorsed on her certificate of registry. After the execution of this bill of sale, *H. Bowman* continued to act as ship's husband as before; and in 1825 ordered the goods, for the price of which this action was brought, and they were supplied for the use of the *Bolton* by the plaintiff, who did not then know that *Wilkinson* was interested in her, nor had *Wilkinson* at that time taken possession or interfered in the concerns of the ship. In *April* 1826, *Wilkinson*, in consideration of 656*l.*, executed a bill of sale of his share in the *Bolton* to one *Tyson*. Upon this evidence the learned Judge thought there was no proof of the goods having been furnished upon the credit of *Wilkinson*; and as the plaintiff's counsel did not desire that question to be left to the jury, he directed a nonsuit, but gave the plaintiff leave to move to enter a verdict for 37*l.* 10*s.*, the value of the goods supplied, if the Court should be of opinion, that, under the circumstances above mentioned, the defendant was liable to the action. A rule nisi was accordingly obtained in last *Michaelmas* term, against which

*The *Attorney-General* and *Parke* now showed cause. It is quite clear [*32 that the work in this case was done, and the goods supplied on the credit of *Bowman*, and not on the credit of *Wilkinson*. The simple question therefore is, whether a mortgagee of a ship, not in possession and to whom no credit is given, is liable for the repairs of the ship and goods supplied for her use. There are two modern cases decisive as to this question, *Annett v. Carstairs* (a), *Jennings v. Griffiths* (b). In the former, which was an action by the master against a mortgagee of a ship out of possession, for his wages and disbursements, Lord *Ellenborough* said, "Title has nothing to do with these cases; we must look to the contract between the parties:" and the plaintiff was nonsuited. In the latter, which was an action against the legal owner of a ship for repairs,

Abbott, C. J. told the jury that the question for their consideration was, "were or were not the repairs done upon the credit of the defendant," and thereupon the plaintiff's counsel chose to be nonsuited. Here it is admitted, that the repairs were not done upon the credit of the defendant. These decisions were not new in principle, but followed the rule given in the earlier cases, *Jackson v. Vernon* (a), *Chinnery v. Blackburne* (b), *M'Iver v. Humble* (c). Where repairs or stores are ordered by the master, the case is different; for, ex necessitate, he is the agent of all the owners if employed generally by them.

Alderson and Patteson contra. *Wilkinson* was not in the situation of an ordinary mortgagee. There was no *covenant by him to reconvey the ship to the *Bowmans* upon payment of the money due, and he had power to retain out of the proceeds of the ship, when sold, all such sums as he might be compelled to pay as registered owner. By the 4 G. 4, c. 41, s. 43, (the register act in force at the time of this transfer) it is provided, "that where a transfer is made by way of mortgage, or for the purpose of effecting a sale for payment of any debt or debts, that shall be expressed in the indorsement on the certificate of registry, and then the person to whom such transfer is made shall not by reason thereof be deemed an owner." No such statement was introduced in this case, and, therefore, *Wilkinson* became owner, and liable to all the responsibilities of an owner. All the cases cited were of a mortgage of the whole ship; and it makes a great difference whether the ship is the property of one or several owners. Before this transfer, *H. Bowman* was employed by the other owners as manager; and as he continued in that situation afterwards, he was agent for *Wilkinson* as well as the other owners in all matters concerning the ship. The real question in this cause then was, not whether credit was given to *Wilkinson*, but whether credit was given to *H. Bowman* personally, or as the representative of the owners of the ship. If the jury had found that credit was given to him in the latter character, *Wilkinson* would have been liable. The case of *Jackson v. Vernon* proceeded upon the authority of *Eaton v. Jaques* (d). That case, however, was expressly overruled in *Williams v. Bosanquet* (e); and *Jackson v. Vernon* was much shaken by the observations of Lord *Kenyon* in *Westerdell v. Dale* (f), and it was again observed upon with disapprobation by **Abbott* C. J. in *Dowson v. Leake* (g). In the case of *Frazer v. Marsh* (h), where the registered owner had chartered his vessel for several voyages, it was held that he was not liable for stores supplied, because he could not be considered as owner.

Lord *TENTERDEN*, C. J. It appears to me that the only question for our consideration is, whether the repairs done, and the stores supplied to the ship in question, can be considered as having been done and supplied under the authority of *Wilkinson*, either express or implied. Express authority there certainly was not. Then, do the facts of the case warrant the inference of an implied authority? It appeared that the order was given by *H. Bowman*, formerly a part owner, who had parted with his legal interest to *Wilkinson*. That, however, was partially for his own benefit, and not wholly for *Wilkinson's*. Beyond the monies secured by the bill of sale, *H. Bowman* continued interested, although he no longer had a legal interest in the ship, and upon repayment of all that was due he might have had his share of the ship re-conveyed to him. In the mean time he continued to manage the ship as before, and gave the orders in question as if no such bill of sale had been executed. During this period, *Wilkinson* never interfered with the concerns of the ship, and it is impossible for us to say that *Bowman* had his authority for giving those orders. There are certainly conflicting dicta and authorities upon this subject: they have arisen since the passing of the register acts, which appear to have influenced the judgment of the

(a) 1 H. Bl. 114.

(b) *Ibid.* 117, n.

(c) 16 East, 109.

(d) *Dong.* 455.

(e) 1 B. & B. 238.

(f) 7 T. R. 396.

(g) D. & R. N. P. C. 52.

(h) 13 East, 238.

courts; I cannot, however, understand how those statutes affect the question. They enable a person to ascertain who are the legal owners of a vessel, [*35 but that might have been ascertained aliunde; and if the legal owners would not at common law be liable to such demands as the present merely on account of their ownership, I cannot think that they are so by reason of any thing to be found in the register acts.

BAYLEY, J. In the case of a ship, as of other property, an agent may make himself or his principal liable for repairs. But the question here is, whether *Wilkinson* can or cannot be treated as one of *Bowman's* principals? Where a ship is under the management of the master, and the owners divide the profits, the master is *prima facie* agent for them all; but the mere legal ownership does not make any person liable for the ship's debts. *Chinnery v. Blackburne* is the first case upon this point; and there the Court seem to have considered that if a mortgagee were entitled to the profits of the ship, he would be liable to the debts. Then in *Jackson v. Vernon* it was held, that a mortgagee was not liable for necessaries supplied to a ship before he took possession. In *Westerdell v. Dale*, Lord *Kenyon* appears to have entertained a different opinion; but that point was not decided, and *Dale* was, independently of the mortgage, part-owner of the ship, and he was charged on the ground of that ownership. Since that time there have been many decisions that mere ownership, without proof of agency, does not render the party liable. In *Young v. Brander* (a), and *M'Iver v. Humble*, the party had made a transfer of his interest; but for want of compliance with certain forms, the legal ownership remained with him, and that was not deemed sufficient to make him liable for the ship's debts. Inasmuch, then, as *Wilkinson* had merely the legal ownership as mortgagee, [*36 and *H. Bowman* had not any authority, either express or implied, to pledge his credit, I think that the nonsuit in this case was right.

HOLROYD and LITTLSDALE, Js., concurred.

Rule discharged.

(a) 8 East, 10.

The Duke of DEVONSHIRE v. LODGE. June 23.

Grouse are not birds of warren.

TRESPASS for breaking and entering the free-chase and free-warren of the plaintiff, and killing and taking away hares, pheasants, grouse, &c. Plea, not guilty. At the trial before *Park J.* at the *Yorkshire* Summer assizes 1826, it was proved that on the 12th of August 1825, the defendant shot some grouse upon land the owner of which gave him leave to shoot, but over which the plaintiff claimed a right of free-chase and free-warren. Various objections were taken to the plaintiff's right to maintain the action; and, amongst others, it was contended that grouse are not birds of warren, upon which the cause was ultimately decided. The learned Judge reserved the points; and the plaintiff having obtained a verdict, a rule nisi was granted, in *Michaelmas* term 1826, for entering a nonsuit upon the several points reserved; but as the Court gave an opinion upon one only, the discussion which took place as to the others has been omitted.

The *Attorney-General*, *Solicitor-General*, and *Brougham*, on a former day in this term, showed cause. It is difficult to find any reason why grouse [*37 should not be included in the protection given to other birds as birds of

warren. But *Manwood's Forest Law* and *Barrington's* case (a) are relied upon as authorities that grouse are not birds of warren. In *Manwood*, p. 362 (b), it is said that the beasts and fowls of warren are, "hare, coney, pheasant, and partridge;" and in *Barrington's* case the same enumeration of beasts and fowls of warren is given. But both those books refer to the following passage in 1 *Inst.* 233: "The beasts of parque or chase *properly* extend to the buck, the doe, the fox, the marten, the roe; but in a *common and legal* sense, to all the beasts of the forest. There be both beasts and fowls of the warren. Beasts, as hares, conies, and roes; fowls of two sorts, viz., terrestres and aquatiles; terrestres of two sorts, silvestres and campestres; campestres, as partridge, quail, rail, &c.; silvestres, as pheasant, woodcock," &c. Now, in the first place, Lord *Coke* makes a distinction between those things which are in a proper sense called beasts and birds of warren, and those which are so in a common and legal sense. Secondly, it is plain that the birds which he mentions are merely put as instances, and the use of the &c. demonstrates that in his opinion there were other birds of warren besides those specified. At all events, *Manwood* and *Barrington's* case, which cite this passage, are not conformable to it, for in them no mention is made of quail and rail, which are included in Lord *Coke's* enumeration. It is certainly true that in very early times grouse are never mentioned, probably because there was then great difficulty in taking them. Netting was impracticable on the moors, and the nature of the ground made hawking very difficult and dangerous. But by the 48th statute 1 J. 1 c. 27, after a recital that there were divers good laws inflicting penalties upon those who should with any gun, &c. spoil or destroy the game of pheasant, partridge, hearn, mallard, and such like, in section 2 a penalty is imposed upon every person who shall with a gun, &c. kill or destroy any pheasant, partridge, &c., grouse, heathcock, moor-game, &c. There they are treated as game of the same nature as pheasant and partridge, and that statute was passed about the time when *Manwood* wrote.

J. Williams, Alderson, and Parke, contra. There is no reason to suppose that *Manwood* has not accurately enumerated the beasts and birds of warren. The ground of the original reservation of warren was for hawking by the king; and accordingly we find that the birds and beasts of warren were those usually taken by long-winged hawks. It is also observable that the forest laws were of Norman origin, and therefore might not be applied to grouse, which are only known in Great Britain. *Manwood*, c. 1, s. 3 (c), says, "A forest is not a privileged place generally for all manner of wild beasts, nor for all manner of fowls, but only for those that are of forrest chase and warren;" and he afterwards says, "the beasts and fowls of warren are these, the hare, coney, pheasant, and partridge, and none other are accounted beasts or fowls of warren." *Manwood* wrote before Lord *Coke*, and therefore in his first edition could not refer to the 1st *Inst.* In subsequent editions, published after *Manwood's* death, there is such a reference, but that proves nothing against the accuracy of the author; and the alleged inconsistency between *Manwood* and the authority upon which he is supposed to have relied does not in reality exist. *Manwood* does, however, give an authority for his list of birds of warren. In c. 4, s. 3, he repeats the enumeration of beasts and fowls of warren, and says that none other are accounted beasts nor fowls of warren; and for this he cites the *Register of Writs*, 93, the *Book of Entries*, 96, and *Fitz. N. B.* 87. He then gives the form of a grant of free-warren, and adds: "And every such charter would be very uncertain by the words 'quod ad warrenam pertinet,' if it was not certainly known what were beasts and fowls of warren; and therefore in the register in the writ of trespass, for hunting in a warren, it is averred 'that the trespass was done there in taking or driving away those beasts or fowls which are beasts and fowls of warren,' which, as *Budeus* tells

us, are such as may be taken by long-winged hawks; and those are, the hare, the coney, the pheasant, and the partridge." The statute 1 J. 1, c. 27, shows that grouse were then well known and treated as game; if therefore they had been considered birds of warren, no doubt they would have been noticed by *Manwood*. Even the comprehensive language of Lord *Coke*, in 1 *Inst.* 233, does not include grouse, for they are not either *campestris* or *silvestres*.

Cur. adv. vult.

The judgment of the Court was now delivered by Lord TENTERDEN, C. J., who, after shortly stating the facts of the case, proceeded as follows: The franchise of free-warren is of great antiquity, and very singular in its nature. It gives a property in wild animals; and that property may be claimed in the land of another, to the exclusion of the owner of the land. Such a right *ought not to be extended by argument and inference to any animals not clearly within it. Now there is not any one book in the law which has [*40 mentioned grouse as a bird of warren. *Manwood* confines his description to two species, pheasants and partridges, and he founds his doctrine upon old writs and entries, and in them birds and beasts of warren are not mentioned generally, but are specially designated. Perhaps it may not be easy at this distance of time to say why one species should be a bird of warren and not another. One reason why grouse were not so considered may be, that grouse were not birds that could be taken by any of the ordinary modes of sport in use at the time when this franchise had its origin. Another may be, that those birds were known only in some parts of *England*. Not finding these birds anywhere mentioned as birds of warren, and for the reasons given, not feeling it right to extend the franchise, we are of opinion that a nonsuit must be entered.

Rule absolute.

Sir OSWALD MOSLEY, Bart., v. JOHN WALKER. June 23.

The lord of an ancient market may, by law, have a right to prevent other persons from selling goods in their private houses situated within the limits of his franchise.

Where such a market had been from ancient times held in a public street, but in consequence of the increased population and traffic, persons frequenting the market-place were subjected to inconvenience and danger, and the lord had permitted part of the market-place to be used for other purposes than for the sale of articles usually sold there; in an action brought by the lord against the owner of a house adjoining to the market-place for there opening a shop and selling goods, but who, at the time when he sold the goods, had a stall in the market-place, which he might have occupied; it was held, that it was properly submitted to the jury to find whether, from the state of the market-place, the defendant had a reasonable cause for selling in his private house; and a verdict having been found for the plaintiff, the Court refused to grant a new trial.

DECLARATION stated, that the plaintiff, on the 1st of *January* 1824, and long before, was and from thenceforth had been, and still was lawfully *possessed of a certain market holden in the town of *Manchester*, in the county of *Lancaster*, on *Tuesday*, *Thursday*, and *Saturday* in every week throughout the year, except on *Christmas-day* and *New Year's day*, when they respectively happened on *Tuesday*, *Thursday*, or *Saturday*; for the buying and selling, amongst other things, of all manner of fish of such kinds as are usually bought and sold in markets; and of all liberties, customs, privileges, tolls, stallages, and all other emoluments belonging thereto; and had during all that time provided proper and sufficient stalls in the market for such persons who needed and required the same for the sale of their fish on *Tuesdays*, *Thursdays*, and *Saturdays*, being such market days as aforesaid; and also had, and of right ought to have,

the correction of the market; and whereas all fishmongers and other persons selling their fish of such kinds as are usually sold in markets on *Tuesdays*, *Thursdays*, or *Saturdays*, or on any of those days, being market days in the town of *Manchester*, ought to sell the same in the open public market there, and not in any private houses, shops, or buildings in the said town, out of the open public market there, and without the licence and authority of the plaintiff; and such fishmongers and other persons selling such fish on those days in the same town upon any stalls placed there, ought to sell the same, and until, &c. had sold the same, upon the stalls of the plaintiff there, or upon stalls placed there by his permission, paying, therefore, a reasonable sum of money for every stall placed there for that purpose by the plaintiff, or by his permission, and made use of by such persons for the sale of their fish on the market days aforesaid; and thereby the plaintiff had and enjoyed, and ought to have continued to have and enjoy, great profit, &c. Yet the defendant, maliciously contriving

*42] and intending to prevent the plaintiff from enjoying the benefit of his market, to wit, on the 1st of *January* 1824, and on divers other *Tuesdays*, *Thursdays*, and *Saturdays*, each of the said *Tuesdays*, *Thursdays*, and *Saturdays* being market days in the town of *Manchester*, wrongfully and injuriously exposed to sale, and sold divers large quantities of his fish of such kinds as are usually sold and exposed to sale in markets, and as were on the same 1st day of *January* 1824, and on the said other *Tuesdays*, *Thursdays*, and *Saturdays*, being market days, exposed to sale and sold in the market of the plaintiff so holden on *Tuesdays*, *Thursdays*, and *Saturdays* as aforesaid, and being of the value of 500*l.*, in certain private houses, shops, and buildings in the same town, out of the open public market there, and not upon any of the stalls of the plaintiff, or any stalls erected by the plaintiff or by his permission, without the licence and against the will of the plaintiff, and without any lawful authority whatsoever, to the manifest injury of the plaintiff, and to the great nuisance of the said market, whereby he was deprived of and lost great part of the profits of his stalls and stallage, tolls, &c. which he otherwise would have had. Plea, not guilty.

At the trial before *Hullock B.*, at the Summer assizes for the county of *Lancaster*, 1826, the following documentary evidence, coming out of the plaintiff's muniment room, was produced by his steward, in order to prove the title of the plaintiff to the market; first, an inquisition post mortem in the time of *Edward I.* A. D. 1282, and it was thereby found that the tolls of the market and fair of *Manchester* were worth 6*l.* 13*s.* 4*d.*, and that *Robert Gresley* was seised at his death of the manor of *Manchester*, with its appurtenances, and therein of fairs, markets, tollage, stallage, and profits of fairs and markets

*43] in his demesne as of fee, as part of the duchy of *Lancaster*. Secondly, an indenture, A. D. 1597, 38th of *Elizabeth*, whereby *John Lacy*, in consideration of 3500*l.*, granted, bargained, and sold to *Nicholas Mosley*, alderman of *London*, and *Robert Mosley*, his heir apparent, the said manor of *Manchester*, and all manner of courts, markets, tolls, &c., in fee. Thirdly, the books of the court-leet from 1582 to 1687, and from 1734 to the time of the trial: the intervening book was lost. It appeared by entries in these books, that inspectors for fish and flesh had been appointed at every *Michaelmas* session. The number varied from time to time; there never having been less than twelve in any one year. In 1825 there were twenty-one. In the court book for *Michaelmas* 1663 there were amercements for offering for sale unwholesome flesh, stinking salmon, and unsound herrings. It was then proved by parol evidence, that the plaintiff or his ancestors had exercised the right of supervision of the market as far back as the memory of living witnesses could go. That they had received rent for stalls in the market, and that the inspectors appointed in the court-leet had seized unwholesome fish and flesh out of the market-place. It was further proved, that the Manor of *Manchester* was co-extensive with the township; that fish was sold on every day, except *Sunday* and *Christmas-day*: it was exposed to sale in the

old market-place, which was a public street, and in no other place with the permission of the lord of the market. It was frequently very much crowded, and persons frequenting it were much inconvenienced by carriages, and the stalls were sometimes knocked down. It appeared that the fishmongers had made application to the plaintiff for more space, and that he had desired his steward to fix on some more *convenient spot; and that he had, within a few years, [*44 expended 20,000*l.* in making a new market-house for flesh and vegetables. The defendant had a stall in the fish-market which he might have occupied to the exclusion of others; but in the year 1825 he took an old house out of the market-place, but adjoining to it, and opened a shop, and exposed to sale and actually sold fish there. The plaintiff told him he could not permit him to expose fish for sale out of the market, but the defendant insisted he had a right to sell in his own house. The defendant attempted to prove that fish had been sold by retail in shops out of the market-place; but he did not show that it was ever so sold by retail with the knowledge of the lord of the market, or that there was any fishmonger's shop in *Manchester* out of the market. It was contended on the part of the defendant, that the plaintiff had no right, as mere grantee of a market, to prevent an individual from selling fish in his private house, out of the market-place; and assuming that such a right might exist, there was not sufficient evidence to show that it did exist in the present case: and, secondly, that the plaintiff could not recover, because it appeared that there was not convenient accommodation for the public in the market. The learned Judge told the jury there were two questions for their consideration; first, whether, from the state of the market-place, the defendant had any reasonable ground for quitting his stall, and selling in his own house? and upon that he observed that the defendant, when applied to by the plaintiff, did not allege any want of accommodation in the market, but insisted on his right to sell in his own house. The second question was, whether they were satisfied that the plaintiff had or had *not, as lord of the manor and market, a right to exact stallage, in respect of all fish sold in *Manchester*, although it was sold out of the market-place? [*45 and he directed them to find for the plaintiff, if they thought that he had established such exclusive right, and that the defendant had, from the state of the market, no sufficient ground for selling in his own house. A verdict having been found for the plaintiff, a rule nisi for a new trial was obtained in last *Michaelmas* term, on the ground that there was no evidence of a right in the plaintiff to prevent other persons from selling in their own private houses; and, secondly, that the plaintiff not having provided sufficient accommodation for the public, could not recover; and *Prince v. Lewis* (a) was cited.

The *Attorney-General*, *Starkie*, and *Parke*, now showed cause. There was sufficient evidence to show that the plaintiff had the exclusive right stated in the declaration, viz. a right to compel all fishmongers to sell in the open market-place, and not in any private house; and that question was properly submitted to the jury. Secondly, the plaintiff was not precluded from recovering by reason of his not having allowed sufficient space for persons frequenting the market. As to the first point, the privilege of holding a market is in its nature exclusive. The privilege is beneficial to the public as well as to the lord of the market; for the public derive an advantage from the supervision exercised by the lord of the market, in respect of the articles there brought for sale. The lord derives an advantage from the tolls, stallage, &c.; but neither the public nor the lord could have the full benefit of the market unless the right were exclusive. [*46 It is *accordingly well established that where the franchise of a market exists a private person cannot sell in a shop, so as to infringe on the rights of the owner of the market. In *Clifton v. Chancellor* (b) it is said that the king cannot grant that a shop shall be market overt (c); and that is adopted by Lord C. B. *Comyns*, in his *Digest*, tit. *Market* (E.), and 2 *Roll. Abr.* 123, l. 30,

(a) 5 B. & C. 363.

(b) *Maers*, 624.

(c) i. e. to bind strangers.

Wood's Inst. 208, and the *Prior of Dunstable's* case (a), are to the same effect, indeed, in all the cases where an action for damages has been brought for an injury to a market, where once the right of market has been established, the question, whether the plaintiff is entitled to recover has been reduced to this, whether the plaintiff has sustained any damage? It has been assumed in all the cases, that the privilege is in its nature exclusive; and the question has been, how far, at what distance of time or place, another party can exercise a right of selling without prejudice to the lord of the market. Several cases on the subject are collected in *Yard v. Ford* (b). Thus it has been decided, that if a market be held on the same day within certain limits, it must be intended in law to be to the damage of the lord; but if it be on a different day, then whether it is injurious or not is a matter of evidence for the jury. But *Mosley v. Chadwick and others*, Trinity term 1782, is an authority expressly in point to show that the plaintiff in this case is entitled to recover. That was an action by an ancestor of the plaintiff against *Chadwick* and others for defrauding the plaintiff of the profits of his market by erecting another market, near the plaintiff's, for selling *flesh-meat for hire and reward, without the licence of *47] the plaintiff. Upon special verdict it was found that the plaintiff was seized of the franchise of the market, and that the defendant erected stalls very near his market, and took money in the nature of rent for those stalls, and that the profits of the plaintiff's market were thereby diminished; the Court, after argument, gave judgment for the plaintiff. (c) Assuming that it does not follow

(a) 11 H. 6, 19 a, and cited in the case of the *City of London*, 8 Co. 127.

(b) 2 Saund. 172.

(c) The following note of the judgment of the Court of King's Bench in *Mosley v. Chadwick and others*, was read by the *Attorney-General*.

Lord Mansfield, C. J. This is an action upon the case, brought by Sir John Parker *Mosley* against the defendants; and it was for depriving and defrauding the plaintiff of the profits and emoluments of his market by erecting another market in a certain place near the plaintiff's market, for selling and exposing to sale flesh-meat, for hire and reward, without the licence, and against the will of the plaintiff. There is a special verdict, and the result of that special verdict is, that the plaintiff was seized of a franchise for holding a market, and that the defendants erected about 140 stalls very near his market, but that they took no toll: they had no pretence of a pie-poudre court; they had no clerk of the market; and they only took money in the nature of rent for the stalls which they had erected. The question was, Whether this action would lie, or whether it was a damage? and the special verdict finds, that there was a diminution of the profits of the plaintiff arising from the market, to the amount of 90*l.*, but the amount of the sum is not material; and the great question which arose out of the special verdict was, Whether an action would lie by the owner of such a market against another, who only made a rent of his own land applied to the use of selling, which was a lawful act, and took nothing that amounted to an usurpation of a franchise upon the crown? Upon consideration, we are of opinion, that we are bound, by the authorities cited in this case, to say, that this was a damage that carried with it that sort of injury that is sufficient to support an action. The principal authorities that were cited, we think, conclude the question. In *Br. Abr. tit. Prescription*, pl. 98, there is cited a case from the Year Books of the 11 Hen. 6, pl. 13. That was an action of trespass by the prior of *Dunstable*, alleging, that whereas he and his predecessors, time out of mind, had held the market in *Dunstable* such a day, and had the correction of the market, and the butchers who sell victuals, should sell in the high street, upon the stalls in the market by him assigned for them, for which the plaintiff had one penny a day for every stall, and that the defendant sold in his house,⁽¹⁾ by which the plaintiff lost the advantage of his stallage, and the correction and so forth of the market; and this was admitted to be a good prescription. The defendant prescribed that he and all householders used to sell in their houses, and the Court was of opinion, that that allegation by the defendant was a bad prescription. If a man has a market in one part of the town of *Dunstable*, the inhabitants of the other parts of the town cannot erect new houses, and in their houses and stalls sell merchandise; for this is to the damage of the market, as in the 2 *Edw. 2*, is admitted. In 2 *Roll. Abr. tit. Market* (B), pl. 1, it is laid down, if a man has a fair in a certain place, those who have their houses near, adjoining to the fair, cannot lawfully open their shops to sell the commodities in the fair, but stallage is due for them, for they cannot take the benefit of the

⁽¹⁾ In the Year Book he is stated to have done this *occulte*, and to have procured others to do the like.

*that where there is a grant of a market, the grantee, as a consequence of law, has a right to prevent the owners and inhabitants from selling in their private houses, *within the precinct of his market, still such a right may [*49 have been granted, and the evidence of the exercise of the right, in this case, was sufficient to show that such was the nature of the grant in this case; for the inspectors of the market seized unwholesome fish out of the market-place, and it appeared that there was not in *Muncheſter* any fishmonger's shop except in the market-place.

Then, as to there not being sufficient accommodation for the public in the market, it is no answer to the action, because the defendant had a stall in the market-place, and might have occupied that stall at the very time when he was selling fish in his shop. This case is, therefore, distinguishable from *Prince v. Lewis (a)*, for in that case there was not room for the defendant on ordinary occasions, and he had no notice that there was room in the market for him on the particular occasion when the alleged cause of action arose.

Gurney, Patteson, and Wightman, contra. It was not distinctly left to the jury, whether a person could, with *a reasonable regard to his own safety, place himself in the market, and sell his goods there. The evidence showed that the market was very much crowded, and that the stalls were frequently knocked down by carriages. The market-place was not only inconvenient but dangerous. Here the plaintiff being lord of the manor, which was co-extensive with the township, might have held the market in any place within the township. Then as to whether the lord has a right to prevent a man from selling in his own private house? it may be questionable whether any such right can exist in point of law. This is distinguishable from the *Prior of Dunstable's case (b)*, for there, another market was set up. That case only establishes that if there be a grant of a market in one part of the town, the inhabitants of another part cannot erect a new market, and there sell their goods, because that is to the damage of the lord of the market. In most of the cases the lord was deprived of his toll. That appears to have been so in the *Dorking Market* case, from the

fact without paying the duties which belong to the person who has the property, as determined in *Michalsms*, 15 Jac. 2, in *Newington Fair* case, *Britton*, 159, c. 63, and *Bracton*, lib. 4, c. 46, fol. 235, show that a new market cannot be erected in the vicinity of an old one without a fresh grant. In the case of *Yard v. Ford*, in 2 Saund. 172, and 1 *Levinz*, 296, which is a case almost directly in point with the present, upon which we lay great stress in the judgment I am now delivering, the declaration stated, that the plaintiff was seized in fee of a market upon every *Wednesday*, for buying and selling all goods, and so on, together with tollage, stallage, and pickage, and all other profits, commodities, and emoluments whatsoever to the said market belonging, and that the defendants, without any lawful warrant or authority, at *Ashburton*, which is within seven miles, erected a new market upon every *Tuesday*, and continued the said markets so newly erected till the time mentioned in the declaration, whereby a great quantity of the goods in the said market so newly erected were sold, to the great damage of the plaintiff, and the great nuisance of his market, and by reason whereof the plaintiff lost the toll, stallage, and other profits and emoluments, which he should have had. It is to be observed, that, in this case, there was no allegation that the defendant took toll, or had a court of pie-poudre, or anything which would have amounted to an usurpation of a franchise upon the crown. *Twissden* said, if he had had a patent to levy his market, perhaps it would have been more doubtful; but it appeared that the defendant, without any lawful warrant or authority, that is to say, without patent or prescription, had levied this market, to the nuisance of the plaintiffs, which was an ancient market, and, therefore, the defendant was an apparent wrong-doer, and had no colour for doing so; and judgment was given for the plaintiff. In the case of *The King v. Marsden*, 3 Burr. 1818, *Wilmot*, J., says, the reason why a fair and market cannot be holden without a grant, is not merely for the sake of promoting traffic and commerce, but for the like reason as in the *Roman* law, for the preservation of order and prevention of irregular behaviour. *Ubi est multitudo ibi debet esse rector*. The crown will not grant a fair and market without a writ of *ad quod damnum*; and if it do, the owner of another market may bring an action or *scire facias* against the grantee, and the argument must conclude, *a fortiori*, against a mere wrongdoer, rather than against the person colourably claiming under a grant from the crown. Upon these authorities, we are of opinion that the plaintiff is entitled to recover.

(a) 5 B. & C. 363.

(b) 11 H. 6, 19 a.

observations made upon it by Lord *Ellenborough* in the *Bailiffs of Truxesbury v. Diston* (a). [Lord *Tenterden*, C. J. Lord *Ellenborough* must have meant stallage: it was not necessary for him to distinguish toll from stallage.] Toll is not incident to a market, but the subject of specific grant; stallage is derived from the right to the soil, and so is pickage. In *Com. Dig.*, tit. *Market*, (F) 2, this is laid down, "The owner of a house next to a fair or market cannot open his shop for selling in a market, *without payment of stallage*; for if he takes the benefit of the market, he ought to pay the duties there." This is said to have *51] been so ruled by the court in the *Newington Fair* case, contrary to the opinion of *Doddridge*, J. In *Vin. Abr.*, tit. *Market*, it is said, "If a person has a shop near a fair or market, he may sell there, on payment of stallage, but not otherwise." In the *Dorking Market* case, referred to in *The Bailiffs of Truxesbury v. Bricknell* (b), it appeared that a man had fitted up an inner room in a public-house, and pitched and sold corn there, not merely his own corn, but that of others. That was setting up another market. It by no means follows from the nature of a grant of a market, that the lord shall have a right to prevent others from selling in their own private houses in or near the market; and although a private person may have the right to sell in his own house a commodity usually sold in the market, he cannot, therefore, set up another market. Now it is a great benefit to a grantee to have a right of market in a place where another cannot interfere with him. The plaintiff does not complain that the defendant set up another market, but merely that he sold goods in his own house. In the *Prior of Dunstable's* case the defendant was charged with procuring other persons to sell in his own house. That was setting up another market, and in that respect it resembled the case of the *Dorking Market*.

LORD TENTERDEN, C. J. I am of opinion that this rule ought to be discharged. We are not called upon, on the present occasion, to lay down as a *52] general rule and principle of law, that the grant of a market for the sale of certain things necessarily carries with it an exclusion of the right of sale of similar commodities in a private house, whether the market is convenient or not, because, admitting it to have been a question of fact, whether the lord of the market had that exclusive right on the present occasion, the evidence abundantly shows that Sir *Oswald Mosley* had that right; and the verdict of the jury, given upon that evidence, decided the question of fact, which was distinctly left to them. Indeed it is a most extraordinary circumstance, that in such a populous town as *Manchester* the defendant should not have been able to prove half a dozen instances of shops having been continually open for the sale of fish. The want of such an convenience in such a place as *Manchester* appears to me abundantly to show that the exclusive right of the lord must have been known and recognized.

Another point made was as to the insufficiency and inconvenience of the market itself, in the place where it is holden. As to that insufficiency, the defendant has no ground of complaint, for he had a stall which he might have used at the time when he sold fish in his private house. As to its inconvenience, it appears that the market is holden in that place where in ancient time it had been holden; not in a place convenient for a market certainly, but in the public street, where most ancient markets were held. In modern times many market-places or houses have been built adjoining to, or a little way removed from the street, but formerly all markets were holden in the public streets. And if the ancient market has been held in the public street, can we say that because *53] population and commerce have increased, and that a greater number of carriages pass through the street in modern times than passed in ancient times, the lord, therefore, is to lose his franchise? If, indeed, it could have been proved that any complaint or remonstrance had been made to the lord on the subject, as he has the power to hold the market in any part of *Manchester*, he

(a) 6 East, 438.

(b) 2 Taunt. 133.

being the lord of the manor and owner of the soil ; and that after complaint and remonstrance on the part of persons frequenting the market, he had persisted to hold the market in this place when he might have holden it elsewhere, there might have been some foundation for the argument addressed to us on the part of the defendant, but in the absence of any such proof, I think that the Court ought to maintain this ancient right ; for as a general rule, I think that all ancient rights and ancient establishments ought to be upheld by us, as far as by law they may. Upon the whole, I am of opinion the rule must be discharged.

BAYLEY, J. The only doubt which I have entertained as to any part of this case related to the right claimed by Sir *Oswald Mosley* to exclude all persons from selling in their own houses such commodities as were usually sold in the market. The case of *Mosley v. Chadwick* does not, as it seems to me, advance the argument upon that point. It was there decided, that the lord having a right of market in a particular place, a stranger could not lawfully set up what in reality was a different market in that place. But the exclusive right claimed may by law exist, and the question was, whether upon the evidence the franchise of the plaintiff *entitled him to that exclusive right. Of that [*54 there was abundant evidence, for where there is a grant of a franchise, the exercise of the right under the grant is evidence of the nature and extent of the right of the grantee. Generally speaking, where a market is granted to a particular individual, he may either permit every place within the specified limits of the market to be the place where articles may be sold, or he may, if he thinks fit, fix upon a particular place within which the sale shall take place ; and he may say that different places shall be appropriated to the sale of different articles ; and he may, in the first instance, if he thinks fit, exclude every private house, and prevent the owner from selling within that private house any of those articles. But then it is always a question of fact whether there has been in the particular instance such an exclusion or not, and such an appropriation of a particular place. In this case it did at first appear singular, that, in so large a place as *Manchester*, fish and butcher's meat should be excluded from sale in private houses. The evidence in the cause was however sufficient to show that there had been in fact such an exclusion, and the authorities establish that by law such an exclusion may take place. The case of the *Prior of Dunstable* is an ancient authority on that point, and it is recognized by Lord C. B. *Comyn* in his *Digest*, tit. *Market*. In *Curwen v. Sulkeld* (a) it was decided, that the lord of a market might determine in what part of the township it should be held, and might shift it from place to place, or confine the right of holding the market to a particular place. Now if he has a right to confine it to a *particular place, he [*55 may exclude every private house, and require that every person shall cease to sell or expose his wares for sale, except within those limits in which he determines that they shall be sold or exposed for sale, and subject them to such burdens and such examination as other articles exposed to sale within those limits are subject to. Then if that point be removed, the only question is, Was there or was there not negligence on the part of the lord in not providing better accommodation for persons from time to time resorting to the market ? I take it to be implied in the terms in which a market is granted, that the grantee, if he confine it to particular parts within a town, shall fix it in such parts as will from time to time yield to the public reasonable accommodation ; and that if the place once allotted ceases to give reasonable accommodation, he is bound, if he has land of his own, to appropriate land on which to hold it ; or if not, to get land from other people in order that the market which was originally granted for the benefit of the public, as well as for the benefit of the grantee, may be effectually held ; and that the public may have the benefit which it was originally intended they should derive from it. That was a question for the jury,

and in this case it appears to have been left fairly and properly to them. Whether I might have come to the same conclusion is a different question; but the jury having the matter left to their consideration, found that no blame was imputable to the lord of the manor in this respect.

HOLKORD, J. I am also of the same opinion. I think both those points were *56] properly left to the jury, and I *cannot say that they have come to a wrong conclusion so as to authorize us to set aside the verdict. If the question in this case had been, whether, where the lord has a right to a market, it follows as a necessary consequence of law resulting from such right, that he may prevent persons, being inhabitants of the place, from selling in private houses, I, for one, should have hesitated before I acceded to that proposition; but I think such a right may exist, wherever there is an ancient right to a market either by grant or prescription. I am bound to say that the right may exist in law so as to go to the exclusion of others. The King may grant a right of market at the present day in case it is beneficial to the public. But where the King grants a new right of market for butcher-meat or fish in a place where there are persons carrying on the trade of a butcher or fishmonger, it by no means follows that the grantee can compel them to come to the market, and to desert their ancient mode of carrying on their trade. I feel a great difficulty in saying that it follows as a consequence of law, that in such a case the lord, having a right of market, may or can compel persons who are inhabitants of the place to come to his market. The question whether he could do so must depend upon the fact, whether the market be an ancient market. If the market be an ancient market, and the lord at all times appears to have prevented a sale in private houses, the exercise of such a control is evidence of the right. I think in this case the evidence established such a right.

Rule discharged.

*57] *On moving for the rule, *Brougham* intimated that he should also move in arrest of judgment, on the ground, that by an old statute (*a*), the holding of a market on certain feast-days (*Ascension-day* and *Good Friday*) was prohibited; and that all the counts in this declaration alleged the market to be held on certain specified days in the week, without any exception as to those feasts. But *Patteson* now admitted, that the case of *Comyns v. Boyer* (*b*) was an authority to show, that where the law raises the exception it need not be stated in pleading.

(a) 27 Hen. 6, c. 5.

(b) Cro. Elis. 485.

RIGBY et al., Assignees of T. W. WILLIAMS, v. OKELL et al. June 25.

A verdict having been found for the defendant, and a rule for a new trial obtained, the cause was referred to a barrister, and the costs of the cause were to be in his discretion. He found that the plaintiffs were entitled to recover, and ordered the defendants to pay the costs of the cause: Held, that the plaintiffs were not entitled to the costs of the first trial.

THIS was an action of trover brought to recover three barges, being the property of the bankrupt before his bankruptcy, but which had been conveyed to the defendants by a deed which the plaintiffs contended to be fraudulent for undue preference. At the Summer assizes for the county of Chester 1826, the defendants obtained a verdict. In the *Michaelmas* term following a rule nisi for a new trial was obtained, and the parties agreed to refer the cause to a bar-

The dock estates within the parish of *Liverpool* are vested in the mayor, aldermen, bailiffs, and common council of *Liverpool*, as trustees of the docks and harbour of *Liverpool*, by virtue of several acts of parliament (viz. 8 *Anne*, c. 12, 3 *G.* 1, and 11 *G.* 2, c. 32, 2 *G.* 3, c. 86, 25 *G.* 3, c. 15, 39 *G.* 3, c. 59, and 51 *G.* 3, c. 143, all of which, excepting the second, are public acts), and consist of a large quantity of land, to the extent of 100 acres. Part of those estates was granted voluntarily by the corporation of *Liverpool*, part was sold by that body to the trustees for a pecuniary consideration, and other parts have been purchased by the trustees from private individuals, according to the powers given to them by the said acts. Before the construction of the present works part of the land was waste, both above and below high-water mark, but other parts consisted of lands and buildings in the occupation of individuals [*63 rated to the relief of the poor of the said parish.

The dock estates at present consist of several wet docks, in which vessels may be constantly afloat, dry basins, that is to say, dry at low water, wharfs, piers, slips, cranes, weighing machines, offices, and yards for storing goods, and other conveniences requisite to form a complete dock; and the trustees are authorized to receive large sums, under the name of dock rates and duties, for the accommodation of vessels in the said docks, by virtue of the said acts of parliament.

The trustees manage the dock estates by their servants and agents, who receive and account to them for the dues and profits arising as aforesaid, and no part of the estates and premises above assessed is let off to other persons.

With regard to the application of the monies received as dock duties, it is enacted, by the 8 *Anne*, c. 12, s. 9, above referred to, under which the first dock was built, "that all and every such sum and sums of money that shall be raised and received by the duties aforesaid, after payment of the expenses of collection, shall be, by the trustees for the time being, applied and disposed of to the building and repairing the said new dock or basin, and other works, and for the securing, preserving, and maintaining the said dock or basin and harbour of *Liverpool*, and to no other use and purpose whatsoever." By the same section the collector of the dock duties is required to keep accurate accounts of all his receipts and disbursements.

By the fifteenth section of the same act nine commissioners are appointed for the inspection of the accounts, which commissioners "shall and may order *and appoint all such monies which shall rest due upon such account to be laid out and expended to and for the uses and purposes in the act mentioned, and to and for no other use whatsoever." [*64

By the fourth section of the 11 *G.* 2, c. 32, passed for building another dock, it is enacted, "that there shall be twelve commissioners to inspect, audit, and adjust the account of all the collectors' receipts and disbursements of all the monies collected and levied by virtue of the former act and that act, who shall be invested with such and the same powers and authorities in all respects, and to all intents, constructions, and purposes, as were given to and vested in the commissioners appointed in pursuance of the former acts, or either of them."

By the 51 *G.* 3, c. 143, s. 125, the mode of appointing the commissioners is altered, but the electors are authorized to appoint them as commissioners, for the purposes in this and the former acts mentioned.

By the 11 *G.* 2, c. 32, s. 8, all the collectors of dock duties are required to keep regular accounts of their receipts and disbursements, and to produce the same to the commissioners when ordered; and by the ninth section of the same act, the treasurer of the dock duties is required to print his account yearly, the expense of such printing to be deducted out of the dock duties, and to deliver a copy to any such person paying dock duties as shall require the same.

All the dock rates payable by the former acts of parliament were repealed by the 51 *G.* 3, c. 143, which imposed the present duties. The twenty-seventh section of that act, which relates to the application of the present dock duties,

*65] is as follows: "And be it further enacted, *that all monies which shall be collected, received, levied, borrowed, and raised by and under this act, shall be applied in paying and defraying the charges and expenses attending the obtaining and passing this present act, and to the paying the expenses and charges attending the levying and collecting the said rates and duties; and after the paying and appropriating one-third part of the said monies, to and for the purpose of making and completing the southernmost of the north docks as hereinafter is mentioned, then to the paying off and discharging the present bond debt of 114,705*l.* 1*9s.* 4*d.*, and the debt of 67,406*l.* 1*8s.* 7*d.* owing by the trustees, to the corporation of *Liverpool*, for the purchase of land and strand intended for the site of the southernmost of the two northern docks, and any future bond debt, and the interest on the same, and to the paying and discharging the interest on all other monies which may be hereafter borrowed and taken up at interest under the provisions of this act upon the credit of the dock rates and duties as aforesaid, and to the carrying into execution the purposes of this act and the said recited acts, in the making, erecting, building, finishing, and maintaining such docks, basins, piers, and other works and buildings in the port of *Liverpool*, under the said acts and this act, and to the paying, defraying, and satisfying all other charges and expenses already incurred, or hereafter to be incurred in the carrying into execution, or under, or in consequence of any of the former acts or this present act; and the residue or surplus of all monies arising from such rates or duties, which shall remain after such application thereof as aforesaid, shall from time to time be applied in or towards the repayment of the principal monies which shall have been *borrowed under this

*66] act, until all such principal monies shall be repaid, and all assignments of or mortgages upon such rates and duties are paid off, satisfied, discharged, and redeemed; and when, by the means last mentioned, all the principal monies which shall have been borrowed shall be repaid, and all assignments and mortgages upon the said rates are satisfied and redeemed, then and in such case it shall be lawful for the trustees, and they are hereby required to lower and reduce the rates and duties hereby granted and made payable as far as the same can be done in the then state of the docks, basins, buildings, and other works and buildings of the said port, and leaving sufficient for all charges of management and collection of rates and other concerns of the said docks, basins, piers, works, and other buildings, and improving, repairing, and maintaining the same, and for carrying into execution the provisions of the former acts and this act." The present duties have been invariably applied by the trustees according to the direction of the last-mentioned section, and they derive no private advantage or emolument whatsoever from the execution of the trusts of the dock estates.

The three cranes mentioned in the schedule were erected by the trustees out of the dock funds, in pursuance of the power given them by the 78th section of the 51*G.* 3, c. 143, before referred to. For the use of these cranes in landing and discharging cargoes, the trustees charge a certain sum, which goes to the general dock estate in the same way as the dock duties, and is applied as the general dock funds are and must be applied by the various acts of parliament, and the trustees derive no individual benefit from them.

*67] The engine-house is used for the purpose of keeping *a fire-engine, which the trustees have provided out of the public funds for the security of the shipping, as empowered by the same section, and no rent is charged to or paid by any one for the same.

Of the different offices enumerated in the schedule some are for the accommodation of the dock masters and gate-men at the various docks, as places of shelter, and merely for the dispatch of public business; others are occupied by the collector of the dock rates, the harbour-master, and other public officers of the trustees, solely for the purposes of the dock business. No rent is charged to them for the use of these offices, and no part of them is occupied as a residence by any one.

The two yards mentioned in the schedule are hired by the trustees at an annual rent, as a place necessary for the deposit of the various articles used in the erection and maintenance of the docks, and from the occupation of which they derive no personal benefit.

The *Solicitor-General* and *Gregson* in support of the order of sessions. By the several statutes set out in the case the funds of the dock company are appropriated entirely to public purposes. There is not, therefore, by any individuals, any beneficial occupation of the property in respect of which the rate was imposed upon the trustees. The case in this respect differs from *Rex v. Agar* (a), but cannot be distinguished from *Rex v. The Commissioners of Salters-load-sluiice* (b). In *Rex v. Terrott* (c), Lord *Ellenborough* says, "The principle to be collected from all the cases on the subject is, that if the party rated have the use of the building, or other subject of the rate, as a mere servant of the crown, or of any public *body, or in any other respect, for the mere exercise of public duty therein, and have no beneficial occupation of, or emolument resulting from it, in any personal and private respect, then he is not rateable." And he afterwards assigns this reason for the rule: "The occupation is throughout that of the public, and of which public occupation the individuals are only the means and instruments." The case of *Lord Amherst v. Lord Somers* (d) was decided on the same grounds. In *Rex v. The Hull Dock Company* (e), where they were held rateable, *Halroyd, J.*, says, "If under the section requiring the company to repair the dock and other works, the specific rates had been, so far as they were required, appropriated to that purpose only, I should have entertained considerable doubt whether any property vested in the trustees which could properly be made the subject of rate, beyond the surplus which might happen to remain in their hands after satisfying the expenses attending the maintenance and repair of the works." Here the trustees never can legally have a surplus, for as soon as certain objects specified in the acts are answered, the rates are directed to be lowered.

The *Attorney-General* and *J. Williams* contra. The property in question is in its nature rateable, and is, therefore, liable to be rated, whether productive of profit or not, *Rex v. Parratt* (f). Nor does it make any difference that the rates are received by trustees, for in *Rex v. Agar* the trustees of a meeting-house were rated. [Lord *Tenterden, C. J.* If in that case there had been no intervention of trustees, and the minister had been *in the receipt of the pew rents, he would have been rateable in respect of them.] It may be true that the trustees in this case derive no peculiar benefit from the docks, but they belong to the corporation of *Liverpool*, who are possessed of much property, and in order to improve that, they obtained power to make the docks. The expense of those works is to be defrayed by the rates, which are, therefore, expended in improving the private property of the corporation. No doubt the public are benefited, but that is no ground for exempting property from poor rates, if there is also a private benefit. But supposing the argument on the other side to be correct as to the main question, still the last two items of the rate are good, for they are in respect of premises rented by the corporation. Suppose the trustees rented a farm in order to pay their labourers in corn or other produce, that would clearly be rateable, and the rate upon the premises in question must be governed by the same principle.

Lord *TENTERDEN, C. J.* I am of opinion that the order of sessions must be confirmed. It seems to me that there is no solid ground for the distinction which has been taken as to those parts of the property rated which are rented by the dock company, for if there be no beneficial occupation it can make no difference whether the occupier be the owner or not. As to the main question, the case of *Rex v. The Commissioners of Salters-load-sluiice* is decisive. There the tolls

(a) 14 *East*, 256.

(d) 2 *T. R.* 372.

(b) 4 *T. R.* 730.

(e) 3 *M. & S.* 402.

(c) 3 *East*, 513.

(f) 5 *T. R.* 523.

were by act of parliament directed to be applied "to the purposes of the act, and to and for no other use or purpose whatsoever." The statute under which 70*] the dock rates in question are levied does not indeed contain an *express direction that the rates shall be applied to the purposes specified, and no other; but it directs that certain burdens shall be discharged, and that then the rates shall be lowered; and, therefore, any application of those rates to other purposes not specified, would be a direct violation of the statute. Nothing of that kind is suggested, and, therefore, there is not in reality any difference between this case and the former. The principle of not rating property of which no person has a beneficial occupation is not confined to canals or docks, or property of that nature. A Quaker's meeting-house, if the pews are not let, is not rateable, as was decided in *Rez v. Woodward (a)*, and the same would be applicable to a chapel with the rites of the church of *England*, or to a dissenting meeting-house. On the other hand, it was held in *Rez v. Agar*, that where the pews of such a meeting-house were let, the trustees were rateable in respect of the rents, although not received to their own use, but for the benefit of the minister. Here the trustees were not occupiers in the ordinary sense of the word, and no profit was received for the use of any person. It is said that the docks were made by the corporation of *Liverpool*, in order to improve their private property; if such an effect is produced, that property will be rateable for the improved value.

BAXLEY and LITLEDALE, Js., concurred (b).

Order of sessions confirmed (c).

(a) 5 T. R. 79.

(b) *Holroyd, J.*, was in the Bail Court during the argument, and therefore gave no opinion.

(c) The following case, *The King v. The Trustees of the River Weaver Navigation*, was argued at the sittings in banc. before this term:—

Where the surplus tolls of a navigation were directed by act of parliament to be expended in repairing public bridges and highways: Held, that they were not rateable to the relief of the poor.

Upon an appeal against a rate made by the overseers of the poor of the township of 71] *Moulton*, in the county of *Chester*, upon the trustees of the *river *Weaver* navigation, the sessions confirmed the rate, subject to the opinion of this Court, on the following case:—

By an act of parliament passed 7 G. 1, entitled "An act for making the river *Weaver* navigable from *Frodsham Bridge* to *Winsford Bridge* in the county of *Chester*," it was enacted, "That from and after the said work shall be finished, and all the charges thereof, &c., fully paid, that then the clear produce of the rates and duties shall, from time to time, be employed for and towards amending and repairing the public bridges within the county of *Chester*, and such other public charges upon the county, and in such manner as the justices of the peace at the *Michaelmas* quarter sessions shall yearly order, direct, and appoint." And after reciting that the roads leading to the river would be much injured by the increased traffic upon them, it was also provided, "That so much of the rates as the justices might think fit should be expended in repairing those roads, and that if any surplus remained, it should be expended in repairing such other highways in the county as the justices in sessions should appoint. By the 33 G. 2 further provisions as to the navigation were made, but it directed that the surplus duties, after payment of the expenses of the navigation, should be applied to such public purposes as before mentioned.

The tonnage rates and duties upon the *Weaver* are not charged by the mile, but 1s. per ton is charged upon the whole line of river; and a vessel navigating the whole or any part of the length of the said navigation is subject to the same charge. This tonnage is paid quarterly at the river *Weaver* navigation office in *Northwich*, which is a distinct township from *Moulton*. The annual accounts up to the 5th of *April* in each year are regularly audited by the clerk of the peace, and filed at the *Michaelmas* quarter sessions, when the balance arising from the rates and duties in the hands of the treasurer, over and above the necessary charges and expenses for the maintenance and support of the navigation, is directed by the magistrates there assembled to be paid, and the same is invariably paid to the county treasurer, to be applied for the general purposes of the county, according to the acts of parliament, and to none others. The township of *Moulton* rated the trustees as follows:—

OCCUPIERS.	PROPERTY RATED.	RENTAL.	SUM ASSESSED.
		£ s. d.	£ s. d.
The trustees of the river Weaver navigation.	Lands used for the river Weaver, with the tolls, dues, and duties arising therefrom, or in respect thereof, within the township of Moulton.	234 13 4	35 4 0

The amount at which the trustees are assessed in the said rate, provided they are rateable at all, is correct.

**Alderson, Brown, and Trafford*, in support of the order of sessions. The only ^[772] doubt is, whether the trustees of the river *Weaver* have a beneficial occupation. It is not necessary that they should enjoy the benefit, for provided benefit accrues to any person, that is sufficient to make the property rateable. For the purposes of this question, the trustee and the cestui que trust are identified. Thus in *Rex v. Agar*, 14 *East*, 256, the trustees of a Methodist meeting-house were held to be rateable for the pew-rents, although the whole surplus, after payment of the current expenses, was paid over to the officiating ministers. But it will perhaps be said, that the surplus profits in this case are to be applied to public purposes. They are, indeed, to be applied to the public purposes of the county, and will therefore go in aid of the county rate, and confer a benefit upon every landholder in the county. Each landholder, therefore, derives a private benefit from these tolls. The principle of exempting from liability to poor-rate monies to be expended for public purposes does not apply, unless the benefit is conferred upon the whole public of the kingdom. *Rex v. Salters-load-sluis*, 4 *T. R.* 730, and *Rex v. Sculcoates*, 12 *East*, 40, may be cited on the other side, but they are distinguishable. In the former, the whole of the money received was to be applied to the purpose of draining the lands adjoining the navigation. Those lands would be rateable for the improved value, and, therefore, if the money had been rateable in the hands of the commissioners, it would, in effect, have been liable to a double rate. In the latter case, no person derived any benefit within the parish from the lands used for the purposes of the drainage.

Nolan and Cottingham contra. The trustees are not rateable unless they have a beneficial occupation of the land in some private and personal respect, *Rex v. Terrott*, 3 *East*, 506. In this case, it does not appear that the trustees have any right in the land: the statutes set out do not vest the soil in them, and the tolls are payable for the right of passage only, and not for the use of land, and, therefore, are not rateable. Thus tolls of a ferry are not rateable, *Rex v. Nicholson*, 12 *East*, 330, *Williams v. Jones*, *Id.* 346; nor market-tolls not incident to the soil, *Rex v. Bell*, 5 *M. & S.* 221; nor tolls paid in respect of a lighthouse, *Rex v. Tynemouth*, 12 *East*, 46, *Rex v. Coke*, 5 *B. & C.* 796, *Rex v. Powke*, *Id.* 814. But supposing these tolls to be connected with the occupation of land, still they are not rateable, inasmuch as the legislature has directed that they shall be applied wholly to public purposes. Upon this point it is impossible to distinguish the present case from *Rex v. Salters-load-sluis* and *Rex v. Sculcoates*. In *Rex v. Agar* it appeared that the pew-rents were received by the trustees for private purposes, although not for their own peculiar benefit.

BAYLEY, J. We are not under the necessity of deciding this latter point; for we think, that, as there is not any clause in the statutes set out *which vests the soil of the river *Weaver* in the trustees, they cannot be rateable to the relief of the poor in respect of ^[779] the tolls.

It was then suggested that the trustees were rated in several parishes through which the river *Weaver* runs, and that in some of them they might be considered as the occupiers of land, it was therefore important to have the opinion of the Court as to their liability to be rated under such circumstances. Upon this point, the Court deferred their judgment until the case of *Rex v. The Inhabitants of Liverpool* had been decided; and then

BAYLEY, J., said, The principle of this decision is applicable to the case of *Rex v. The Trustees of the River Weaver Navigation*. There the surplus tolls remaining over and above the expenses of supporting the navigation were to be applied to the repairing and maintaining of bridges and highways. Those were public purposes; and as no part of the monies received could be applied to private purposes, those monies were not rateable in the hands of the trustees. The order confirming the rate must therefore be quashed upon this ground, as well as that which was mentioned by the Court at the time of the argument.

Order of sessions quashed.

SHAW et. al., assignees of E. Howard and J. Gibbs, v. WOODCOCK. June 29.

[In Error.]

A payment, made in order to obtain possession of goods or property to which a party is entitled, and of which he cannot otherwise obtain possession at the time, is a compulsory, and not a voluntary payment, and may be recovered back.

The agent for the grantee of several annuities delivered him four accounts in the course of eighteen months, and gave him credit for all the half-yearly instalments of the several annuities then due, but stated that some of them had not been received. He charged commission on all the instalments, and paid the balance of the accounts as if they had been received, and in the later accounts never brought forward those sums, nor intimated that he expected them to be repaid: Held, upon a bill of exceptions, that upon this evidence the jury were properly told by the Judge, that they might infer an agreement whereby the agent made himself personally responsible for the payment of those annuity-instalments in default of payment by the grantors.

THIS was an action for money had and received, brought by *Woodcock*, the plaintiff below, to recover from *Shaw* and others, the defendants below, the *74] *assignees of *Howard* and *Gibbs*, bankrupts, the sum of 715*l.* 5*s.* 7*d.*, paid to them by the plaintiff below, in order to obtain possession of certain policies of insurance belonging to him, and upon which the assignees claimed a lien to that amount, and which they refused to deliver up until that sum was paid. The bankrupts acted as the agents of the plaintiff for the purpose of receiving instalments of annuities due to him, and charged him a commission for so doing, and from time to time rendered him accounts of all sums paid or received for him. In the accounts delivered they from time to time gave credit for several instalments of annuities due, but which were not received, and were so described in the accounts, but they paid him the balance of those accounts as if all the instalments had been received. In the succeeding accounts no notice was ever taken of the instalments which, in the preceding accounts, had been marked as not then received. At the trial, at the *London* sittings after *Hilary* term 1825, before *Best*, C. J. of the Court of Common Pleas, the jury, under his direction (to which a bill of exceptions was tendered), found a verdict for the plaintiff below. The record, when brought into this court by writ of error, after setting out the pleadings and continuances, stated, that on a certain day the cause came on to be tried, and that one *J. Hindman* was produced and examined as a witness for the plaintiff, and gave the following evidence:—In the year 1822 he had been, and still was, the attorney for the plaintiff. The defendants, as assignees of the estate and effects of *Howard* and *Gibbs*, had been in possession of certain policies of insurance belonging to the plaintiff, *75] which had been effected on the joint lives of one **Gowland* and his wife. He, the witness, in the early part of said year, and soon after the death of *Gowland*, had applied to the defendants to deliver up the policies of insurance, but they claimed from the plaintiff a sum of 715*l.* 5*s.* 7*d.* as assignees of *Howard* and *Gibbs*, and claimed a lien upon the policies for that sum. *Hindman*, as the attorney for and on the behalf of the plaintiff, paid to the defendants, in order to get the policies out of their hands, the sum of 715*l.* 5*s.* 7*d.*, the balance so claimed, but which he, the witness, denied to be due. It was a disputed account; and he was obliged to pay the money before they would deliver the policies. At the time when he paid the 715*l.* 5*s.* 7*d.* he gave to the defendants a notice in writing, signed by *Woodcock*, stating, "that he had paid to the assignees 715*l.* 5*s.* 7*d.* for which they claimed a lien on the policies, his (*Woodcock's*) property, in order to obtain possession of such policies, and on no other account; and that by such payment to them he did not mean to admit that they were entitled to a lien to such amount, or to any amount on the said policies; and that he (*Woodcock*) should bring an action against them, to recover back the said sum of 715*l.* 5*s.* 7*d.*." The witness then produced certain

paper writings, in the hand-writing of *Gibbs*, one of the bankrupts, which writings the witness had received from *Woodcock*. The first was an account, which contained a statement of transactions between *Woodcock* and the bankrupts, from *December* 1818 to *March* 17th 1819. *Woodcock* was there debited with various sums of money paid on his account for insurance on lives and for cash paid, and for commission on all the annuity instalments then due, and stamps. He was credited with various sums *due to him on account of [*76 annuities, and among others, with "50*l.*, one half-year's annuity due from *B. Sydenham*, not yet received;" and 14*l.* 5*s.*, another half year's annuity, "due from *R. S. Gowland*, not received;" and the balance due to *Woodcock* was in the account stated to be 94*l.* 5*s.* 9*d.* This account was sent to *Woodcock*, inclosed in a letter from *Gibbs*, dated the 17th *March* 1819, and in which he stated that he had not received either *Gowland's* or *Sydenham's* annuity, but that he would accept *Woodcock's* bill at two months after date, for the balance of the account. The second account was delivered on the 23d of *October* 1819. and contained statements of money transactions between the parties, from the 17th of *March* 1819 to 17th *September*. *Woodcock* was debited with various sums paid on his account, with commission on annuity instalments then due, and he was credited with several sums received, and with 50*l.*, one half-year's annuity due from *B. Sydenham*, 9th of *September*, and 83*l.* 10*s.*, a half-year's annuity due from one *Cunliff*, 17th of *May*. These two instalments were marked as not received, and the balance due to him was stated to be 107*l.* 16*s.* 3*d.* This account was also inclosed in a letter from *Gibbs*, in which he stated that he had included all the annuities, though not received, and added, if he (*Woodcock*) felt the necessity of drawing, he was to let him (*Gibbs*) know. The third account contained a statement of money paid and received on account of *Woodcock*, from *January* to the 23d of *February* 1820. *Woodcock* was, as before, debited with various sums of money paid on his account, with commission on the annuity instalments then due, and credited with 83*l.* 10*s.*, *one half-year's annuity due from one *Cunliff*, but which was stated to be not yet [*77 received, and the balance due to him upon that account was 56*l.* 4*s.* 7*d.*; and *Gibbs* in his letter inclosing the account stated, that although half a year's annuity, with which *Woodcock* was credited, was not received, he might draw for the balance. The fourth account was transmitted on the 25th *November* 1820, inclosed in a letter from *Gibbs*. It contained an account of money transactions between the parties, from the 4th of *April* to the 24th *November* 1820. In that account *Woodcock* was debited with various sums paid on his account, with commission on all the half-yearly instalments of annuities then due, and credited with several sums due to him on account of half-yearly payments of annuities; but two of these half-yearly instalments, viz., one for 100*l.* due from *B. Sydenham*, 9th of *September*, and 167*l.* another due from *Cunliff*, 17th *November*, were stated to be not yet received. These two instalments were given credit for on the 4th of *November*, and the balance due to *Woodcock* was stated to be 58*l.* 4*s.* 7*d.* *Gibbs* transmitted this account to *Woodcock* by a letter dated the 23d of *February* 1820. The instalments on the half-yearly annuities, which were stated as not received, were not placed to the credit of *Woodcock* on the days when they respectively became due, but on subsequent days, and in some instances credit was given generally without date. No evidence being produced on the part of the defendants, the Chief Justice declared and delivered his opinion to the jury, that the payment of the sum of 715*l.* 5*s.* 7*d.*, by the plaintiff to the defendants, having been made to obtain possession of a paper of great value to the plaintiff, and because he was obliged to make the *pay- [*78 ment for that purpose, was not a voluntary payment, and that the plaintiff was not concluded from recovering the said sum of 715*l.* 5*s.* 7*d.* from the defendants; and the Chief Justice did further declare and deliver his opinion to the jury, that such sums of money as were stated in the accounts to have been received the jury might conclude to have been received, as there was no

evidence to the contrary; and that with respect to such items as were stated in the accounts to be not received, or not yet received, the jury might consider the mode in which the parties dealt together as evidenced by the letters and accounts; and inasmuch as commission was charged by *Howard and Gibbs*, the bankrupts, on all those items, and as successive accounts were rendered, still charging commission, and the items stated in a former account not to have been received not being brought forward in subsequent accounts between the parties or debited to the plaintiff, or any subsequent notice given to the plaintiff of their non-payment, there being in evidence four successive accounts between the parties, they, the jury, might infer an agreement by *Howard and Gibbs*, the bankrupts, to take the responsibility for the payment of the said items on themselves; but that it was a question for their consideration and decision; and that upon the aforesaid evidence, the jury might lawfully find a verdict for the plaintiff, and with that direction left the same to the jury.

Hill for the plaintiff in error. There was no evidence to go to the jury of any agreement between *Woodcock* the plaintiff and the bankrupts, binding the latter to pay the instalments of the several annuities in default of payment *79] by the grantors. Such an agreement would amount to an undertaking to pay the debt of another, and must have been in writing. The original agreement, therefore, ought to have been produced, or it ought to have been shown to have been lost or destroyed. In *Shaw v. Dartnall* (a), it was argued that the bankrupts were agents acting under a del credere commission. But the Court held, that such a conclusion could not be drawn from the entries in the books, it being wholly inconsistent with the entry made in that case as to one of the annuities, that it was money not yet received. Besides, the observation applies to this case, that if that had been the contract, the bankrupts would have given the grantee of the annuities credit for the instalments on the days when they became due. Those entries in the accounts did not afford any evidence whence the jury could infer that the bankrupts had agreed to guaranty the payment of the annuities, but that they intended from time to time to make the plaintiff believe that the annuities had been paid into their hands to induce him to continue his dealings with them. That was the only inference to be deduced from the accounts. Secondly, this was a voluntary payment made with full knowledge of all the facts, and the money paid cannot be recovered back. Two circumstances must concur to take a case out of that rule. First, the payment must be made in order to get possession of goods for which the owner has an immediate pressing necessity, *Astley v. Reynolds* (b). Secondly, the claim of lien must be clearly void. In **Fulham v. Dearn* (c) Lord *80] *Kenyon* said, where a voluntary payment is made of an illegal demand (the party knowing the demand to be illegal), without an immediate and urgent necessity, that is, unless to redeem or preserve his person or goods, it is not the subject of an action for money had and received. Here *Woodcock* had no immediate pressing necessity for the policies. It does not appear that the persons whose lives were insured were dead. The bankruptcy of *Howard and Gibbs* took place in 1821, the plaintiff did not apply for the policies until 1822. Secondly, the claim of lien was not clearly void: whether it was so or not, depended on the mode of rendering the accounts between principal and agent. Then, unless it was clear that the assignees had not any lien, *Woodcock* ought to have brought trover, which is the proper legal remedy in such a case. He must, in that form of action, have tendered the exact amount of the defendant's lien, which, in a matter of such complicated account, it might be difficult to ascertain, and in default of so doing, would have had to pay the costs of the action. By paying the money claimed, he makes the assignees defendants, and throws on those who held the security, the necessity of making the proper tender. This was a voluntary payment, because it was made merely to avoid the necessity of bringing an action of

(a) 6 B. & C. 56.

(b) *Strang*, 915.

(c) 6 Esp. 26.

trover, and in order to gain an advantage in the mode of trying the right of lien.

Parke contrâ. This was not a voluntary payment, for the assignees refused to deliver up the policies until *the sum required was paid. The plaintiff was therefore compelled to pay the money to obtain possession of his own [*81] property. The Lord Chief Justice was right in leaving it to the jury to find, whether, under the circumstances, *Howard* and *Gibbs* had or had not agreed to make themselves responsible for the annuity instalments for which they gave credit, but which were stated at the time not to have been received. It was a question for the jury with what intent those entries were made. Those entries may have been made, because *Howard* and *Gibbs* knew that they had guaranteed the payment of the annuities. The argument urged on behalf of the plaintiff in error goes to show that the conclusion of the jury was wrong, but not that there was not evidence to show that such an agreement existed. Here four accounts were delivered. In all of them credit was given for annuity payments, which were not received, and the bankrupts paid the grantee those instalments as if they had been received, and in the later accounts never intimated that they looked to the plaintiff to repay them those sums for which they had given him credit in the former.

Lord TENTERDEN, C. J. I am of opinion that the question was properly submitted to the jury. The bill of exceptions, after setting out the evidence, states, that the Lord Chief Justice told the jury, that from the evidence, they might infer an agreement by the bankrupts to take on themselves the responsibility as to those items of account for which credit was given to *Woodcock*, the plaintiff below, but which were described as not received, but that it was a question for their consideration upon the evidence. The question now before this Court, is not whether the conclusion come to by the jury was correct, but whether the evidence was such as that the *jury might lawfully infer from it such an [*82] agreement. It appeared that there had been delivered to *Woodcock*, by the bankrupts, four successive accounts, in each of which the latter took credit for commission on the instalments of the annuities as if they had been received. In the first account they give him credit for half-yearly instalments of two annuities, and stated a balance of 94*l.* to be due to *Woodcock*. In a letter from one of the bankrupts, accompanying this account, he informs *Woodcock* that those two sums had not been received, but that his bill for the balance would be accepted. At the very time, therefore, when he says he has not received the money for which credit is given, he charges commission as if it had been received, and promises to accept a bill drawn upon him and his partner for the balance of the account. A second account is afterwards sent in, in which all the annuity instalments due to *Woodcock* were included, although they were not received; and *Gibbs* desires that when he feels a necessity to draw, he will let him (*Gibbs*) know. So, when the third account is sent, although *Woodcock* is informed by *Gibbs* that a half-yearly instalment of *Cunliffe's* annuity, for which credit was then given, had not been received, he is at the same time told that he may draw for the balance struck in that account. In the fourth account, credit is given for two half-yearly instalments, which were stated not to have been received, but in the letter accompanying that account, the plaintiff is not informed that he may draw for the balance. It must, however, be taken that he did draw for the balance of that as well as of all the other accounts, for otherwise there could not have been due to the bankrupt or the assignees the balance claimed and paid to redeem the policies. This being the state of the accounts *between the [*83] parties, the assignees of the bankrupts insisted that they were entitled to be allowed in account all those sums, for which they had authorized *Woodcock* to draw, and which were paid by the bankrupts in respect of those annuity instalments which were stated not to have been received; and they, as assignees, being in possession of certain policies of insurance, and *Woodcock* having occasion for them, the assignees refused to deliver them up unless he paid 715*l.* 8*s.*

7d. The question which arises in this action wherein the plaintiff below seeks to recover back the money which he paid in order to obtain possession of the policies, is precisely the same as if the assignees had brought an action to recover back the money paid by them; and it is clear that such an action would be answered if the defendant were to show that the bankrupts had agreed to become responsible for the instalments of the annuities in default of payment by the grantors; and that being so, if there was such an agreement proved in this case, the assignees had no lien, and consequently cannot retain the money which they compelled the plaintiff to pay. Now the circumstances of the bankrupts having from time to time given the grantee credit for the annuity instalments, and having authorized him to draw for the amount of those instalments, and having actually paid them, although they had not received them, and not having intimated in the later accounts that they expected to be repaid those sums, and having moreover, charged commission upon those sums, were some evidence for the jury to infer that they had made those payments in pursuance of some agreement on their part to do so, whether they received them or not; and if there was evidence to go to the jury, then I think the question was properly submitted to their consideration, and, consequently, the judgment of the *84] Court of Common Pleas ought to be affirmed.

BAYLEY, J. If a party has in his possession goods or other property belonging to another, and refuses to deliver such property to that other, unless the latter pays him a sum of money which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment made by compulsion, and may be recovered back. There is no authority to show that the two things mentioned in argument are required in order to make the payment compulsory. That being the general rule of law, it is quite clear that the sum paid to obtain possession of these policies was not a voluntary payment, and that it may be recovered back, unless the assignees had a right to receive the money. Upon the other point I think that there was some evidence from which the jury might infer an agreement between *Woodcock* and the bankrupts, by which the latter became responsible for the payment of the annuities, and we are not in this state of the proceedings to inquire whether their conclusion was right or wrong. It has been argued that in order to make such an agreement binding on *Howard* and *Gibbs*, it should have been in writing. That argument for a time created some doubt in my mind. But on further consideration I think there was in this case evidence of an assumed and executed responsibility. The plaintiff below does not attempt in this action to enforce such an agreement by compelling payment. The bankrupts have executed the agreement by paying the money which they had not received. We must look to the whole of the accounts to see whether there was any evidence to show *85] that the bankrupts had taken upon themselves the responsibility, and looking at them I think there was some evidence from which the jury might draw that inference, although upon that evidence I should, perhaps, have come to a different conclusion. I think, therefore, the question was properly submitted to the jury, and that the judgment of the Court of Common Pleas ought to be affirmed.

HOLROYD, J. Upon the question whether a payment be voluntary or not, the law is quite clear. If a party making the payment is obliged to pay, in order to obtain possession of things to which he is entitled, the money so paid is not a voluntary, but a compulsory payment, and may be recovered back; and if the plaintiff below, therefore, was compelled to make the payment in question in order to get the policies of insurance, whether there was a pressing necessity or not, he has a right to recover it back. The other question is, whether it was properly left to the jury to infer from the evidence an agreement by *Howard* and *Gibbs* to become responsible for the payment of the annuities? If, as in *Shaw v. Dartnall* (a), one account only had been delivered, that might not

have been sufficient to prevent the party who delivered the account from saying that he had not received the money, or that whether he had received it or not he had not made himself responsible for it. But in this case successive accounts were delivered from time to time, and in all of them credit was given for instalments of annuities not received at the time when those accounts were respectively delivered. In the latter accounts there was no allusion to the sums for which *credit was given in the earlier as sums not received. In fact, those [*86 sums had not been received. That was evidence to be laid before the jury in order to show that the bankrupts had made themselves responsible for the sums which they had so paid. Suppose such successive accounts had been delivered by the bankrupts from time to time for four or five years, and that the balance had been always paid by them, although they had not in fact received the instalments for which they had so given credit, would not those accounts have afforded a fair ground for a jury to have inferred that the party who had for that period given credit for those sums had made himself responsible for them? Here the accounts were not delivered during so long a period of time. But they still afford some evidence of such an agreement; and if there was any evidence, then upon a bill of exceptions we cannot say that the question was not properly submitted to the jury.

LITLEDALE, J., concurred.

Judgment affirmed.

ROGERS v. JONES. June 30.

By the 12 G. 1, c. 29, s. 2, it is provided, that before arrest by an inferior court, an affidavit of debt shall be made before the officer who issues the process, or his deputy: Held, that the deputy must be appointed for issuing process, and not merely for taking affidavits.

An acknowledgment of a debt, made by a debtor after arrest, but before an escape, is evidence against the marshal in an action for the escape. *Per Bayley, J.*

CASE against the marshal of the King's Bench for an escape. The declaration stated, that one *H. S.*, on, &c., at the town and port of *Dover*, and within the jurisdiction of the court of record of our lord the King, holden before the mayor and jurats of *Dover*, to wit, at **Westminster*, was indebted to the plaintiff in the sum of 200*l.* upon and in respect to certain causes of action [*87 before then accrued to the plaintiff against *H. S.*, within the jurisdiction of the said court. That the said sum of money being unpaid, and *H. S.* then being a prisoner for debt in the actual custody of the mayor, &c., of *Dover*, at the suit of *H. D.*, plaintiff for the recovery of his debt, on, &c., at, &c., and within the jurisdiction of the said court, duly made an affidavit before *T. Pain*, duly constituted and appointed to take affidavits in the same court. (The declaration then set out the affidavit, plaint, and precept, and alleged a detainer of *H. S.* thereupon.) And *H. S.* being detained, and remaining a prisoner at the suit of the plaintiff for the cause aforesaid, afterwards, to wit, on, &c., at, &c., was brought before Sir *G. S. Holroyd*, one of the justices of K. B., by virtue of a writ of habeas corpus, and was thereupon then and there duly committed, by Sir *G. S. Holroyd*, to the custody of the marshal of the Marshalsea, there to remain until, &c. By virtue of which commitment, defendant then and still being marshal of the Marshalsea, took *H. S.* into his custody, and detained her until afterwards, to wit, on, &c., he, the defendant, without the licence, &c., voluntarily suffered *H. S.* to escape. Plea, not guilty. At the trial before Lord Tenterden, C. J., at the *Westminster* sittings after last *Hilary* term, it

was proved, that *H. S.*, a native of *France*, had given to the plaintiff four promissory notes for 50*l.* each, dated at *Dover*, but payable at *Calais*. The consideration for the notes was not proved to have been given at *Dover*. The town-clerk of *Dover* is the proper officer to issue process out of the court of record holden before the mayor and jurats, and has for many years been in the *88] habit of giving to several persons at *Dover* a deputation to take affidavits of debt. *T. P.*, before whom the affidavit mentioned in the declaration was sworn, had a deputation of this nature, but was not the deputy of the town-clerk for general purposes. The arrest of *H. S.*, an acknowledgment of the debt by her when in custody at *Dover*, the removal by habeas corpus, issued at the suit of the plaintiff, and the escape, were then proved. For the defendant it was objected, that there was no evidence that the debt arose within the jurisdiction of the court of record at *Dover*, and that *T. P.* had not any sufficient authority to take the affidavit of debt. The Lord Chief Justice reserved these points; and the plaintiff having obtained a verdict, a rule nisi for a nonsuit was granted in *Easter* term.

The *Attorney-General* and *Comyn* showed cause. It appeared that the affidavit of debt was sworn before *T. P.*, a person appointed by the town-clerk, according to the practice followed for many years. *T. P.* was the deputy of the town-clerk for that purpose, and his appointment was analogous to the appointment of commissioners for taking affidavits in the superior courts. The statute 12 *G. 1.*, c. 29, does not make it necessary that he should be deputy for general purposes. Then it was objected that the cause of action did not arise within the jurisdiction of the court of record at *Dover*. But the notes were made at *Dover*; and, moreover, the plaintiff was not bound to prove that the cause of action arose within the limited jurisdiction, the cause having been removed into this court. [Lord *Tenterden*, C. J. The cause was removed by *89] the plaintiff, and it does appear singular that a party should be able to *arrest a debtor by process out of an inferior court, for a cause not within its jurisdiction, and have the benefit of that arrest by removing the cause into a superior court.] At all events, the giving of the notes to the plaintiff constituted a cause of action, and that arose at *Dover*; and the debtor when in custody there acknowledged the debt.

Gurney and *Campbell* contra. The affidavit of debt was made before a person who had no authority to take it. By the 12 *G. 1.*, c. 29, an act made to prevent frivolous and vexatious arrests, a difference is made between superior and inferior courts in this respect. In the former, a commissioner may take affidavits; in the latter, they must be sworn before "the officer who issues the process or his deputy;"—that means his deputy for the general purposes of his office, not merely for taking affidavits. Next, the cause of action was not proved to have arisen within the inferior jurisdiction. The date of the notes was not evidence of their being made at *Dover*, nor were they proved to have been delivered at that place. The acknowledgment of the debt made after the arrest was not evidence against the marshal. [*Bayley*, J. It would be evidence if made before the escape.]

Lord *TENTERDEN*, C. J. We are of opinion that *Pain*, before whom the affidavit of debt was made, was not a deputy within the meaning of the statute 12 *G. 1.*, c. 29. That statute says that the affidavit must be sworn before the officer who shall issue the process or his deputy. It is not necessary to say whether that requires the deputy to be appointed generally for the officer; but, *90] at all events, it makes it necessary that he *should be deputy for the purpose of issuing process; and the only authority delegated to *Pain* was that of taking affidavits: consequently the arrest was not good; and as the party was never in lawful custody, no action for the escape can be maintained against the marshal. The rule for entering a nonsuit must, therefore, on this ground, be made absolute, and it becomes unnecessary to say any thing as to the other

point. But it may be proper to notice that in *Melsome v. Gardner* (a) it was decided, after consideration, that a plaintiff having arrested a debtor by process out of an inferior court cannot, by habeas corpus ad respondendum, remove him into the custody of this court to answer to a new action here for the same debt.

Rule absolute.

(a) 1 *Cowp.* 116.

HANSARD v. ROBINSON. July 3.

The holder of a bill of exchange cannot by the custom of merchants insist upon payment by the acceptor, without producing and offering to deliver up the bill; and, therefore, it was held that the indorsee of a bill having lost it, could not in an action at law recover the amount from the acceptor, although the loss was after the bill became due, and the indorsee offered an indemnity.

THIS was an action by the plaintiff, as indorsee, against the defendant as acceptor of a bill of exchange for 32*l.* 1*s.* 6*d.*, dated the 10th of *October* 1823, drawn by *Henry Butterworth*, payable forty days after date, accepted by the defendant, and indorsed by *Butterworth* to the plaintiff. Plea, the general issue. At the trial before *Littledale, J.*, at the *Westminster* sittings after *Michaelmas* term 1826, it was proved by the drawer that the defendant being indebted to him in *the sum of 32*l.* 1*s.* 6*d.* for books, he, on the 10th of *October* 1823, [*91 drew a bill on him for that sum, payable at forty days after date, which the defendant accepted. The bill was drawn on a proper stamp. *Butterworth* indorsed the bill in blank, and delivered it, so indorsed, to the plaintiff. The bill became due on the 22d of *November* 1823, but was not presented for payment until the 1st of *May* 1824. The defendant then offered to give in payment another bill, but before that bill was given the plaintiff's clerk lost the original bill. The plaintiff informed the defendant of the loss, and offered him an indemnity, but he refused to pay the amount unless the bill was produced and delivered up to him. Upon this evidence it was contended that the plaintiff, the indorsee of the bill, could not recover against the acceptor unless the bill were produced, or shown to have been destroyed, because the acceptor was liable to be sued by a bona fide indorsee for value at any time, even although the bill might have been obtained by a prior party through fraud or felony; that there was no privity between the indorsee and the acceptor except through the bill; and that the latter by his acceptance undertook only to pay the bill upon its being produced and delivered up to him. There was no breach of his contract unless the bill were so produced by the holder, and unless the latter offered to deliver it up, on being paid the amount. As to the offer of indemnity, a court of law had no power to compel a party, who by law was entitled to have the bill delivered up to him, to take an indemnity. A court of equity is the proper tribunal to judge of the sufficiency of the indemnity. The learned Judge was of opinion that the plaintiff was not entitled to recover, unless he produced the bill, *and directed a nonsuit, with liberty to the plaintiff to [*92 move to enter a verdict for the amount of the bill. A rule nisi having been obtained for that purpose,

Campbell and *Patteson*, in *Easter* term, showed cause. There are certainly contradictory authorities on this point; but the *Nisi Prius* cases of *Pierson v. Hutchinson* (a), *Mayor v. Johnson* (b), *Poole v. Smith* (c), *Dangerfield v.*

Wilby (a), *Bevan v. Hill* (b), and a case tried before Lord *Eldon*, when Chief Justice of the Court of Common Pleas, and mentioned by him in *Ex parte Greenway* (c), and two cases in Banc. decided by the Court of Common Pleas, *Davis v. Dodd* (d) and *Champion v. Terry* (e), are in favour of the defendant. *Williamson v. Clements* (f) is not an authority against him, for there the action was on a special promise, and the consideration stated, for that promise, was, that the defendant was indebted to the plaintiff on a bill of exchange, and that the plaintiff having lost the bill, had at his request given him a bond acknowledging payment, and conditioned to indemnify him against the bill; and on motion in arrest of judgment it was held that, after verdict, it must be taken to have been proved at the trial, that the defendant was so indebted; and that there was, therefore, a good consideration for the promise. In *Long v. Baillie* (g) the bill was specially indorsed to the plaintiff, and had no indorsement from him upon it, and no other person but the plaintiff could have acquired a right to sue thereon. *Brown v. Messiter* (h) was a decision of a single judge, and no *93] cause was shown against the rule for referring the bill to the Master to compute principal and interest; and *Glover v. Thomson* (i) was an undefended cause. *Hart v. King* (k) was a Nisi Prius case before *Holt*, C. J., and it does not appear from the report in what character the plaintiff sued. The bill might have been either indorsed specially or not at all; it might have been proved to have been destroyed, or might have been in such a state, when lost, that other persons could not recover upon it.

Gurney and Chitty, contra, relied upon the three last-mentioned cases; and on a Nisi Prius case of *Dart v. Hinckes*, tried before Lord *Tenterden*, and a case of *Rolfe, assignee, v. Watson*, before *Best*, C. J., at the sittings in last *Easter* term, where, in an action on a lost bill, the jury having found that the bill was not indorsed at the time of the loss, the plaintiff was permitted to recover. And they contended that it was material for the plaintiff in this case, that the bill was not lost until after it became due, and after the defendant had made default in not paying it when presented.

Cur. adv. vult.

LORD TENTERDEN, C. J., now delivered the judgment of the Court. This was an action on a bill of exchange, brought by the indorsee against the acceptor. The bill was not produced at the trial, but proof was given of the signature of the parties, and other particulars of the bill, and that it was lost after it had become due, and after payment had been required of the defendant, and he had requested time and promised payment.

*94] "It is not necessary to say whether any special action could have been framed and maintained upon the particular facts and the defendant's promise, because the declaration in the present cause is not founded upon such facts, but upon the bill itself, in the usual way. We would not, however, be understood to give any encouragement to such an action; and we think the special facts cannot properly be considered as affording a satisfactory ground for decision in this case, but the case must be considered generally, as an action brought upon a lost bill, and introducing the general question, whether such an action can be maintained.

Upon this question the opinions of judges, as they are to be found in the cases quoted at the Bar, have not been uniform, and cannot be reconciled to each other. It is not necessary to advert again to the cases. Amid conflicting opinions the proper course is, to revert to the principle of these actions on bills of exchange, and to pronounce such a decision as may best conform thereto. Now the principle upon which all such actions are founded is the custom of merchants. The general rule of the *English* law does not allow a suit by the

(a) 4 *Exp. N. P. C.* 159.

(d) 4 *Taunt.* 602.

(g) 2 *Comp.* 314.

(b) 2 *Comp.* 381.

(e) 3 *Brod. & B.* 295.

(h) 3 *M. & S.* 281.

(k) 12 *Mod.* 310.

(c) 6 *Ves. jun.* 812.

(f) 1 *Taunt.* 523.

(i) 1 *Ryan & Moody*, 403.

assignee of a chose in action. The custom of merchants, considered as part of the law, furnishes, in this case, an exception to the general rule. What, then, is the custom in this respect? It is that the holder of the bill shall present the instrument, at its maturity, to the acceptor, demand payment of its amount, and upon receipt of the money deliver up the bill. The acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher and discharge pro tanto in his account with the drawer. If, upon an offer of payment, the holder should refuse to deliver up the bill, can it be *doubted that the acceptor might retract his offer or retain his money? [*95 And if this be the right of an acceptor, ready to pay at the maturity of the bill, must not his right remain the same if, though not ready at that time, he is ready afterwards; and can his right be varied if the payment is to be made under a compulsory process of law? The foundation of his right, his own security, his voucher, and his discharge toward the drawer remain unchanged. As far as regards his voucher and discharge toward the drawer, it will be the same thing whether the instrument has been destroyed or mislaid. With respect to his own security against a demand by another holder there may be a difference. But how is he to be assured of the fact, either of the loss or destruction of the bill? Is he to rely upon the assertion of the holder, or to defend an action at the peril of costs? And if the bill should afterwards appear and a suit be brought against him by another holder, a fact not absolutely improbable in the case of a lost bill, is he to seek for the witnesses to prove the loss, and to prove that the new plaintiff must have obtained it after it became due? Has the holder a right, by his own negligence or misfortune, to cast this burden upon the acceptor, even as a punishment for not discharging the bill on the day it became due? We think the custom of merchants does not authorize us to say that this is the law. Is the holder, then, without remedy? Not wholly so. He may tender sufficient indemnity to the acceptor, and if it be refused, he may enforce payment thereupon in a court of equity. And this is agreeable to the mercantile law of other countries. In the modern *Code de Commerce of France*, Liv. 1. Tit. 9, Art. 151, 152, this is distinctly provided. And this *provision is not new in the law of that country, but is found [*96 also in the *Ordonnance de Commerce of Lewis the Fourteenth*, Tit. 5, Art. 19. The rule for entering a verdict for the plaintiff must therefore be discharged.

Rule discharged.

SANDIMAN v. BREACH. July 4.

The statutes 3 Car. 1, c. 1, and 29 Car. 2, c. 7, do not make it illegal for stage-coaches to travel on the Lord's day.

ASSUMPSIT to recover the expense of hiring a post-chaise to convey the plaintiff from *Clapton* to *London*, the defendant, who had contracted to take him in his stage-coach, having neglected to do so. Plea, the general issue. At the trial before Lord *Tenterden*, C. J., at the *London* sittings after *Michaelmas* term 1826, it appeared that on a *Sunday* the plaintiff sent to a booking-office kept by the defendant, who was the proprietor of a stage-coach travelling from *Clapton* to *London*, booked himself to be carried to *London* on that evening, and paid half the fare. The defendant afterwards, not having any passenger except the plaintiff, refused to go to *London*, and thereupon the plaintiff hired a post-chaise. For the defendant, it was contended, that the contract was illegal, being in con-

travention of the statutes, 3 *Car.* 1, c. 1, and 29 *Car.* 2, c. 7, and that, therefore, the defendant was not bound to perform it. The Lord Chief Justice gave the defendant leave to move to enter a nonsuit, and the plaintiff had a verdict for 13s. In *Hilary* term a rule for entering a nonsuit was obtained, against which

Dodd showed cause. The statutes referred to at the trial do not prevent stage-coaches from travelling on the *Sabbath. The 3 *Car.* 1, c. 1, begins *97] by reciting, that "the Lord's day is much broken and profaned by carriers, waggoners, carters, wainmen, butchers and drovers of cattle;" and then enacts, "that no carrier with any horse or horses, nor waggon-man with any waggon, nor carman with any cart, nor wainman with any wain, nor drover with any cattle, shall by themselves, nor any other, travel upon the said day, upon pain that every person so offending shall forfeit 20s. for every such offence." The only word there used, that could by possibility apply to a stage-coachman, is *carrier*, but that means carrier of *goods*; and, accordingly, in *Ex parte Middleton* (a), where the driver of a van was held to be a carrier within the meaning of the act, the Court expressly avoided giving any opinion as to the drivers of stage-coaches. By the 29 *Car.* 2, c. 7, s. 1, it was enacted, "that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's day, or any part thereof, works of necessity and charity only excepted; and that every person being of the age of fourteen years or upwards, offending in the premises, shall for every such offence forfeit the sum of 5s." The defendant does not come within any part of the description there given, and the general words "other person," are applicable only to persons ejusdem generis. [Lord *Tenterden*, C. J. Is there not some provision as to travellers by water?] Yes, in section 2, but that is in favour of the plaintiff; for as some travellers are specially mentioned, the Court will not extend its provisions to any others. The *98] words *are, "no drover, horse-courser, waggoner, butcher, higgler, their or any of their servants, shall travel or come into his or their inn or lodging upon the Lord's day, upon pain that every such offender shall forfeit 20s. for every such offence; and that no person shall use, employ, or travel upon the Lord's day, with any *boat, wherry*, lighter, or barge, unless it be upon some extraordinary occasions, to be allowed by some justice of peace." Even if the language of the first section applied to the driver of a stage-coach, his employment would come within the exception of "works of charity and necessity;" for it is necessary for many persons, as witnesses or medical men, to travel on *Sunday*, and this exception has always been liberally construed, *Rex v. Cox* (b), *Rex v. Younger* (c). But, secondly, if any offence was committed, that was by the defendant, and not the plaintiff. He alone is guilty of the offence, who exercises his ordinary calling on the Sabbath, *Bloxam v. Williams* (d), *Hodgson v. Temple* (e). Lastly, the defendant had a licence for his coach to travel on *Sunday*, granted in pursuance of the powers given to the commissioners of hackney-coaches by the 25 *G.* 3, c. 51.

Gurney contra. There is no doubt that the defendant as a stage-coach proprietor and driver, had "an ordinary calling," and if he had exercised that calling on the Sabbath day, he would have been subject to the penalty imposed by the 29 *Car.* 2, c. 7, and the only question is, whether a person who has *99] made a contract with another, in contravention of the law, can maintain *an action against that other for refusing to perform such contract? [Lord *Tenterden*, C. J. If the words "other person," in the first section, are large enough to include all persons having an ordinary calling, why should drovers and waggoners be specially mentioned in the second section?] The fifth section shows that persons travelling on the Sabbath were considered as offenders, for

(a) 3 *B.* & *C.* 164.(b) 2 *Burr.* 785.(c) 5 *T. R.* 450.(d) 3 *C.* & *B.* 232.(e) 5 *Taunt.* 181.

it deprives them of any remedy against the hundred in case of robbery. Then as to the exception of "works of necessity," the case of *Rex v. Cox* (a), which was a motion for a criminal information against a baker, was decided on the ground that he came within the exemption in section 3, in favour of cooks' shops.

Cur. adv. vult.

The judgment of the Court was now delivered by

Lord TENTERDEN, C. J. It was objected that the plaintiff in this case could not recover, because the contract, for the breach of which the action was brought, was to have been performed on the Sabbath day, and that it could not legally be performed on that day. But upon looking into the statutes 3 *Car.* 1, c. 1, and 29 *Car.* 2, c. 7, upon which the objection was founded, we are of opinion that this case does not come within them. There have been subsequent statutes, containing regulations as to hackney coaches, but they are too ambiguous to be taken as legislative expositions of the former acts. By the first of these, the 3 *Car.* 1, c. 1, it was enacted, that "no carrier with any horse, nor waggon-man with any waggon, nor carman with any cart, nor wainman with any wain, nor drover with any cattle, shall by themselves, *or any other, [*100 travel on the Lord's day;" and by the 29 *Car.* 2, c. 7, that "no tradesman, artificer, workman, labourer, or other person or persons, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's day." It was contended, that under the words "other person or persons" the drivers of stage-coaches are included. But where general words follow particular ones, the rule is to construe them as applicable to persons ejusdem generis. Considering, then, that in the 3 *Car.* 1, c. 1, carriers of a certain description are mentioned, and that in the 29 *Car.* 2, c. 7, drovers, horse-courers, waggons, and travellers of certain descriptions, are specifically mentioned, we think that the words "other person or persons" cannot have been used in a sense large enough to include the owner and driver of a stage-coach. For these reasons we are of opinion that the rule for entering a nonsuit must be discharged.

Rule discharged.

(a) 2 *Burr.* 785.

*TOPE and NICHOLLS, assignees of J. FORD, v. W. L. HOCKIN, [*101
 Gent., one, &c. July 4.

Where a commission of bankrupt was sued out on the petition of *A. B.*, founded on an act of bankruptcy in *December*, and it appeared that in the preceding *October*, the bankrupt, by a deed, to which *A. B.* was a party, assigned all his property: Held, that the assignees (although *A. B.* was not one of them) could not avail themselves of this deed as an act of bankruptcy in order to recover money subsequently paid by the bankrupt, inasmuch as the creditors represented by the assignees derived all their rights under the commission from the petitioning creditor, who was a party to the deed.

The money sought to be recovered had been deposited by the bankrupt in the hands of an arbitrator, who was to decide to whom it belonged. The arbitrator, before the commission issued, and without knowledge of any act of bankruptcy having been committed, paid the money over to the person whom he thought entitled to receive it: Held, that the assignees could not recover it from the arbitrator.

ASSUMPSIT for money had and received. At the trial before *Littledale, J.*, at the Summer assizes, 1826, for the county of *Devon*, a verdict was found for the plaintiffs, damages 15*l.*, subject to the following case for the opinion of this Court as to the increase of the damages.

The plaintiffs were the assignees of the estate and effects of *John Ford*, a bankrupt, under a commission of bankruptcy dated the 4th day of *December* 1823, which was issued on that day upon the petition of *John Lyndon*, the brother-in-law of *Ford*. The acts of bankruptcy, in respect of which *Ford* was adjudged and declared a bankrupt under the commission, and which were stated and set forth in the proceedings and depositions before the commissioners, were committed by him on the 21st of *November* and the 1st of *December* 1823. At the trial, the trading, the petitioning creditor's debt, and these acts of bankruptcy, were duly proved, and no question was made thereon; and there was proved, and given in evidence, a certain indenture bearing date the 1st day of *October* 1823, made between *Ford* of the first part, and one *H. Mudge* and *J.*

Lyndon of the other part, whereby *Ford* granted and conveyed *all
 *102] his goods and chattels in the county of *Devon* to *Mudge* and *Lyndon*, upon certain trusts in the deed specified. It did not appear that the bankrupt had at the date of the deed any goods or chattels out of the county of *Devon*. The deed was executed by *Ford* on the day of its date. *Lyndon* did not execute, but he was privy to it. Many years before this time, *Ford*, being the owner of a freehold estate at *Brent*, in the county of *Devon*, had mortgaged it at several times to several persons; but in the year 1823, he, by the intervention of *Smith*, an attorney, who had been for a long time concerned for him as his attorney, contracted to sell the same to a Mr. *Cornish*, and the purchase was to be completed on the 4th day of *October* in that year. Accordingly, on that day a meeting took place for that purpose at *Totness*, at which were present *Ford*, *Cornish* (the purchaser), with his attorney, some of the mortgagees, *Smith*, who attended there as well on behalf of *Ford*, as on behalf of two of the mortgagees, and *Hockin*, the defendant, who attended on behalf of a third mortgagee. *Smith* brought with him the title-deeds of the estate, which had been in his possession for several years, and which had first come into his possession as the attorney for and on behalf of his clients, two of the mortgagees. The parties being assembled, *Cornish*, the purchaser, drew four checks upon a bank at *Totness* for the amount of the purchase-money, i. e. three for the separate amounts of the said several claims of the three mortgagees payable to them respectively or bearer, and the fourth for the amount of the residue, being the sum of 904*l.* payable to *Ford* or bearer. The first three checks were then given to the respective mortgagees, and the last-mentioned check *Ford* took

*103] *from the hand of *Cornish*, and put into his pocket, but *Smith* immediately claimed to have possession of it, and declared that the business should not be completed if the check was not given up to him. At this time the first two mortgagees had executed the deeds of conveyance, and the third mortgagee was in the act of executing them, but an altercation ensuing between *Smith* and *Ford* respecting the check, the business was interrupted, and the three first-mentioned checks were given back to *Cornish*. It was, however, finally agreed between *Smith* and *Ford*, that the check in question should be deposited in the hands of the defendant, who was named by *Ford*. Contradictory evidence was given both as to the grounds on which *Smith* claimed possession of the check, and also as to the purpose of the deposit with the defendant; but the jury found that *Smith* had made his claim on the ground of a balance due to him for bills of costs, and on a cash account, and also on the ground of the authority hereinafter mentioned; and the jury also found that the deposit was made for the purpose of the defendant's determining how much was due from *Ford* to *Smith*, and also to Messrs. *Hine* and Co., at that time bankers at *Dartmouth*, after payment of which sums he was to return the residue to *Ford*. The check was thereupon deposited by *Ford* in the hands of the defendant, and the purchase was completed. The defendant deposited this check at his bankers on the 6th day of *October*, and had credit with them for the amount thereof in a separate account; and on the 18th, *Ford*, with one *Fowle* an accountant, and *Smith*, met at the defendant's office at *Dartmouth*, when *Ford* agreed to a

balance of account between himself and *Smith* to the amount of 262*l*. After this, but at the *same meeting, Mr. *Hine* came to the defendant's office, and produced an account of the claims of *Hine* and Co. against *Ford*, [*104 and *Smith* also produced the paper-writing, bearing date the 31st May 1823, hereinafter set forth, and *Ford* and *Hine* went through the last-mentioned account; and finally, the defendant decided, that the sum of 627*l*. was due from *Ford* to *Hine* and Co. He accordingly drew and delivered to *Smith* a check on his bankers, for the sum of 889*l*., whereof 262*l*. was for *Smith* himself, and 627*l*. was to be by him paid to *Hine* and Co. The paper-writing so produced by *Smith* was as follows: "Mr. J. B. *Smith*—Sir, I hereby authorize and request you to retain the deeds of my estate at *Brent*, as security for my debt to Messrs. *Hine* and *Holdsworth*, after satisfying the mortgage, and request you to pay them the balance of my account out of the purchase-money, as soon as the property is sold. John *Ford*.—*Dartmouth*, 31st May 1823."—This paper was signed by *Ford* at the time of its date; and on signing it he gave it to Mr. *Hine*, and at *Hine*'s request he immediately afterwards delivered it to *Smith*. The paper was stamped only with an agreement-stamp of the amount of 1*l*. It appeared, by the said account of *Hine* and Co., that on the 31st May 1823, there was due from *Ford* to *Hine* and Co. the sum of 306*l*. 18*s*. 11*d*. only, and on the 18th October following the said sum of 627*l*. The question for the opinion of the Court was, whether the plaintiffs were entitled to recover the sum of 889*l*., or any and what part thereof? If the Court should be of opinion that the plaintiffs were entitled to recover the sum of 889*l*., or any part thereof, the damages were to be increased accordingly, but if otherwise, the damages to remain at the amount of 15*l*. *as aforesaid. The case was argued on a [*105 former day in this term by

Carter for the plaintiffs. The deed of the 1st of October 1823, made between the bankrupt and *Mudge* and *Lyndon*, was an act of bankruptcy; and if it were so, then it overrides and annuls the payments made on the 18th of October to *Smith* and to *Hine* and Co. The deed, treating it as independent of any connection with the petitioning creditor, being an assignment of all the bankrupt's effects, was clearly an act of bankruptcy. Now the money came into the defendant's hands on the 6th of October, when he had credit for it with his bankers, and so remained until the 18th. It was, therefore, money had and received by him to the use of the assignees, which they are entitled to recover. The objection in this case will be, that the deed was a concerted act of bankruptcy between the bankrupt and *Lyndon* the petitioning creditor. Questions as to concerted acts of bankruptcy have only arisen in cases where it was proposed to give them in evidence as the foundation and support of the commission; and such concerted acts have been held not to be available, on two grounds. Some acts, if done by agreement, are not acts of bankruptcy at all. The very circumstance of their being agreed or concerted takes away one of the main qualities which must be found in the transaction to make it an act of bankruptcy, viz. the intention to delay creditors. Thus, in the case of a denial to a creditor, the latter cannot be said to be delayed when he comes by agreement to demand and to be denied. There is another ground upon which a concerted act has been held not to be available, viz. that although the act in *itself may [*106 be an act of bankruptcy, yet the petitioning creditor is estopped from saying that it is so. The estoppel, however, is limited to the petitioning creditor who sets the proceeding in motion: he is bound to establish an act of bankruptcy available by himself to support the commission. The assignees also must show such an act of bankruptcy in order to originate their jurisdiction. But when that has been done, the creditors at large, represented by the assignees, may take the benefit of another act of bankruptcy, although the petitioning creditor was a consenting party to it. *Tappenden v. Burgess* (a) shows that the estop-

pea applies not to assignees who are mere trustees for the creditors at large, but only to a petitioning creditor who originates the commission. (a)

Coleridge contra. The deed of the 1st of October 1823 is not available for any purpose under a commission sued out by *Lyndon* the petitioning creditor, because he was privy to it. It is clear that he could not have sued out a commission upon that act of bankruptcy. And although a commission has been sued out and supported on an act of bankruptcy free from this objection, reference cannot be had to the deed of the 1st of October by the assignees for the purpose of bringing property into the general fund. Unless the deed were fraudulent in law, it is not an act of bankruptcy; and he who has executed, assented to, or acted under such a deed, is estopped from saying that it is fraudulent. This *estoppel is not merely personal to the petitioning creditor, 107*] but extends to the assignees. *Bamford v. Baron* (b) shows that parties who have been privy and assenting to the deed of assignment cannot set it up as an act of bankruptcy; and *Tuppender v. Burgess* (c) shows that the estoppel on the assignees is in virtue of their representative, not their individual character, for there all the assignees except *Tuppender* (the petitioning creditor) were privy to the deed; and yet it was held that they might, under a commission founded on that deed, sue for and recover the bankrupt's estate. It was not necessary that *Lyndon* should execute the deed. In *Back v. Gooch* (d), the only connection which the petitioning creditor had with the deed, which was relied on as an act of bankruptcy, was, that he knew of it while it was preparing, called on the attorneys who were preparing it whilst it was in progress, and expressed no disapprobation, and when the bankrupts had executed it, recommended a person to take possession of the stock; so in *Hicks v. Burfitt* (e), the petitioning creditor was only privy and consenting to the deed. In *Ex parte Cantwell* (f) the Lord Chancellor said, "If the petitioning creditor has acted under the deed, although he may not have executed it, he not only cannot avail himself of it as an act of bankruptcy, but will be liable to all the costs of the commission." It is true, that in all these cases the commission rested on the deed. But, if neither the petitioning creditor could have sued out, nor the assignees sustained the commission upon this deed, they must, on the same principle, be prevented *from relying upon it for the purpose of overreaching 108*] the transaction in question.

Supposing, however, that the assignees may treat this deed as an act of bankruptcy, still this action is not maintainable against the present defendant. He was a mere arbitrator. The money was only deposited with him. He had no interest in it. He never mixed it with his own, and he paid it over without having notice of any act of bankruptcy or of insolvency. *Coles, Assignee of Wright, v. Robins* (g), *Coles v. Wright* (h), are authorities to show that under such circumstances the defendant is not liable.

Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court; and, after stating the facts of the case, proceeded as follows: Upon the argument of this case some questions were raised upon the effect of the paper signed by the bankrupt *Ford* on the 31st of May 1823, and the sufficiency of the stamp upon it, as relating to the lien of *Hine* and *Holdsworth* on the title-deeds of the estate sold to *Cornish*, and which were in the hands of *Smith*, and also as to the lien of *Smith* himself upon those deeds. But as the payment made by the defendant to *Smith* was of a sum assented and agreed to by the bankrupt, and the payment to *Hine* and *Holdsworth* was made under an authority delegated by him to the defendant, as an arbitrator, to settle and pay their claim, if these payments

(a) There were several other points discussed at the bar, upon which the Court did not pronounce any opinion, and the arguments as to those points have, therefore, been omitted.

(b) 2 T. R. 593.

(c) 4 East, 230.

(d) *Holt, N. P. C.* 13, and 4 Camp. 232.

(e) 4 Camp. 235.

(f) 1 Ross, 313.

(g) 3 Camp. 183.

(h) 4 Trunt. 198.

were made before any act of bankruptcy committed by *Ford* of which the plaintiffs can avail themselves, all those questions become immaterial. And we think the payments were so made. They were made *on the 18th of [109] *October*. The commission issued on acts of bankruptcy committed on the 21st of *November* and 1st of *December* following. It issued on the petition of *John Lyndon*. The plaintiffs endeavoured to overreach these payments by proof of an act of bankruptcy committed on the 1st of *October*. That act of bankruptcy was the execution of a deed conveying all the bankrupt's goods and chattels in *Devonshire*, the county of his residence, to one *Henry Mudge* and this *John Lyndon*, for the purpose of discharging a debt due to them. *Lyndon* was privy to this transaction; and, therefore, taking the deed to be an act of bankruptcy, it is clear by all the authorities that *Lyndon* could not be allowed so to treat it, and to take out a commission upon it. But it was argued that although the law might be so as to the suing out a commission, yet if the commission were sued out upon another distinct act of bankruptcy sufficient to sustain it, the creditors represented by the assignees (*Lyndon* not being an assignee) might, nevertheless, avail themselves of this act of bankruptcy for the purpose of avoiding subsequent acts by force of the relation to this deed. We, however, think that the reasons upon which the creditors at large are not allowed to avail themselves, for the purpose of supporting the commission, of an act which the petitioning creditor is not allowed to call an act of bankruptcy, although another creditor might do so for that purpose, apply equally to the present purpose, for which they rely upon it. One reason must be, that the creditors at large are to be considered as connected with the petitioning creditor, and as deriving their rights under the commission from him; for if they were not so considered, they might say, "Here is a good act of bankruptcy, and a sufficient debt owing to *the petitioning creditor. His connection with the act of bankruptcy is [110] immaterial to us: there are many among us to whom debts were owing of sufficient amount to have authorized us to sue out a commission, and, therefore, in our favour the commission shall stand good." Another reason may be, that if a commission sued out by such a petitioning creditor could be available, he would have a right to prove his debt under it, and participate in the dividend, and so would derive a benefit from a commission which he ought not to have sued out, and thus take advantage of his own wrong. And this reason also will be applicable to the purpose for which the act of bankruptcy in *October* is insisted on. For if the plaintiffs can avail themselves of that, they will increase the fund to be divided, and *Lyndon* will participate in that increase.

As this objection alone is sufficient to defeat the plaintiffs' claim, it is not necessary to pronounce a judicial opinion upon any other. But adverting to the case of *Coles v. Wright (a)*, which was quoted by Mr. *Coleridge* in support of his last objection, we think that that objection is also good, and that the money cannot be recovered from the present defendant. It was placed under his control for a special purpose; it was never mixed with his own, but kept separate as a distinct fund, to answer that purpose; he was to derive no benefit from it; he afterwards applied it to the intended purpose, in part with the express assent, and in part under the authority of *Ford*. He was, therefore, as it appears to us, a mere channel of conveyance, and his situation was the same in effect as that of *F. Wright*, in the case that has been quoted, with this difference in his favour, that *F. Wright* might have *known that the person to whom he carried [111] the money, and who was then in prison for debt, might by continuing in prison become a bankrupt, from a time antecedent to the transaction; whereas the present defendant had no knowledge of the execution of the deed, which had been managed altogether in secret. It is obvious that much inconvenience and obstruction to business might take place, if one who is employed as a mere gratuitous carrier, or made the gratuitous channel of conveyance or delivery,

should be answerable for property passing through his hands, under circumstances which lead to no suspicion that the transfer may not be made lawfully and without injury to the right of any third person. And a decision to this effect would be a great hardship on the individual so employed, and give a very harsh (and I may say as to him a very injurious) effect to that relation to the act of bankruptcy, which, though necessary for many purposes, it has been the object of the legislature, in modern times, to narrow and contract within the compass that justice to particular individuals requires. For these reasons we think that the damages ought not to be increased, but that the verdict should stand for 15*l.* only.

WILLAN v. TAYLOR.

The plaintiff, in an action on the statute 9 *Anne*, c. 14, s. 2, recovered treble the value of money lost at play, the loser not having sued within the time prescribed by the statute. A writ of error was brought by the defendant, and judgment was affirmed without costs: Held, that the poor of the parish where the offence was committed were entitled to one moiety of the sum recovered, without deducting costs.

THIS was an action brought by a stranger, upon the statute 9 *Anne*, c. 14, s. 2, to recover treble the value of money lost at play, the loser not having *brought any action within three months. By that statute it is provided, *112] that the loser of 10*l.* at cards, &c. may sue for the money within three months; and in case the person who shall lose such money, shall not, within the time aforesaid, sue for the same, it shall be lawful for any person by any action or suit to sue for and recover the same, and treble the value thereof, with costs of suit against the winner, the one moiety thereof to the use of the person that will sue for the same, and the other to the use of the poor of the parish where the offence shall be committed. There was a verdict for the plaintiff for 540*l.* A writ of error was brought, and judgment was affirmed in the House of Lords, but the costs of the writ of error were refused.

Brodrick moved that satisfaction might be entered on the judgment roll, upon payment of one half of the penalty to the churchwardens and overseers of the parish of *St. James*, where the offence was committed, the defendant having paid the other moiety and all taxed costs to the plaintiff.

Patteson, contra, insisted that the plaintiff had a right to receive the whole penalty, and pay over to the poor one moiety of the surplus, after deducting the costs of the writ of error.

Lord TENTERDEN, C. J. In the absence of all authority, we are of opinion, upon the words of the statute, that the poor are entitled to one moiety of the penalty, without deducting costs.

Rule granted.

*F. H. RENNELL, Administratrix of THOMAS RENNELL, Clerk, v. The Bishop of LINCOLN, T. H. MIREHOUSE, and W. S. MIREHOUSE.

July 3.

Where a prebendary, having the advowson of a rectory in right of his prebend, dies whilst the church is vacant, his personal representative has the right of presentation for that turn. Per *Bayley, Holroyd, and Littledale, J's.* Lord *Tenterden, C. J.*, diss.

QUARE impedit. The declaration stated, that whereas one *William Dodwell*, clerk, doctor in divinity, late prebendary of the prebend or canonry of *South Grantham*, founded in the cathedral church of *Salisbury*, heretofore, to wit, on, &c. at, &c. was seised of and in the said prebend or canonry, with its appurtenances, to which said prebend or canonry the advowson of the rectory of the parish church of *Welby* with its appurtenances then belonged and still belongs, in his demesne as of fee, in right of the said prebend or canonry. And so being such prebendary as aforesaid, and so being seised of and in the said prebend or canonry, with its appurtenances, to which, &c. afterwards, to wit, on, &c. at, &c. presented to the said church of *Welby*, being then vacant, one *William Dodwell*, master of arts, his clerk, who, on the said presentation of the said *W. D.*, doctor in divinity, was admitted, instituted, and inducted into the same in the time of peace, &c. That the said *W. D.*, being so seised of the prebend or canonry, with its appurtenances, to which, &c. in his demesne as of fee in right of the said prebend or canonry, afterwards, to wit, on, &c. at, &c. died so seised; after whose death, to wit, on, &c. at, &c. one *Robert Price*, clerk, was lawfully admitted, &c. and afterwards died; after whose death, to wit, on, &c. at, &c. *Thomas Rennell*, the intestate, was lawfully admitted, *instituted, and inducted prebendary of the said prebend or canonry, with its appurtenances, to which, &c. whereby the said *Thomas Rennell* [*114 then and there became and was seised of and in the said prebend or canonry, with its appurtenances, to which, &c. in his demesne as of fee in right of the said prebend or canonry. And the said *Thomas Rennell* being so seised, the said church, afterwards, to wit, on, &c. at, &c. became vacant by the death of the said Rev. *William Dodwell*, clerk, the late parson and incumbent thereof, and still is vacant, whereby it then and there belonged to the said *Thomas Rennell* to present a fit person to the said rectory of the said parish church so vacant as aforesaid. Averment, that afterwards, and whilst the said church was so vacant as aforesaid, to wit, on, &c. at, &c. the said *Thomas Rennell* died intestate, so seised of and in the said prebend or canonry, with its appurtenances, to which, &c. in his demesne as of fee in right of the said prebend or canonry, without having presented any person to the said rectory of the said parish church; after whose death, and whilst the said church was so vacant as aforesaid, to wit, on, &c. at, &c. administration was granted to the plaintiff, whereupon and whereby it then and there belonged, and now belongs to the said *F. H.*, as administratrix as aforesaid, to present a fit person to the said rectory of the said parish church so being vacant as aforesaid, and which is still vacant, but the said Bishop of *Lincoln* and the said *T. H. Mirehouse* and *W. S. Mirehouse* unjustly hinder her, &c. The Bishop of *Lincoln*, by his plea, disclaimed except as to the admission, institution, and induction of the rectors to the same rectory and parish church, and all such other things as belong to *the ordinary as ordinary of that place. The said defendants, *T. H. Mirehouse*, clerk, and *W. S. Mirehouse*, clerk, pleaded that after the said *T. Rennell* had so died without having presented any person to the said rectory of the said parish church, and whilst the said church was so vacant as aforesaid, to wit, on, &c. at, &c. he, the said defendant, *T. H. Mirehouse*, clerk, was lawfully admitted, instituted, and inducted prebendary of the said prebend or canonry, with its appurtenances, to which said prebend or canonry the said advow-

son with its appurtenances then belonged and still belongs, whereby he the said *T. H. Mirehouse* then and there became and was seised of and in the said prebend or canonry, with its appurtenances, to which, &c. in his demesne as of fee in right of the said prebend or canonry, and whereby it then and there belonged to him to present a fit person to the said rectory so being vacant as aforesaid, and that the said *T. H. Mirehouse* presented the said defendant *W. S. Mirehouse*. Upon the bishop's disclaimer, the plaintiff prayed judgment against him, and demurred to the plea of the other defendants. Joinder in demurrer. The case was argued in C. P., and judgment given for the defendants, whereupon the plaintiff brought a writ of error. The case was argued in *Michaelmas* term, 7 G. 4, by

Patteson for the plaintiff in error. The contending parties upon this record are, the administratrix of the late prebendary of the stall of *South Grantham*, in the cathedral of *Salisbury*, to which the advowson of *Welby* belongs, and the succeeding prebendary; and the question is, who has the right to present for this turn only to the church which was vacant in the lifetime of the *late prebendary. It has been suggested, and may be admitted, that it *116] lies on the plaintiff to prove her right, and that if she fails in doing so, it is immaterial whether the defendant has the right or not. With a view, therefore, to defeat the plaintiff, other claims besides that of the defendant have been brought forward, viz. those of the king, the Bishop of *Salisbury*, as supposed patron of the stall, and the Bishop of *Lincoln*, as bishop of the diocese in which the church is situate (who, however, be it remembered, disclaims upon this very record).

In order to show the plaintiff's right in this case, it will be attempted to establish to the satisfaction of the court, first, that where the patron is lay, if a presentative church becomes vacant, and the patron dies without presenting, his executor, and not his heir or devisee, or the next owner of the advowson, shall present, and the reason is, because the moment a church becomes vacant, the turn is separated and disannexed from the advowson, is a chattel, and is vested in the person of the individual to whom the advowson at that moment belongs.

Secondly, that, assuming the patronage to be ecclesiastical, still the same law prevails in all cases, except where a bishop is patron, and then the king, by his prerogative, takes the turn as the guardian of the temporalities of the bishopric.

Thirdly, that there is not any valid objection on the ground of this advowson being supposed to have been always in ecclesiastical hands; for, first, prebendaries need not have been ecclesiastics before the 13 & 14 Car. 2, c. 4, s. 14. Secondly, this is a rectory, and advowsons of rectories were all originally in *lay hands or the hands of some bishop. Wherever the tithes had *117] always been in ecclesiastical bodies, vicarages and not *rectories* were endowed by them. Thirdly, even if the advowson always was in ecclesiastical hands, its descent is regulated in this country by the temporal law, and not the ecclesiastical; and, fourthly, even the ecclesiastical law of this country would not give the turn in this case to the successor.

Lastly, it is proposed to establish that the supposed intention of the donor cannot affect this case: First, because nothing is known as to the donor, the time or circumstances of the grant, nor could any evidence be gone into upon this record, framed as it is, if any thing were known. So that no particular intention of the particular donor can be relied on. Secondly, because there is nothing to raise a legal presumption of a general intention in all donors to sole ecclesiastical corporations, that an actual ecclesiastic should always present. If there were, the grantees of such ecclesiastical corporations could never have prevented by law, which they have done and may do. Thirdly, any such general intention would equally apply to the donors of advowsons appendant to manors, as to which it is constantly violated, and they are disappended. Fourthly,

if any such general or particular intention could be shown, it could not prevail against the known rule of law, that a corporation sole cannot take a chattel by succession.

As to the first point, it is clear that where the owner of the advowson is a layman seised in fee, and dies during the vacancy of the church, the turn goes to his executors, and not to his heir, *Watson's Complete Incumbent*, chap. 9. 1 *Burn's Ecclesiastical Law*, tit. *Advowson*, p. 13. *Benefice*, p. 138. (This, as a general position, was admitted *by the defendant in error.) It may, [*118 nevertheless, be necessary to cite some of the authorities, because the reasoning upon which they proceed is applicable to this case. In *Stephens v. Wall and Another* (a), it was holden by *Harper*, *Weston*, and *Dyer*, that "the grant of the present avoidance is void, because it is a mere personal thing annexed to the person of him who was patron in expectancy at the time of the vacancy; and also a thing in right, power, and authority, and also a chose in action and in effect, the fruit and execution of the advowson, and not any advowson, and yet executors shall have it by privity of law. And to this opinion, afterwards, *Cattlyn*, C. J., *Carus* and *Southcot*, Js., agreed; but *Welsh* e contra, and to his opinion *Saunders*, C. B., and *Whiddon*, J., afterwards assented." The opinion of those six Judges is adopted by *Gibson*, *Cad.* 797, tit. 33, c. 1, s. 5, and so in *Fitz. N. B. Quare Impedit*, 34 B, it is said, "The heir in tail shall not have a presentment fallen in the life of the tenant in tail, but the executor of the tenant in tail." And, again, in *Fitz. N. B.* 33 P., this reason is given, "If a man be seised of an advowson in gross or in fee appendant unto a manor, and the advowson void, and he dieth, his executor shall present and not the heir, because it was a chattel vested and severed from the manor, &c. But if the bishop die, and the advowson happen void before his death, the king shall present unto the same by reason of the temporalities, and not the bishop's executors;" and so in *Bro. Abr.* tit. *Presentation à l'Eglise*, 34, citing 21 H. 7, c. 21. "Quare impedit; fuit agree que home seisi d'advowson in fee, l'eglise voide, il devy l'executer avera le presentation et nemy heire." The void turn is like rent *due, or any other fruit fallen, *Digby v. Fitch* (b). [*119 Rent due vests in the reversioner, in respect of the reversion; but if he dies after the rent is due, and before payment, it passes to his executor, who does not take the reversion, because the rent is disannexed from it, and vested in the person of the then reversioner. [Lord *Tenterden*, C. J. Do you find any case of rent going to the administrator or executor of a prebendary?] No, but it does not appear to have been ever disputed, and the stat. 28 H. 8, c. 11, gives the rent during vacancy to the successor. A grant of the next turn during vacancy is void, and a grant of the advowson equally void, quoad the vacant turn, *Bishop of Lincoln v. Wolforstan* (c). But a grant of an advowson during vacancy is good, and does not affect the vacant turn, for it is disannexed from the advowson, *Agard v. The Bishop of Peterborough* (d), *Stephens v. Clark* (e), *Hill v. The Bishop of Exeter* (f). In the *Queen's*, *Fane's*, and the *Archbishop of Canterbury's* case (g), the patron was outlawed, the church became void, the Queen claimed, *Fane* set up a grant of *Edw.* 4, of goods and chattels of outlaws. The Queen's counsel said that this special chattel would not pass by general words. *Anderson*, J., so held, "for they extend only to such things which are commonly known and understood by such words. By grant of goods, chattels real do not pass." But *Periam*, J., said, "This interest is a chattel; for if the church became void, and before presentment the patron died, his executors shall have the presentment, for that it was a chattel vested in their testator. In **Holland v. Shelley and others* (h), the grantee of the goods [*120 of outlaws claimed the next avoidance, and no objection was made as to

(a) *Dyer*, 282 b.(d) *Dyer*, 129 b.(g) 4 *Leon.* 109.(b) 1 *Brownl. & Gouldsb.* 167.(e) *Moore*, 89.(h) *Hob.* 302. *Winch.* 692, nom. *Holland v. Bishop of Chichester*.(c) 3 *Burr.* 1505.(f) 2 *Taunt.* 69.

the sufficiency of the words "bona et catalla." Again, in *Ob. Litt.* 120, it is laid down, that if a feme covert be seised of an advowson, and the church becometh void, and the wife dies, the husband shall present, but otherwise it is of a bond made to the wife, because that is merely in action." So where the husband is tenant by the curtesy, and the church becomes void, and the husband dies, his executors and not the heir shall have it. 38 *E. 3. c.* 37. *Bro. Presentation à l'Eglise*, 18. In *Fitz. N. B. Quare Impedit*, 34 N., it is said, "If a vicarage happen void, and before the parson presents he is made a bishop, &c. yet he shall present to this vicarage, because it was a chattel vested in him." That case is precisely similar to this, for there it is assumed that the parson is patron in right of his parsonage. It is admitted, that in some cases quare impedit may be brought by an executor, but there is no case expressly in point as to quare impedit, either by the executor or administrator of a prebendary; neither is there any instance of such a proceeding by the successor. In the case of *Repington, Executor, v. The Governors of Tamworth School* (a), a distinction was taken as to donatives. The case was as follows:—*A. B.* seised of the advowson of a donative, church voids. *A. B.* dies, and his executor sues, supposing himself entitled, as in the case of a presentative benefice. Judgment against the plaintiff. It was said by the Court in giving this judgment, *121] "that before the council of *Lateran* all benefices were like what *donatives are now, that no lapse could have occurred in ancient times, and that bishops had no right of institution before the time of *Ric. 2* (b). Ante concilium Lateranense (1179) (says *Bracton*), nullum currebat tempus contra presentantes, *Seld. Hist. Tithes*, cap. 12, fo. 380. And the Chief Justice, Sir *C. Pratt* (Lord *Camden*), said, that the author of the *Codez* never read this chapter of *Selden*, or he has imposed upon the public: he said there is no case in the books to exclude the heir of a donative from his turn in this case, that a patron of a donative can never be put out of possession by an usurpation. And after verdict for the plaintiff, judgment was arrested." But the chapter of *Selden* there cited, shows only that lay patrons did not present to the bishop, but invested the incumbent themselves. Whether the executor or heir invested in the case of the ancestor's death, during the vacancy of the church, is no where alluded to.

The reason of the decision in 2 *Wils.* is not to be found, and to argue back from that decision, that the heir must formerly have had the right against the executor in all cases is manifestly unsound. In all probability that report is very incomplete; in the declaration some prescription was laid, and as the verdict was for the plaintiff that prescription must have been found by the jury, and yet the report does not notice it. But there is a great distinction between donative and presentative livings. In the former there is no lapse, the particular right to the void turn remains for ever until the church is filled up: there is nothing to distinguish the duration of that right from the general right of nomination, and therefore the void turn may be considered as constituting part *122] of the general right, and on *that account may go with the advowson to the heir; in a presentative living the void turn does in a certain time lapse, and is therefore considered as severed from the advowson. All these authorities are applicable to the present case, for the patronage is substantially lay, inasmuch as a prebendary need not formerly have been an ecclesiastic. In *Bland v. Maddox* (c) it was agreed clearly that a layman may be presented to a prebend; for non habet curam animarum; and *Coke* said, all the possessions of prebends were at first the bishop's, 7 *Ed. 3, pl. 5*, 30 *Ed. 3, pl. 26*, and de mero jure do belong to the bishops. There is no exception of prebendaries in 13 *Eliz. c. 12*, concerning reading articles, and yet if a prebendary read not the articles within the time limited by that statute his promotion is not void. The reason is, because it is not a benefice with cure of souls, and a

(a) 2 *Wils.* 150.(b) By mistake for *R. 1.*(c) *Cro. Eliz.* 79.

layman might have been presented to a prebend (a). So also, in former time a layman might have taken a title to a deanery, prebendary, or other benefice, without cure, *Fairchild v. Gair* (b). But now the contrary is provided by the 13 & 14 Car. 2, c. 4, ss. 13, 14. And in this statute, section 29, there is a remarkable provision, "that the statute shall not be prejudicial to the king's professor of law in the University of Oxford, for or concerning the prebend of *Shipton*, within the church of *Sarum*, united to it by King James."

Secondly, assuming the patronage to be ecclesiastical the same rule prevails. The right of the owner of an advowson cannot depend on the mode of becoming owner, whether by grant, descent, devise, or office. It is absurd to say [*123 that the character of the person who exercises the right can alter the nature of the right, although it may put the party under some personal peculiarity in that exercise. As, for instance, with respect to varying presentations, an ecclesiastical patron cannot present one, and revoking that presentation present another. The bishop must give notice of refusal to a lay patron, not to an ecclesiastical (c). It is said that this is an ecclesiastical trust to be exercised only by an existing prebendary, being an ecclesiastic. This cannot be so, for there are many instances of prebendaries making grants of the next turn of a living of which they were patrons, and of the grantees and their assignees, though laymen, and sometimes tracing their title through executors, bringing actions of quare impedit in their own names, *Stanhope v. The Bishop of Lincoln*, *Williams, and Adamson* (d), *Dyng v. Bishop of Lincoln*, *Halsey, and Primett*, (e), *Doylye v. The Archbishop of Canterbury*, *Bishop of Norwich*, and *Mason* (f), *Webster v. The Archbishop of York and Woodroffe* (g), *Hill v. The Bishop of London and others* (h), *J. N. v. Bishop of Bath and Wells* (i), *Adamson v. The Bishop of Lincoln and others* (k), *Overton v. Syddall* (l), where there was an exception of the advowson. It is true that these are entries of pleadings and not decisions; but in *Radcliffe v. Doyly* (m), *Ashurst, J.*, says "The form of declarations is very material in a case where no direct determinations can be found one way or the other; for the form of legal proceedings is evidence of what the law is." In *London v. Southwell* (n), where [*124 a prebendary demised his prebend, an advowson belonging to it was held not to pass, not because it was illegal to demise it, but because the words were not sufficient. This goes the whole length of the present case, because it shows that the notion of the donor having restricted the right of presenting to an actual prebendary is fanciful; and it is observable that the Court says, that the words "commoditatibus, emolumentis, proficuis, et advantagiis," are insufficient; "all which four words are of one sense and nature, implying things gainful, which is contrary to the nature of an advowson regularly; yet an advowson may be yielded in value upon a voucher, and may be assets in the hands of an executor." If it be held, that where the advowson is in the hands of an ecclesiastic, an executor cannot present, it is impossible to account for the power which an archbishop has to devise his options, to which there is no objection, *Potter v. Chapman* (p). It was said in the Court below that such right was an anomaly, but there is no ground for that; it is consistent with and confirms the cases cited from *Winch*, *Coke*, and *Hobart*. In *Smallwood and another v. The Bishop of Coventry* (q), the plaintiffs, executors of *John Sale*, brought quare impedit for the archdeaconry of *Derby*, and counted upon a grant of the next turn made to

(a) *Cowley's Laws concerning Recusants*, 233. *Watson's Clergyman's Law*, chap. 2, § 9.

(b) 1 *Brownl. & Gouldsb.* 201.

(d) *Winch.* 825. *Hob.* 237.

(f) *Winch.* 905.

(h) *Coke, Entr.* 508.

(k) 2 *Brownl. Entr.* 233.

(m) 2 *T. R.* 836.

(o) *Winch.* 692.

(q) *Cro. Eliz.* 207. 4 *Leon.* 15, S. C.

(c) *Burn.* tit. *Benefice*, 157.

(e) *Winch.* 853.

(g) *Coke, Entr.* 507.

(i) *Rastall*, 522.

(l) *Coke, Entr.* 122.

(n) *Winch.* 810. *Hob.* 304.

(p) *Ambl.* 98. 1 *Burn. Eccl. Law*, tit. *Bishops*, 239.

their testator by the defendant: it was held, first, that the grant was good against the grantor, though bad against his successor; secondly, that the action for disturbance *125] in the time of the testator was within the equity of the 4 *Ed. 3, c. 7*, for it was a chattel that should go to the executor if the disturbance had not been.

The next question is, whether the present case is to be assimilated to that of a bishop dying during the vacancy of a church of which he is patron. In such case it is laid down, that neither the bishop's executors nor the successor shall have the turn, but the king, *Co. Litt. 90 a, Potter v. Chapman (a), Vin. Abr. Presentation (C a) (E a), Mull. Qu. Imp. 69*. Lord Coke at 90 *a*, gives as the reason, "because it is a chose in action," but this is plainly not the true reason; for, as *Hargrave* observes in note 85 to this passage, "it is not that choses in action are in their nature incapable of transmission to executors, for the contrary is known to be law;" and, indeed, in this very page, Lord Coke states, "that the bishop's executors shall have a wardship fallen in his life and not seized, for albeit the bishop hath the seigniorie en auter droit, yet, the wardship being but a chattel he hath in his own right, and a chattel cannot go in the succession of a sole corporation, unless it be in the case of the king." Now a wardship is expressly here called a chattel, and it is manifestly as much a chose in action as the next avoidance; this, therefore, is not the true reason of the king's right. But Lord Coke, at 388 *a*, speaking of the same matter, says that the bishop's executors shall have the wardship, but not the next turn of the church; for nothing can be taken for a presentment, and therefore it is no assets. *Hargrave*, in his note 85 on *Co. Litt. 90 a*, seems to think this the true reason, and takes the distinction between a trust coupled with a *126] profit and a mere trust; but he adds, "as a like reason might be urged against executors in favour of an heir, it is most safe to rely on the right of the king, as settled by authorities and long practice." In truth, when once the church is vacant, the then turn is a mere trust in all cases, whosoever may be entitled to it, and cannot be made matter of profit. The distinction, therefore, hinted at by Lord Coke, and noticed by *Hargrave*, is not the true reason. Besides, in the same page in *Co. Litt. 388 a*, it is said, "But if the king's tenant by knight's service in capite be served of a manor whereunto an advowson is appendant, and the church become void, the tenant dieth, his heir within age, the king shall present to the church, and not the executor or administrator; but if the land be holden of a common person, in that case the executor shall present, and not the guardian." Here there is nothing about the executor not taking, because it is a mere trust, and no assets; and it is plain that the king has the right merely by his prerogative. It is observable also that the king's right prevailing not only against the bishop's executors, but against the executors of his tenant by knight's service in capite, shows that it makes no difference whether the patron be lay or ecclesiastic, on which circumstance (his ecclesiastical character) it is presumed that the argument for assimilating a prebendary to a bishop rests: and it is also observable that the king takes the turn in respect of the temporalities of the bishop, for he is not guardian of the spiritualities, but the archbishop is. The analogy, if it did exist, would show that the patron of the prebend should have the turn, not the new prebendary; for the patron is *127] analogous to the king, and the new prebendary to the new bishop, whose right is nowhere asserted. According, however, to the doctrine now contended for as to ecclesiastical patronage remaining in the office, by the intention of the donor, the new bishop would certainly have the right if the king's prerogative did not interfere, and yet in none of the books is he noticed as having any claim. *Rolle's Abr. Presentment à l'Eglise, (C.)* pl. 4. "Si un eglise a que l'evesque ad title a presenter come patron en respect del temporalies sil morust devant presentment le roy avera le presentment et nemy ses

(a) *Ambl. 98.*

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executors," citing 50 *Ed. 3*, 26, 9 *H. 6*, 16, b, 24 *E. 3*, 26, b. *Bro. Presentation à l'Eglise*, 10. "Ou voidance est dun benefice appartenant al evesque et il devy devant q. il fait collation, le roy ceo avera ratione temporalium episcopi, et nemy l'executors l'evesque, et ou appropriation del benefice est fait, et vicar endowe, le primer patron serra patron de ceo et nemy lordinarie, quod nota." (50 *Ed. 3*, 25.) It has been already said, and perhaps will be said again, that the words "nemy ses executors" are not to be found in the Year-books. Be it so. But they are in *Rolle*, and in *Brooke*, and in *Lord Coke*, and in *Fitzherbert*, and show distinctly that those great men thought the question to be between the bishop's executors and the Crown; and that they had no idea of any doctrine such as is now contended for, that in ecclesiastical patronage the turn is not disannexed, but shall go with the advowson to the successor. Again, in 2 *Roll. Abr.* 346, (F) pl. 4, "Si le parson doit presenter al vicarage, uncore si le vicarage devigne void durant le vacancy del parsonage, le patron del parsonage presentera." The right of the successor is never suggested.

*Thirdly, there is not any valid objection to the plaintiff's claim on the ground of the advowson having been always in ecclesiastical hands; [*128 for, first, as has been shown, the prebendary *might have been* a layman; secondly, the living of *Welby* is a rectory, and the advowson or patronage of all rectories must have been originally in lay hands; and if it be found now in the hands of an ecclesiastical corporation, aggregate or sole, it must have come into such hands by grant from the original patron. In *Co. Litt.* 119 b, it is said that "the advowson of a church is the right of presentation or collation to the church;" and upon the word "Advocatio," it is said, "so called because the right of presenting to the church was first gained by such as were founders, benefactors, or maintainers of the church, viz. ratione foundationis, where the ancestor was founder of the church; or ratione donationis, where he endowed the church; or ratione fundi, as where he gave the soil whereupon the church was built; and therefore they were called advocati. They were also called patroni, and thereupon the advowson is called jus patronatus." And by *Burn's Ecclesiastical Law*, tit. *Appropriations*, it appears that where a church was from the first in the hands of ecclesiastics, they (that is, the aggregate body) received the tithes, and sent curates to officiate, at first in circuits, then to some particular church, and afterwards these curates became vicars with vicarages endowed or perpetual curates; but the ecclesiastical body kept the tithes, or a portion of them, in their own possession; there is no instance of their creating a rectory, giving all the tithes to the officiating minister, and keeping only the advowson. If that be so, then ecclesiastical *bodies can only have rec- [*129 tories by grant from the founders. Now the founder could only grant what he had, viz. the lay fee in the advowson, and it would be liable to all the incidents of a lay fee. A layman could not reserve any other right than that of patronage, for he could not take the tithes to his own use. Vicarages, on the other hand, were created by ecclesiastical bodies, who had obtained grants of rectories. In *Lyndewood's Provinciale Constitutio Othoboni* (a), chap. *de Intrusis*, this distinction between rectories and vicarages is recognized. In the commentary on the word *collatio* he says, "Et nota quod nil de presentatione patroni laici in hac parte loquitur, innuendo presentationem vicariæ ad laicum patronum pertinere non posse, sed ad patronum seu prælatum ecclesiasticum duntaxat." And after assigning a reason for this, the commentary proceeds: "Secus tamen super jure patronatus rectoriarum de lege regni; quia idem jus uniformiter pertinet ad patronos et laicos." Thirdly, supposing this church to have been always in ecclesiastical hands, still the right of presenting must be governed by the temporal and not the ecclesiastical law. In *Doctor and Student*, dial. 2, ch. 26, p. 191, it is said, "It is holden in the laws of the realm that the right of presentment to a church is a temporal inheritance, and shall descend

by course of inheritance from heir to heir, as lands and tenements shall, and shall be taken to be assets, as lands and tenements be." And in c. 39, p. 226, "The goods of spiritual men be temporal, in what manner soever they come to them, and must be ordered after the temporal law, as the goods of temporal *130] men must be." Coupling this with the former *passage, it shows that a void turn being a chattel must go to the executor of the patron. In the report of the judgment in the present case, delivered by *Best, C. J.*, in the court below (a), several authorities are quoted to establish that the ecclesiastical law, and not the temporal, must prevail in this case. According to that report the Lord Chief Justice is made to say, "Lord *Coke*, in 1 *Inst.* 344, says, the ecclesiastical law is to prevail where it is not against the common law or any custom." The passage in the original is as follows: "Ley, spiritual, &c. That is, the ecclesiastical laws allowed by the laws of this realm, viz. which are not against the common law (whereof the king's prerogative is a principal part) nor against the statutes and customs of the realm; and regularly, according to such ecclesiastical laws, the ordinary and other ecclesiastical judges do proceed in causes within their consueance:" in which passage there is nothing to warrant the conclusion said to have been drawn from it. Again, in p. 273 of that report, the law is thus stated: "Ecclesiastical presentations, having no connection with lay property, but existing only as rights of the church, are governed only by the laws of the church. The ecclesiastical law is for the decision of such questions, and must be taken notice of by the judges of the courts of common law in deciding them;" and for this, *Edes v. The Bishop of Oxford*, *Vaughan's Rep.* 21 and 24, is cited; but no such passage is there to be found. But, fourthly, even the ecclesiastical law would not give the right of presentation in this case to the successor. In the report before alluded to, *Lyndewood de Consuetudine*, p. 19, is thus *131] *quoted in support of that position. "Si beneficiatus decedat intestatus, et non disponat de fructibus de jure communi ecclesia in eis succedat. De consuetudine tamen posset esse quod per episcopum vel alium ad quem pertineret bona testatorum tueri, deberent distribui ad decedentis debita solvenda." Referring to *Lyndewood*, it appears that the passage is essentially different; it stands thus:—"Sed quero quid si rector vel hujusmodi beneficiatus decedat intestatus et non disponat de fructibus? Dic, quod de jure communi ecclesia in eis succedet. De consuetudine tamen," &c. (b) The author is there discussing a constitution of archbishop *Edmund*, forbidding rectors to dispose of the fruits before *Lady-day*, and the whole of the argument is to show that a rector may at any time by will dispose of all fruits received, and after *Lady-day* of all fruits to be received during the year, because he has done the duty during the winter when there were no fruits; and he says the object of the constitution was, to pay debts and legacies; and after arguing the question, whether in the case of an intestate not indebted, the custom shall prevail, he sums up thus:—"Ex prædictis patet quod licet nulla sint decedentis legata vel debita, et sic cesset causa consuetudinis, non tamen cessabit ejus effectus, sed quod fructus ipsi aliunde disponantur pro salute animæ suæ per eos qui alia bona sua administrabunt, et non pertinebunt ad ecclesiam vel ad successorem, nec ecclesia nec successor poterit ipsos fructus (stante tali consuetudine) vendicare, nisi forsan consideratione alicujus debiti." In the report in 3 *Bing.* it is assumed, that *Lyndewood* says the fruits "pertinent ad successorem."

*132] *Lastly, the supposed intention of the founder cannot affect this question. It appears to have been assumed in the court below, that the advowson of the rectory of *Welby* belonged to the bishop or church of *Salisbury*. and was by the bishop or church given to the stall of *South Grantham*; and that the gift was so restricted that no one should ever present to the rectory who was not at the time prebendary of *South Grantham*. It is easy to arrive

at conclusions by assuming premises, but for this assumption there is not the slightest ground appearing upon the record. One of the learned Judges in the court below is supposed to have relied upon certain facts, as to the grant of the living, not appearing upon the record; but his judgment could not have been correctly understood, for there is no rule of law more inflexible than that, on demurrer and writs of error, the facts are to be taken from the record and the record alone. If there were any facts affecting the case they should have been pleaded, in order that they might have been submitted to a jury, or to the judgment of the Court. Secondly, ecclesiastical history determines nothing as to this question. *Dugdale's Monasticon*, which is said to have been relied on in the court below, is evidence only, and if it contained anything to the purpose it should have been pleaded; and that book was rejected, even when produced as evidence, to prove a matter as to which original records might have been obtained, *Staines v. Burgesses of Droitwich* (a). Thirdly, advowsons appendant are constantly disannexed, and become in gross, and then a vacant turn confessedly goes to the executor when the manor goes to the heir; but in that case the intention of the donor must have been, that the turn should go with the manor; *and, fourthly, if the donor did restrict the right, so that in case [*133 of a prebendary dying during vacancy his executor should not present, but the successor, such restriction would be void, being repugnant to the grant. A new mode of descent cannot be created otherwise than by the intervention of trustees, *Litt. s. 31, Co. Litt. 25 a, 27, 223 b, n.* (132.) Sir *Anthony Mildmay's* case (b), 3d resolution: *Corbet's* case (c), *Co. Litt. 145 b.* Corporations aggregate, whether lay or ecclesiastical, never die; and therefore no argument is deducible from cases where such corporations are patrons. But a prebendary is a corporation sole, and except in the case of the king, a corporation sole cannot take a chattel by succession, *Co. Litt. 9 a, 90 a.* In the same book, 46 b, it is laid down, "If a lease for years be made to a bishop and his successors, yet his executors or administrators shall have it in auter droit; for, regularly, no chattel can go in succession in a case of a sole corporation, no more than if a lease be made to a man and his heirs, it can go to his heirs." It is plain, therefore, that the successor in a sole corporation is as the heir of a natural person, *Fulwood's* case (d), *Arundel's* case (e), *Vin. Abr. Corporation* (L).

In the court below several minor objections to the plaintiff's right were taken, which it may be proper briefly to notice. It was said, first, that the declaration avers that the right belongs to the prebendary in right of his prebend. It does so as to the advowson, but not as to the next turn. Secondly, that there is no personal representative of a prebendary, as prebendary. That is true, but the turn was in him individually. Thirdly, that the *prebendary's rights [*134 were as a member of the church of *Salisbury*. This would be true if the advowson had belonged to the corporation aggregate, but the contrary is averred on the record, and not denied. Fourthly, that the cases in the books of entries were just after the Reformation, and remnants of popery. But the Reformation did not alter the law of *England*; and it is manifest, from the restraining statutes of *Elizabeth*, that up to that period churchmen might alien. Fifthly, that it might as well be contended, that if one of the chapter, whose turn it was to present, died, his executor should present. But that case is wholly different, for there the presentation is by the whole body, although the nomination, by arrangement amongst themselves, is in the particular member. So, also, the cases put in 3 *Bing.* 266, apply only to legal rights vested in the corporate body, but exercised by particular members. The argument as to supposed inconvenience cannot have any weight; for in this, as in all other cases, the ordinary will take care that an improper person shall not, if presented, be instituted; and even if there were any inconvenience, in allowing the void turn to be disposed of by a layman, that could not alter the rule of law.

(a) 1 *Salk.* 281.(b) 6 *Co.* 41 a.(c) 1 *Co.* 84 a.(d) 4 *Co.* 65.(e) *Hob.* 64.

D'Oyley, Serjt., contra. The right of patronage in this case went to the successor, and not to the personal representative of the deceased prebendary. The question applies exclusively to ecclesiastical matters, and there is not any decided case by which it can be governed; it must, therefore, depend upon principle only. Ecclesiastical rights are anomalies in the law of this country, and the rules applicable to them are exceptions from those established in other

*135] cases. Thus an ecclesiastical *interest is for life only, and yet the party interested may have some writs and remedies, applying only to estates of inheritance; thus he may have a writ of waste. And he has some peculiar privileges; he may prescribe in non decimando, which a layman cannot do. An ecclesiastic, on the other hand, is under some disabilities not attaching to laymen. He cannot vary in his presentation, although a layman may. "Fit etiam devolutio ad episcopum quando per patronum clericum presentatur indignus; non tamen fit devolutio quando scienter presentatur indignus per laicum." *Lyndewood Prov.* 215, *de Jure Patronatus*, verb. *Devolvatur*. As these differences exist between the situation of a lay and ecclesiastical patron, it is not to be assumed that the void turn in question goes to the personal representative of the deceased prebendary, although such turn would go to the executor of a lay patron. It is difficult to ascertain upon what foundation this rule of law stands. In general, the rights of executors and administrators extend only to personal property. A right of presentation cannot come strictly within the description of personal property as assets. In *Co. Litt.* 388 a, it is said, "If a bishop hath a ward fallen and dieth, the king shall not have the ward, nor the successor, but the executor, and the ward shall be assets in his hands, &c. But if a church become void in the life of a bishop, and so remain until after his decease, the king shall present thereunto, and not the executor or administrator; for nothing can be taken for a presentment, and therefore it is no assets." And the same appears by the case of *London v. The Chapter of the Collegiate*

*136] *Church of Southwell* (a). *And guardian in soccage shall not present, because nothing can be made of the right (b). Again, although in some places a void turn is called a chattel, yet it is not always so treated. In *Co. Litt.* 90 a, it is said, "And yet, if a bishop have an advowson and the church become void, and the bishop die, neither the successor nor the executors shall present, but the king; because it is but a chose in action." And in note 85 on that passage, Mr. *Hargrave* states, that "chooses in action are not in their nature incapable of transmission to executors; but that in the case of a chose in action so peculiar as a right of presentation, the law favours the king more than the bishop's executors." He then observes, "But then it may be asked, why the king should not have the preference, in case of the bishop's being entitled to a wardship by knight's service in right of his see, and dying before reducing it into possession by seizure? The answer may be, that the law distinguishes between an interest both of profit and trust, as wardship by knight's service is, and one merely of trust, such as a presentation." He afterwards adds, "However, as a like reason might be urged against executors in favour of an heir, it is most safe to rely on the right of the king, as settled by authority and long practice." All Mr. *Hargrave's* reasoning is against the right of the executor. Why, then, should not his right be considered as resting upon authority and long practice, rather than upon any sound intelligible principle? That authority and long practice do not apply to the present case, for there is a wide difference, as has been already shown, between ecclesiastical and lay patrons.

*137] *Besides, it is now generally agreed, that private and lay patronage arose in this manner. When the lord of an extensive domain built or endowed a church, he was allowed to name the incumbent; and then the general right of patronage descended with the estate to his heir, (although such a right might, by a separate grant, be disannexed from the estate, and then the right of

patronage became an advowson in gross.) But a vacancy in the church having happened during the life of a patron, who died without filling it up, the question arose whether the right for that turn devolved upon the heir, or the executor. If it were *res integra*, there would be strong grounds to contend for the right of the heir, the void turn not being a subject of profit which can benefit the personal estate of the testator, and the heir having a greater interest than the executor in appointing a fit person to the church. The contrary, however, is stated to be the law in *Füz. N. B.* 33, P. Q. But it is observable, that in the note (g) to that passage, said to have been by Sir *M. Hale*, four references to the Year-books are given, 9 *H.* 6, 33, 4 *Ed.* 3, 2, 39 *Ed.* 3, 21, 44 *Ed.* 3; and the first three are said to be against, and the fourth alone in favour of the position in the text. So also in *Bro. Abr., Presentation à l'Eglise*, pl. 34, it is said, that where a man is seised in fee of an advowson, and the church becomes void, and he dies, his executor shall present, and not the heir; and 21 *H.* 7, 21, is referred to; but it there appears as an obiter dictum, and not as the point in issue. In modern times no doubt has ever been raised as to this matter; but in these old cases, upon which the rule of law depends, no reason for that rule is given. Sometimes the void turn is compared to a fruit fallen, not very accurately, for no profit or pecuniary advantage can be derived from it; sometimes it is compared to the next avoidance, which is said to be a chattel; sometimes it has been said to be a thing severed from the advowson. The rule, however, has certainly prevailed in the case of presentative livings in the hands of lay patrons, but it does not appear to have extended to any but those. Even in the case of a donative, which differs but little from a presentative, the law is different. The same rule of law as to granting a void turn applies to both, and the void turn of a donative is at least as much like a fruit fallen as that of a presentative, and yet there it was held that the right of presentation went to the heir, and not to the executor, *Repington v. Tamworth School* (a). It has been suggested that the judgment probably proceeded upon some prescription which is said to have been laid in the declaration; but no notice of that prescription is taken in the judgment, nor could the judgment have proceeded upon it, for the prescription was introduced, if at all, by the plaintiff, the executor, and found for him, but the judgment was against him. Nor can that decision be accounted for by the circumstance of there being no lapse in the case of a donative, for the patron of a presentative living may present after the expiration of the six months, if the church has not been filled by the ordinary. The more probable ground of the decision is, that the Court, not being fettered by any precise authority as to a donative, decided upon principle. So in this case there is not any decided case by which the Court are bound to give judgment for the plaintiff, and the right of patronage of the living in question being vested in the prebendary in his ecclesiastical character, is a sufficient reason for holding that the trust ought to be executed by the successor. In the case of a private patron, it may be indifferent to the public whether the heir or executor presents, but where the right is given to a church dignitary, the public have the pledge of his character and station, that the trust shall be well executed, and it is important that the right of presentation should not be disannexed from the person of the ecclesiastical patron. Most of the cases cited on the other side respecting the right of the executor have proceeded upon the notion that the void turn is a chattel, a chose in action, a thing in action and effect, a fruit fallen, &c.; and the same reason has been given for the rule preventing the grant of a void turn; but in the case of the *Bishop of Lincoln v. Wolfstan* (b), Lord *Mansfield* and *Wilmut J.* say, that the true reason why a grant of a fallen presentation or of an advowson after avoidance is not good, quoad the fallen vacancy, is the public utility, and the better to guard against simony; not for the fictitious reason of its then being become a chose in action. The same ground

of public utility is sufficient to warrant a decision in this case in favour of the defendant. The rule of law, following from the principle there laid down, is, that where the right is annexed to the person, the law will not take it from him. Thus, in *Co. Litt.* 120 a, where it is said, that "if a feme covert be seised of an advowson and the church becometh void, and the wife dieth, the husband shall present:" the observation applies, that at the time of the vacancy the right of presentation became annexed to the husband, and the subsequent death of the wife could not disannex it. The same principle is applicable to the case put in *Mallory, Qua. Imp.* 70, of a manor with an advowson appendant, being in the king's hands: the church becomes vacant, the king grants the manor with the advowson; the king shall present, and not the patentee. And this rule satisfies the greater part of the cases cited for the plaintiff. Where the king has the right of presentation to a church becoming vacant in the time of a bishop, the patron, who dies during vacancy, it is said that the king has this right by prerogative as guardian of the temporalities, but he takes it as belonging to the see, and not as part of the goods of the deceased bishop; in that case, therefore, the void turn cannot be considered as a chattel vested in the person of the bishop without relation to his office. Neither can it, in this case, be considered as having vested in the person of the deceased prebendary, without relation to the prebend. And if that be so, it must go with the prebend to the person of the successor. There is not any analogous case in which the right to present to a vacant office goes to the executor. The incumbent on a living has a right to appoint the parish clerk, but if that office (in which the clerk has a freehold interest) is vacant, and the incumbent dies during the vacancy, it never was contended that his executor should appoint. So in *Skrogges v. Coleshill (a)*, where a question arose as to the office of exigenter of London. That office became vacant when Sir *R. Brooke* was Chief Justice of the Common Pleas; during the vacancy of both the offices, Queen *Mary* granted the former to *Coleshill*, and on the same day Sir *A. Browne* was appointed Chief Justice, and he refused *Coleshill*, and appointed *Skrogges* to the office of exigenter. The dispute was referred to the Judges of the Courts of King's Bench and Exchequer, and the Attorney and Solicitor-General, and they decided that the appointment belonged to the Chief Justice for the time being, as an inseparable incident belonging to his person. Suppose the Lord Chancellor (a corporation sole) were to die, leaving several livings vacant, the Crown would not present nor his executor. The argument on the other side is, that the void turn is severed from the advowson, and is therefore a chattel, and therefore cannot go with the inheritance. How then does it go with the inheritance in the case of a donative? Again, it has been already shown, that where a church is vacant, a bishop being patron in respect of the temporalities, and he dies before presentment, the king shall have the presentation and not the bishop's executor, *Mall. Qu. Imp.* 65. And if the king die, his successor shall have the temporalities and not his executor, and yet it is but a chattel, *Bro. Abr. Prerog.* pl. 85. So also where the king is entitled to a presentation illâ vice, and dies, his heir shall have it who is king, and not his executor, *Bro. Abr. Pres. à l'Eglise*, 11, 7 H. 4, 25. And if the king has an advowson in fee which voids, and during the avoidance the king grants the advowson in fee, the king shall not present to this avoidance (b). It is true, that Lord *Hale* in his note doubts whether this would be so unless the grant contained words applicable to the avoidance; but still the position that the void turn is severed from the advowson cannot be correct; for, in *Fitz. N. B.* 33, 8, it is said, that "If a man have a manor unto which an advowson is appendant in fee, and the church void in the father's time, and the father die, and his heir in ward to the king, the king shall have the presentment." In that case the advowson goes to the heir, but the heir being an infant, the king has the care of the church and

(a) *Dyer*, 175 a.(b) *Fitz. N. B.* 33. (N.)

the void turn; the advowson and the void turn therefore go together. Supposing the void turn to be properly called a chattel, that by no means proves that it may not go with the advowson in the case of a common person, for many chattels go with the inheritance; as charters, muniments, deer in a park, or fish in a pond; and in like manner the furniture of a bishop's chapel goes to his successor, and not to his executor, *Bishop of Carlisle's case* (a). It may not be unimportant in this case to consider the origin of church patronage. Originally, the patron who founded a church, had the sole right of judging of the fitness of the person whom he nominated to fill it, and neither presentation, institution, nor induction were necessary, *Selden on Tithes*, c. 12, s. 2. All livings were, therefore, originally in the nature of donatives, nor was this altered until after the Council of *Lateran*, in the 25 H. 2, when, according to *Bracton*, b. 4, s. 3, a great change took place. Until then the doctrine of lapse was unknown, and donatives still remain exempted from it, which confirms the idea that all livings were originally of the same nature. Nor is it unimportant that the pleadings in this case describe the prebend as belonging to the church of *Salisbury*, and that the advowson is claimed in right of the stall. For in *Gibson's Codex*, tit. 30, c. 13, *Of Appropriation*, *s. 2, it is said, that [*143 "the person appropriating was of necessity a spiritual person, so as no other might do it." In s. 3, that appropriations could be made to no other than to spiritual persons; and in s. 4, that "appropriations might be made to no spiritual persons, but as spiritual bodies politic or corporate." And this agrees with *Grendon v. The Bishop of Lincoln* (b). The argument, therefore, that a prebendary might have been a layman, is of no avail; it rather shows that the advowson must have been appropriated to the dean and chapter of *Salisbury*, and not to the stall. [*Bayley, J.* The pleadings do not admit of that argument.] Even if it could be annexed to the stall, the prebendary was restrained by the 13 *Eliz.* c. 10 from making any grant of it which could bind after his life; he could not have devised it, and the administrator can only claim what might have been devised, so that even if at common law the claim of the present plaintiff might have been good, it cannot prevail since the restraining statutes were passed. The case of an archbishop's options does not apply; in the first place, they were introduced by *Cranmer*; the legality of them has never been solemnly determined; in the case in *Amb.* no person was interested in disputing it; besides, the bishop who made the grant might be estopped, and it has never been pretended that the grant would bind after the death of the grantor. Even if it were held that the prebendary might, in his lifetime, make a binding grant of the next turn, it would not affect the defendant, inasmuch as no grant was here made; if he could not make such a grant, that is conclusive in the defendant's favour. *With respect to the supposed inaccuracies [*144 in the report of the judgment delivered in this case in the court below, they are quite unimportant. The passages are certainly not correctly set out, but the substance of them is correct, and the only error was in printing them as quotations; and in *Lyndewood*, as to the disposition of fruits in cases of intestacy of incumbents, and in *Doctor and Student*, as to the disposition of the property of clerks; such property as would be assets is evidently intended, and not spiritual patronage, of which no profit could be made; for in the first place the payment of debts is contemplated, and then the purchase of masses for the soul of the deceased.

Patteson in reply. No attempt has been made on the other side to overturn any of the points submitted on behalf of the plaintiff. The argument has been principally directed to showing that a void turn is not, properly speaking, a chattel severed from the advowson; but that is established by an infinite number of authorities, and the cases where by prerogative or custom the person who takes the advowson has also the right of presentation to the void turn, are mere

(a) 21 Ed. 3, 48, cited in *Corwen's case*, 12 Co. 106.(b) *Pleas.* 493.

exceptions out of the general rule of law. The void turn does not go as part of the advowson, but is given by prerogative. If the turn be a chattel, it must continue so whoever is patron. Nor is the case of a void turn the only one in which an assignment cannot be made after the event upon which the right accrues has happened; rent (to which this fruit of the advowson has been likened) cannot, after it is due, be released by one joint-tenant to the other, *145] *Brookesby v. Wickham (a)*. *The argument as to all livings being formerly donatives is not founded upon any authority; *Selden* speaks of special donative chapels as exceptions, and *Bracton* says, "Ante concilium Lateranense nullum tempus currebat contra presentantes." It would be singular if that passage could be taken to prove that no presentations had before then been made. The case of the parish clerk has no application to this, for it cannot be shown what interest the incumbent has in the right of presentation. Neither is *Skrogges v. Coleshill* an authority in point, for the Chief Justice was held to have the right of appointing to the office of exigenter by prescription and usage. The defendant's case was as little aided by the supposed instances of chattels going with the inheritance, and not to the personal representative of the deceased. They were all instances of heir-looms; and in *Corren's* case that of the furniture in the bishop's chapel is expressly put on that ground. Lastly, the restraining statute 13 *Eliz. c. 10* was relied on; but if the argument be correct that the right of presentation became severed from the advowson as soon as the vacancy happened, that statute cannot affect the question. The advowson belonged to the prebend, and therefore could not be alienated, but the void turn being severed from it, and vested in the person of the prebendary, would go to his personal representative.

Cur. adv. vult.

The learned Judges not being agreed in opinion, now delivered judgment seriatim.

LITLEDAL, J. The question raised upon the defendants' plea, to which *146] there is a demurrer, is, if there be a *prebendary of a prebend to which the advowson of a church is appendant, and the church becomes void in the lifetime of the prebendary, and he dies without presenting to the church, whether the successor of the prebendary is entitled to present? But that point need not be decided, because, though if the affirmative of that be true, it would be an answer to the plaintiff's declaration, yet supposing it not to be true, the defendants have a right to show, that, even though the right be not in the successor, yet it is not in the plaintiff. And, therefore, the point comes more properly to be considered on the plaintiff's declaration, and upon that the question is, "if there be a prebendary of a prebend to which an advowson is appendant, and the church becomes void in the lifetime of the prebendary, and he dies without presenting to the church, whether the executor or administrator (as the case may be) of the deceased prebendary be entitled to present?" For if not, it is quite immaterial to the plaintiff's claim whether the right be in the successor, or in the king, or in the bishop of the diocese in which the prebend is, or in the bishop of the diocese in which the rectory is. I may, however, say that though the question is upon the plaintiff's right, yet the dispute is in effect between the plaintiff and the successor to the prebend; because there does not appear to be any ground for the claim of the crown, except that if no one can establish a legal right, the presentation would belong to the king as the head of the church. There seems no ground for the claim either of the bishop of *Lincoln* or *Salisbury* as there is no lapse, no such right is set up, and it is not necessary to enter into any discussion to show that such right could not be supported. It is admitted on both sides that this is the *147] *first case in which the question comes to be decided in a court of justice; and it must be considered in what way presentative benefices have

been treated in the decisions which have taken place in cases which have any resemblance to the present, and in the opinions of text writers of authority. There is no doubt that in case of a benefice presentable for institution, if a person in his own right, as contradistinguished from his corporate rights, be seised in fee or in tail of an advowson appendant to a manor or other estate, or of an advowson in gross, and the church becomes void in the lifetime of the patron, and the patron dies, the church still being void, the executor shall present, and not the heir, *Brooke's Abr.* tit. *Presentacion al Eglise*, 34; *Fitzherbert, Presentment à l'Eglises*, 7; *Fitzherbert's N. B.* 33, 34; *Co. Litt.* 388 a; the Queen, *Fane*, and the Archbishop of *Canterbury's case* (a); *Comyn's Digest, Eglise*, H 2, where he mentions it as of his own authority; admitted in the case of *Repington v. The Governors of Tamworth School* (b); recognized in the case of *Holl v. Bishop of Winchester* (c), where the case was, that if a man seised in fee of an advowson be parson of the church, and dies, his heir, and not his executor, shall present; for though the advowson doth not descend to the heir till after the death of the ancestor, and by his death the church is become void, so that the avoidance may be said to be severed from the advowson before it descend to the heir, and vest in the executor, yet both the avoidance and the descent to the heir happening at the same instant, the title of the heir shall be preferred as the elder. But that recognizes the general proposition,* though in the particular case the title of the heir is to be preferred. How the presentation came to belong to the executor, and whether it would not have been as well if it had been held to belong to the heir, it is now too late to enquire; the law has been so long settled, and has been so repeatedly admitted, that it would be most dangerous to think of disturbing it. The reason assigned in *Fitz. N. B.* 33, for its going to the executor is that it is a chattel vested and severed from the manor, and in 4 *Leon.* 109, it is called a chattel. In *Wentworth's Office of Executors*, 54, it is said that the next presentation before it becomes void is a chattel real, and after, it is a personal chattel. The language of six Judges in *Stephens v. Wall* (d), (where the question was, whether the present avoidance of a church could be granted by a subject) is, that the grant of the present avoidance was void "because it was a mere personal thing annexed to the person of him who was patron in expectancy at the time of the vacancy; and also a thing in right, power, and authority; and also a chose in action, and in effect, the fruit and execution of the advowson, and not any advowson, and yet executors shall have it by privity of law." The principal case was, whether the present avoidance of a church could be granted by a subject, and six of the Judges to whom the above expressions are attributed, held that it could not; but though the other three Judges differed, I do not understand that to be as to what is there said by six of the Judges, but only as to the point itself in discussion. However, the law has since been recognized according to the decision in *Dyer* as to the principal case, *Co. Litt.* 120 a, 3 *Burr.* 1515. The case itself is recognized in **Brokesby v. Wickham and the Bishop of London* (e). There are other cases also besides these of executors of tenants in fee or in tail where the void turn is treated as a chattel. If a woman be seised of an advowson and marries, and she and her husband have issue, though the right of patronage descends to his heir, and though the wife never presented, and died before the church became vacant, the right of presenting is vested in the husband during his life, as tenant by the curtesy, though his wife had but a seisin in law, because he could by no industry obtain any other seisin. And if the church in this case becomes void during the life of the husband, and he dies during the vacancy, the heir shall not present, but the husband's executor; and if, the church being void, the wife dies not having had issue, so that the husband is not tenant by the curtesy, yet he

(a) 4 *Leon.* 109.(d) *Dyer*, 282.(b) 2 *Wils.* 150.(c) 3 *Lev.* 47.(e) 1 *Leon.* 17.

shall present to the void turn as being a chattel, *Co. Litt.* 29 a, 120 a, 388 a. *Bro. Present. al Eglise*, 18—22. *Watson, Incumbent*, c. 9. And in *Fitz. N. B.* 34, "If a vicarage happen void, and before the parson present he is made a bishop, &c., yet he shall present to this turn, because it is a chattel vested in him." This last position of *Fitzherbert* shows that in his opinion it was as much a chattel in case of an ecclesiastic as in any other case.

The plaintiff therefore contends, that as this is a chattel vested in her, in her quality of administratrix, the right to present is in her. But though the law be not doubted by the defendant, to the extent of the cases to which it has been carried, yet he says that it is not founded on principle, and should not be carried
 *150] beyond the cases already decided. And he says the *presentation ought not to go to the executor, because it is not assets; and for this may be cited *Co. Litt.* 388 a, "Nothing can be taken for a presentation, and therefore it is not assets;" *Co. Litt.* 120 a, "It is not merely a chose in action;" *Fitz. N. B.* 33, "And if there be guardian in socage of a manor to which an advowson is appendant, and the church becomes void, the heir shall present and not the guardian, because he cannot account for the same." So *Co. Litt.* 17 b, guardian in socage shall not present to an advowson, because he can take nothing for it, and cannot account for it, and he shall not meddle with anything he cannot account for; *S. P.* in *Co. Litt.* 69 a; and there the reason given that he can make no benefit of it is, that the law doth abhor simony; and the same reason is given in *The Bishop of Lincoln v. Wolforstan* (a). But as to this point the cases of guardians do not apply, because their duty is to account for what they make, and, of course, they cannot meddle with what they cannot turn into profit. But it is otherwise in the case of an executor. An advowson is assets in the hands of the heir, and the right of the next presentation to a church which is full, is assets in the hands of an executor; both these are allowed by the law to be sold, but a void presentation is not. The meaning of assets is, that it may be converted into money, which a void presentation cannot be; but the reason of that is, not that it is a chose in action, but because the law against simony prevents its being sold, which otherwise it might be. In 3 *Burr.* 1515, Lord *Mansfield* and Mr. Justice *Wilnot* say, that the true reason why a grant of a fallen presentation is not good, is the public utility, and the better to guard
 *151] against simony; not for the fictitious *reason of its having then become a chose in action. In the case of *London v. The Collegiate Church of Southwells* (b) it was said that a lease by a prebendary, under the words "commodities, emoluments, profits, and advantages to the prebend belonging," the advowson of a vicarage would not pass, because these words imply things gainful, which is contrary to the nature of an advowson. But the report goes on, "yet an advowson may be yielded in value upon a voucher, and may be assets in the hands of an executor." But the case was decided on the particular meaning of the words used, denoting something gainful. No question was made, but that if proper words had been used the advowson would have passed. And there can be no doubt whatever, that the next presentation, if the church be full, is of value, and would be saleable by law, and would be assets in the hands of an executor; and the only distinction between a presentation where the church is full or void, is, that in one case it is not simoniacal to sell it, and in the other it is. But though it be not saleable as the subject of profit it is not the less a chattel, or the less belongs to the executor. An outstanding term to attend the inheritance, or a term in trust for other purposes, cannot be made the subject of sale, or be made available assets in the hands of the termor, but they go to the executor. It is also contended by the defendant, that the rule does not hold universally, even in the case of lay patronage; for that in the case of donatives the right of presentation vests in the heir and not in the executor, as was decided, after two arguments, in the case of *Repington v. The Governor of Tamworth*

(a) 3 *Burr.* 1514.(b) *Hob.* 303.

School (a). Though the *case must have been very much discussed, the grounds of the decision are not given at length; but it was said, "that [*152 before the council of *Lateran* all benefices were like what donatives are now; that no lapse could have occurred in ancient times, and that bishops had no right of institution before the reign of *Richard 2.*" "Ante concilium Lateranense," says *Bracton*, "nullum currebat tempus contra præsentes," *Selden's History of Tithes*, c. 12, fo. 380. When *Richard* the Second is mentioned in *Wilson* it must be a mistake in the reporter; it should be *Richard* the First.

It will require some detail of the history of the church in earlier times, and of lay patronage and lay investitures, and the law of lapse, to show how what is stated in *Wilson* could be any ground for the presentation being adjudged to the heir; but, when that is done, I think it will appear that the decision is quite proper, and founded upon the original state of church patronage and the law of lapse, and that the short minutes of the reporter, when expanded into a fuller explanation, were really what was the substance of the decision.

It will be seen, however, by what I am about to state, that though the law of lapse took place nearly about the same time as the right of institution by the bishops, yet that they were measures wholly unconnected, though both of them are applicable to the right of the heir in the case of donatives.

In the early ages of Christianity, the bishops had probably the appointment and regulation of the inferior clergy, who were to perform divine service, and to preach in such places as the bishop thought best calculated to promote the cause of religion, and they were to be paid out of the funds which went to the common treasury of the diocese, and over which the bishop had the disposal *for himself, his clergy, the poor, and the repairing of churches. But [*153 in the early centuries of Christianity there were no compulsory payments; no tithes were paid, and the whole of the funds depended upon voluntary donations and oblations made from time to time, or the produce of lands which had been given to the church. The countries of Christendom were not in the earlier times divided into parishes as they have since been, and the ministers of the church had neither permanent places in which they were to discharge their ecclesiastical duties, nor had they any permanent funds allotted to their maintenance and support. What are now called ecclesiastical livings were at that time unknown, and the early ages of Christianity will afford no guide in considering the rights of parties to church presentation or appointment. By degrees the funds of the church became increased, territorial possessions were from time to time given to religious houses, or otherwise for the purposes of religion, and about 400 years from the birth of our Saviour tithes began to be paid in some places; and in the seventh century some churches were endowed with the perpetual right to tithes; and some provincial ordinances, but by no means general, were made for their payment. After about eight centuries, the payment of them became more frequent, and consecrations of them made from time to time to churches and religious houses, as is stated in *Selden on Tithes*; and in these centuries there were some provincial constitutions of the clergy directing the payment of tithes; these, however, were probably not much more attended to than the inclination of persons led them to do, but that inclination no doubt increased among all classes. In the year 855 there is a charter of *Elthelwolf*, in which, *with the consent of his bishops and his [*154 princes, he directs some tithes to be given to the church; but what was the exact language of this charter and the extent of the ordinance, the older historians are by no means agreed. Different kings after him, before the conquest, made different orders for the payment of tithes; but it is by no means clear that the payment of them was even then altogether general or compulsory. Soon after the conquest the payment of them seems to have become general,

(a) 2 *Wils.* 150. It appears by the case of *Collins v. Sawrey*, 4 *Br. P. C.* 692, that *Revington* was both heir and executor of the deceased patron.

though not always to the churches of the parishes where they arose. That council of *Lateran* which was held in 1215, endeavours to alter some usages which had prevailed to the contrary, and directs all payments in future to be made to the parish church; but it seems doubtful whether this obligation to pay to the parish church was fully established till the general council of *Lyons* in the year 1274. Tithes, however, were not the only possessions of the church. Lands were from time to time given for religious purposes. Some were given to religious houses, that they might dispose of the profits. The clergy are said at one time to have had their general residence in the same place with the bishops, except when they were on their missions; but by degrees, as devotion increased, the clergy came to reside more permanently in particular places, and some persons gave their tithes, and others appropriated their land for their support, and others built churches; and persons would become more willing to endow the church founded chiefly for the use of themselves and their families and tenants, if they could have the liberty of giving the incumbent there resident a special and several maintenance, instead of the former community of the *155] clergy's revenue remaining. There is no doubt *but the bishops would give their sanction to these foundations, and the profits of the several churches would be restrained to the incumbents. It does not very well appear when these lay foundations began in *England*. It appears from *Selden's History of Tithes*, c. 9, s. 4, that the first instance that occurs is about the year 700, and he says, that about the year 800 many churches, founded by laymen, are said to have been appropriated to the Abbey of *Crowland*, and by this time probably lay foundations had become very common, and parochial limits assigned to the incumbents; though from other parts of *Selden's* work it seems that the payment of tithes did not always correspond to the parochial divisions till some centuries afterwards.

When gifts were first made to the church, and churches founded by laymen, it does not always appear to have been done through pure devotion. For in some countries of Christendom, at least, the patron sometimes arbitrarily divided part with the incumbent, and what the incumbent did not receive, the patron took to his own use, and by different councils of the church lay patrons were forbidden from making such a disposition. The lay patrons, however, in their new created churches, claimed a right of collation or investiture, whereby the incumbent might receive full possession without the aid of the bishop or other churchman; and notwithstanding some imperials were made against this course of proceeding, the lay patrons could not be prevented from claiming the patronage, and they took upon themselves not only the advocation or advowson, that is, the defence or patronage of the incumbent's title, but also the collation by investiture, without presentation, at any vacancy. And the right of *advowson whereto *156] the right of investiture was in these times annexed, the bishop in some places confirmed to the patron by putting a robe or some other thing upon him at the dedication. And from this right of collation and patronage reserved by lay patrons, the practice came to be, that parish churches, and all the temporalities annexed to them, as the glebe and tithe, were at every vacancy conferred by the patron on the new incumbent by some ceremony of investiture, with these words, "accipe ecclesiam," or the like.

Upon these presentations the bishop did not institute as has been done since. And the incumbent as really, fully, and immediately received the body of his church, and his glebe, and such tithes as were joined with it in point of interest, from the patron's hands, as a lessee for life receives his lands by livery of the lessor.

These investitures by lay patrons were very objectionable to the church, and in a general council at *Constantinople* in 870, some attempts were made to prevent them; and in the council of *Rome*, in 1078, further regulations were endeavoured to be made against them: there is a canon against them, and in the council of *Lateran*, in 1119, many decrees were made to the same effect:

and soon after a general council, which was held in 1188, they became less frequent, and institution now and then followed upon presentation. And as the canons acquired force, and the papal power increased, it appears to have been out of use about the year 1200, but till then it was not left off.

So, also, *Selden* in his *History of Tithes*, c. 12, s. 5, says, "But after such time as the decretals and the increasing authority of the canons, about the year 1200, had settled the universal course here of filling churches *by presentation to the bishop, or as it seems it sometimes was to the archdeacon, or to the vicar of the bishop, as guardian of the spiritualities, that use of investiture of churches and tithes severally or together, practised by laymen, was left off, and a division of ecclesiastical right from thence hath continued in practice. Neither did the king afterwards, much less common persons, fill their common parochial churches without such presentments to bishops,—parochial churches, for of special donative chapels we here speak not; neither were appropriations of churches and tithes afterwards allowed that had not confirmation from the ordinary, immediate or supreme."

Up to this time, therefore, benefices were donative. The patrons had the whole of the advowsons in their own hands; they invested the incumbent with the full possession of the church, either severally or together, and the incumbents were in the nature of lessees for life under the patron. There was then no law of lapse, and the investiture of the incumbent might take place wherever it suited the patron, though the patron, by ecclesiastical censures, might be compelled to fill the church. I do not find any statement that in these times the patrons took the profits of the benefices to their own use; but there can be no doubt that it was so, because, in the case of donatives, even now when the rights of the lay patrons are so much less than formerly, the patrons are entitled to take them; though, according to *Selden*, they cannot institute any suit for the recovery of them if they are refused to be paid. Some few donatives there are at the present day, whether they were suffered to continue as they formerly were at the time when the investiture by lay patrons was discontinued, or *whether they have been since founded by letters patent, or licence from the crown, or whether there are some of each, I cannot at all say. [158]

In the twelfth century the law of lapse was introduced. A general council was held at *Lateran* in 1175, at which, our *Selden* says, in c. 12, s. 5, as last cited, four bishops were sent, according to custom, as agents to the church of *England*. And *Bracton*, lib. 4, 241, says, ante concilium Lateranense nullum currebat tempus contra presentantes. Lord *Coke*, in 2 *Institute*, 273 and 361, notices that *Briton* and *Fleta* describe the council as having been held at *Lyons*, and not at *Lateran*, as *Bracton* does, but it is not material where it was held. *Selden*, however, says, "by that council, after vacancy of six months, the chapter is to bestow those churches which the bishop being patron had left so long void, and upon their default the metropolitan. But no word is of lay patrons in it; yet by reason of the authority of that council, and a decretal of the same pope (Alexander the third), which speaks of like time upon default of lay patrons, it hath been since taken here generally, that, after vacancy of six months, the next ordinary is regularly to collate by lapse." It appears, therefore, that nearly about the same period of time the discontinuance of investitures by laymen, the law of lapse, and the payment of tithes in the parishes where they arose, were introduced. These measures, however, were wholly unconnected with each other, though they all arose from the increasing authority of the church and the force of the canons.

In the case of donatives, which I consider all benefices of lay patronage to have been, and, as I have before endeavoured to show, as long as the right of *institution was in the patron, the complete dominion remained with the patron. When the church is vacant, he is entitled to take the profits to his own use, but he has no remedy to compel payment, and if a stranger takes them, the patron cannot bring an action for them, but must put in a clerk, who

is to sue. It is said by *Popham*, C. J., in *Fairchild v. Gaire* (a), that the patron may take the profits, and sue for them in the spiritual court, and though the other Judges differ with *Popham*, yet I consider their point of difference to apply to his opinion, that if the patron will not collate, there is no remedy to compel him, but he is left to his conscience; for when they are said to be contra, they say that the ordinary may compel him to collate a clerk, and give their reasons, but, as they say nothing about the patron taking the profits, I do not understand them to differ upon that point. The same point was put in argument in *Britton v. Ward* (b), where it is said that when the church is void, the patron may take the profits to his own use, if the parishioners will pay them, but he has no remedy to compel them to pay their tithes to him. The same case of *Britten v. Ward* is reported in *Cro. Jac.* p. 515, but there called *Britten v. Wude*, and there it is also said, "but if any take the profits from him he cannot maintain the action, but he ought to put in his clerk, and he maintain the action;" but the language there is that the patron of a donative may lose the profits if he will; that is evidently a mistake, it is not proper *English*, and is not consistent with what follows: the mistake seems to arise from the translator taking the French word to be *perdre*, instead of *prendre*, *it is *prendre* in *Rolle's Reports*; and in *Mallory's Quare Impedit*, 35, where this case is cited, he says the patron may take the profits. So also *Burn*, in his *Ecclesiastical Law*, title "*Vacation*," says that in case of donatives the patron may take the profits during the time of vacation.

Donatives may be resigned by the incumbent to the patron, *Fairchild v. Gaire*, as before cited in *Yelverton*, 60, and *Cro. Jac.*, 65, where the Court held that a donative begins only by the erection and foundation of the donor, and he hath the sole visitation and correction, the ordinary nothing to do therewith; and, as he comes in by him, so he may restore to him for unum quodque eodem modo quo colligatum est dissolvitur. And although the presentee, when he is in, hath the freehold, yet he may revest it by his resignation, without any other ceremony, and the ordinary hath nothing to do therein. And in the Year-book 6 *Hen. 7*, c. 14, *Keble* says, that if the founder ordain that he and his heirs shall present, then the ordinary shall have nothing to do with it; and *Brooke*, *Presentment al Eglise*, in referring to the Year-book just cited, says, where a free chapel donative is void the founder may retake it, and need not appoint any other incumbent.

The old history of the church, as well as the more modern cases, treat donatives as being the entire property of the patron; if the church be void, the freehold is in him, though perhaps upon consideration of all the authorities on both sides, he may be compelled by ecclesiastical censures to fill it, but in the meantime he may enter upon the glebe and take the profits of that and the tithes; and if he may take them, his heir may take them after his death, as the foundation of the *church is on behalf of himself and his heirs; and as there is *161] no lapse in the case of donatives, this taking of the profits may continue till the church is filled; but if the executor could collate to the church, that would be adverse to the right of the heir to take the profits; and I think that from the whole of the law of donatives the right to collate is in the heir, and does not at all clash with the right of the executor as to benefices, which are presentative for institution. And though it may be said that the right of presentation is as completely severed from the advowson in case of a donative as in a presentative living, I do not so consider it, as the nature of a donative is such that the whole vests in the patron and his heirs, who may take the profits during the vacancy, and, therefore, the executor has nothing to do with it. But the defendant contends, that supposing the case of the donative to be accounted for by any means as constituting a well founded difference from a benefice presentable for institution, yet that the case of ecclesiastical persons

having benefices in right of their church is at all events different, and the first instance that is shown is the case of a bishop who in right of his bishopric has an advowson, and the church becomes void and he dies, the king shall present. For this are cited 2 *Rolle's Abridgment*, 345, "If a church of the patronage of the bishop void in the time of the bishop and after the bishop dies, the king shall have the presentment by reason of the temporalities, and not his executor;" *Brooke's Abr. Presentation al Eglise*, 10, "Where the avoidance is of a benefice belonging to the bishop, and he dies before he makes collation, the king shall have it by reason of the temporalities of the bishop, and not the executors of the bishop." **Fitzh. N. B.* 33, "If the bishop die, and the advowson happen void before his death, the king shall present to the same by reason of the temporalities, and not the bishop's executors." *Co. Litt.* 90 a, "If a bishop have an advowson, and the church become void and the bishop die, neither the successor nor the executors shall present, but the king, because it is but a chose in action." *Co. Litt.* 388 a, "If a church become void in the life of a bishop, and so remain till after his decease, the king shall present thereto, and not the executor or administrator, for nothing can be taken for a presentment, and, therefore, it is no assets." The reason given in *Co. Litt.* 90 a, that it does not go to the successor or executors, because it is a chose in action, does not appear at all satisfactory, because choses in action do go to the executors. And there is a note by the writer of the earlier notes to *Co. Litt.* who gives this explanation of the passage, "that in the case of a chose in action, so peculiar as the right of presentation, the law favours the king more than the bishop's executors, and, therefore, gives the king, as having in his custody the temporalities of the vacant bishopric, that presentation which in general executors are entitled to when opposed to an heir." And the writer of these notes, after discussing the reason of the presentation belonging to the king, comes at last to the conclusion, that it is most safe to rely on the right of the king, as settled by authorities and long practice. In none of these authorities is there any mention made of the successors, except in *Co. Litt.* 90. But they are all, even in *Co. Litt.* 388 a, as to the king's right as opposed to that of the executors, and, consequently, if the king had not the right, treating it as if it would go to the *executors. [*163 It is true, that in the Year Books to which these authorities refer, there is nothing about the executors. If there had been it would have been stronger; but as it is, there is the statement of *Brooke*, *Rolle*, *Fitzherbert*, and *Coke*, as to the claimants, and, therefore, their opinions, that the law was that, except for the right of the king, it would go to the executors. But indeed the right of the king is so strong, that in 2 *Rolle's Abr.* 345, it is said, that if a church of the patronage of a bishop, abbot, or prior, voids, and the bishop, abbot, or prior presents, and afterwards dies before institution, the king shall have this presentment by his prerogative, *The Prior of Bermondsey's* case; and so in the same book and page, "if the bishop, abbot, or prior dies after institution of the clerk and before induction, the king shall have this presentment by his prerogative."

It seems from the next placitum in *Rolle*, as if the contrary had been held in one case, out there seems no reason to doubt the position; for, in *F. N. B.* 34, K, it is said, if a bishop make a collation, and before induction or installation dieth, and the king seizes the temporalities, he shall have the presentment, because that the church is not full against the king until the parson or prebend be installed or inducted. And the same point seems admitted in *Fitzherbert's N. B.* 36, K, though there the king did not prevail, because he ought not to have given the prebend to his own clerk, but should have removed the clerk collated by the bishop, by quare impedit. And the same point is in *Bro. Presentment al Eglise*, in one part of pl. 13. The instance of the bishop dying before presentation, after the right had vested in him, is not the only one where the king's prerogative gives him the right to present. For if the tenant of the king has an *advowson, and an avoidance happens, and after the tenant [*164 dies, his heir in ward to the king, the king shall have the presentation

and not the executor of the father, though the heir be of full age, 2 *Rolle's Abr.* 345, pl. 1; and in *Co. Litt.* 338 a, if the king's tenant by knight's service in capite be seised of a manor, whereunto an advowson is appendant, and the church become void, the tenant dieth, his heir within age, the king shall present to the church, and not the executor or administrator; but if the land be holden of a common person, in that case the executor shall present and not the guardian. So in *Co. Litt.* 90 b, in speaking of the king's right he says, So it is, in case where the king hath wardship, but that is a prerogative that belongeth to the king, to provide for the church being void; for where the tenure by knight's service is of a common person, the executors of the tenant shall present where the avoidance fell in the life of the tenant. And so if the tenant of the king has an advowson and an avoidance happens, and the tenant presents and his clerk is admitted and instituted, and before induction the patron dies, and the advowson comes by wardship to the king, he shall present, for the church is not full against him before induction, 2 *Rolle's Abr.* 345. Other cases may be put, though not applicable to the case of executors, where the king's prerogative gives him a right to present where a subject would not. As if the youngest daughter, coparcener, be in ward to the king, and the church becomes void, the king shall have the presentment alone, and not the other coparceners, 2 *Rolle's Abr.* 344, pl. 8. These cases, therefore, which are excepted out of the rule, that executors shall present where the chattel is vested, must be confined to those cases *165] where the king, by his *prerogative, has a right to present either in the instance of his being guardian of the temporalities in the cases of bishops, abbots, and priors, or in the instances of the king's tenants in capite, where he has the wardship. In all these instances, the question has been between the king and the executors; and in case of the bishop, no surmise (except that in one of the cases there mentioned) was ever made, that the successor would have the presentation in case the king had not been entitled by his prerogative.

Another exception to the rule is alleged, that in case of a person holding an office, in right of which he presents to another office, and that other office becomes void in the lifetime of the patron, and the patron dies, his successor, and not his executor, shall appoint to the office; and the case of exigenter is put as reported in *Scrogges v. Coleshill, Dyer*, p. 175. To that case I entirely agree; but the reason of that is, that it is a personal thing annexed to the judge of the court who is to appoint the officers of the court; and if the office becomes vacant, and the judge dies, his executor can have nothing to do with the appointment, for it belongs to the judge to appoint the officers of the court. The office of judge is not like an advowson, which is a thing which descends and is capable of being conveyed from one person to another, and the presentation of which is the fruit of the advowson. But if an advowson be annexed to an office and the church becomes void, and then the person holding the office dies, I think the right to present would be in the executor and not the successor, because it would be a fruit fallen, a chose in action personally vested in the officer.

*166] *If the principle be established, that a vacant presentation is a chose in action, and is like a fruit fallen, and goes to the executor of a private patron, I do not see why it should not go to the executor of a prebendary patron. He is seised of the advowson itself in right of his prebend in his corporate capacity, and as long as the prebend remains in him, he has it in his corporate character. But it is only the prebend itself, and the advowson which he has as such; the proceeds of a prebend stand upon a different ground. These proceeds do not belong to him in his corporate character, for if they did, they could only be enjoyed by him while he exercises that character. The produce of the lands, such as corn, hay, fruits, and vegetables, come to him to be eaten, consumed, or sold at his pleasure. So the rents of the lands of the prebend, when they fall due, are to be received by him for his own private use, and not to be laid out on his prebend, but at his own pleasure. In the case of death, such of these issues and profits as remain fallen or due, but have not actually come into

the hands of the prebendary, do not go to the successor, or the king, or the ordinary, but go to his executors, as any other part of his personal property. The reason is, because these things, by being severed from the prebend, become chattels, and are no longer parcel of the prebend; and no persons, who afterwards have any interest in the prebend, either direct or incidental, can claim what has thus been severed from it. The same rule holds as to the issues and profits of any thing which is appurtenant to the prebend, and which become chattels, such as proceeds of fisheries, common of turbary, housebotes, and other things which have been taken and remain in specie *at the death of the prebendary: for things appurtenant to the prebend are as much parcel of it as if they were of the actual corpus of it. The general principle of such manual chattels and choses in action as I have mentioned being admitted, it is to be considered, whether the right of presentation to a church is to be considered in the same light. In the case of a private individual, if for *prebend* you substitute *manor*, there is no doubt upon the current of all the authorities. The species of property is the same: in the one case it is an advowson appendant to a manor, in the other it is an advowson appendant to a prebend in right of the prebend. But in both cases it is an advowson, and being an advowson, it must partake of the qualities applicable to an advowson. [*167]

In the case of lay patronage the vacant presentation becomes severed from the inheritance; but if that be the nature of an advowson, that a right to a presentation becomes severed from the inheritance, it must have that quality throughout, to whomsoever the advowson belongs, or in whatever right it is held; for otherwise great confusion would ensue. And if it be a chattel it must go as all other chattels do. A chattel does not go to the successor of a corporation sole, except in the case of the king, *Co. Litt.* 90 a. But the king is altogether upon a different footing from other corporations sole. If, then, this be a chattel and should go to the successor, it would be quite an anomaly, and an exception to the general rule.

But there is one very important instance where the right of presentation is transmissible to the personal representatives, and does not go to the successor. I mean the option of the archbishop, which is founded on a *grant made to the archbishop; and upon the death of the archbishop during the continuance of the bishop in his see, it will devolve on his executors or administrators; that being a personal grant to the archbishop, is different from the present; but it proves, that in the highest ecclesiastical dignity in the church the principle, in one instance at least, is recognized, that it is transmissible to the personal representatives. [*168]

It has been said that this is a trust to be exercised for the benefit of the church, and that it is more proper that a spiritual person should exercise it; but it is also an important trust if it be exercised by a layman, he, also, has a duty to perform in the selection he makes. The ordinary, both in the case of ecclesiastical and lay patronage, is to examine into the fitness of the clerk, and the only thing that can be said in favour of the ecclesiastic is, that he will make a better choice; but that is not a principle upon which the legal rights of parties can be decided. The state of patronage is as much diversified in *England* as it is possible to be; all classes in the community that can be enumerated have patronage belonging to them, and their rights are to be determined by legal principles; and where there has been no decision or practice or received opinion, then by analogy, as far as can be collected; but the question, what class of patrons are likely to make the best choice, cannot, I think, be taken into consideration.

In the course of the argument it has been said, that this prebend has been appropriate to the church of *Salisbury*, and also that the will and intention of the founder is to be considered. As to that we know nothing upon this record; all we know is, that the advowson is appendant to the prebend; but how it became so *does not appear, or who was the founder, or what were the terms of the foundation, or by what statutes it is governed: if there were [*169]

any terms or statutes they might have been shown; if there were none, the case must be governed by the general rules of law.

Neither can we look to the constitutions of the church of *Sali Jury*,—they are not stated in the record; and in the absence of any thing particular in them the rules of law, as applicable to all churches in general, must prevail.

The statute of the 28 *Hen.* 8, c. 11, has been adverted to. It states what things are to go to the successor of an archdeacon, dean, prebendary, parson, &c. &c., but the enumeration is of things growing, arising, or coming during the time of vacation; no allusion is made to any thing which fell during the time of the predecessor. This statute has been said to be only declaratory of the common law; whether it be so or not, cannot be material; because if it was, it would be a declaration of what the successor would take by the common law, which is only of things falling in the vacation. But as the statute directs these things to go to the successor, towards payment of the first fruits to the king, it would not ~~enumerate~~ things which could not be converted into money, and therefore would not include a vacant presentation, and the statute, consequently, does not affect the question.

For the reasons I have already mentioned, I think that the plaintiff is entitled to present in the present case, and that the judgment of the Court of Common Pleas should be reversed.

HOLROYD, J. The question is on the right of the plaintiff, though the demurrer is to the claim of right *in the defendants set forth in the plea. *170] The question is, whether the plaintiff, as administratrix of the deceased prebendary, is entitled to present? It is admitted, if the advowson had been in *lay* hands, the right would have been in the administratrix, and not in the heir; but it is contended that as it was in the prebendary (a person having an ecclesiastical station or office derived from the bishop), and in right of his prebend, ergo, as a body corporate, that it is in him as a confidential trust reposed in the body corporate or person holding the office, and not as an individual, and that it does not therefore vest in any person who is his personal representative as an individual; but, though a fruit fallen, that it belongs to his successor. If that were so, we might expect to find that the right to present would have been deemed so much a confidential trust in whoever is the prebendary as to be therefore inseparable from the office or station. But this, I think, is not so, as will, as it seems to me, appear by what follows. Even in the case of a bishop, where it goes not to his personal representative, it goes not to his successor, but vests in the king as guardian of the temporalities by his prerogative. In the case of a common person, by the vacancy the right to present on that turn becomes separated from the advowson, as a fruit fallen, it becomes a *personal* chattel in the person entitled; though he has the advowson *in fee*, it descends not with the advowson to his heir, in case of his death, but goes to his personal representative; and in case the right was in such common person before and until the vacancy by a grant of the next presentation, in which case the right would, until the vacancy has happened, be in him as a chattel *real*, *171] the vacancy turns it into a chattel *personal*. **Vin. Exor.* (Z), pl. 4, cites *Wentw. Exor.* 54, and 73, for this; like rent due, which on death goes to the executor, though the land or reversion goes to the successor, or heir, or devisee, according to *Digby v. Fitch* (a). So a termor shall present, though after the term is expired, to a vacancy which happened during the term, *Fitz. N. B. Quare Impedit*, 33, A. It is a *chattel vested*, and not merely a chose in action, and therefore the husband shall *present* to a turn after his wife's death, on a vacancy happening in her life in her advowson, *although* he could not *sue* after her death on a *bond* to her, because that is merely in action, *Co. Litt.* 120 a.

The nature of the right to present on a vacancy having fallen, is not changed

by its being vested in a prebendary in right of his prebend, but the rules of law (such as its being a fruit fallen separated from the advowson, a right vested, a chattel personal and transmissible to executors, &c.) applicable to it from its nature, must, in like manner, still be applicable to it, unless we find some rule or principle of law established, such as the king's prerogative in the case of bishops (and the prerogative is the sole ground on which the bishop's case is varied, as will appear from a case I shall state hereafter), unless we find some principle or rule of law, I say, to prevent their being so applied, or to vary this right in the case of a prebendary from the same right in the case of a lay patron. And I think there is no such rule or principle of law to prevent their being so applied, or to vary the case of a prebendary from that of a lay patron.

In the case of a bishop, the nature of the right to *present is not at all changed from what it would be in the case of a lay patron; but notwithstanding the nature of the right in each of those cases be the same, the established rule of law to be found in our books as to the king's prerogative, intervenes and applies in the one case, the bishop's, to deprive his executor, &c. of the right to present, which but for the prerogative applicable to the bishop's case the executor would have in the one case as well as in the other; but I do not find any where in our books any rule or principle of law applicable to the case of a prebendary, who is patron in right of his prebend, to vary it from the case of a lay patron, more especially as a prebendary might formerly have been a layman, according to *Bland v. Maddox* (a), and other authorities. Suppose an advowson of a presentative rectory to be conveyed by a lay patron to a prebendary and his successors in right of the prebend in fee, or to be conveyed to a lay patron in fee by a prebendary who has it in right of his prebend, concurrentibus iis qui de jure requiruntur; which conveyance in former times, before the restraining statutes, would have been good even against his successors, and would now be good against the individual prebendary himself, unless the advowson or right of presentation of a prebendary in right of his prebend can be shown to be wholly inalienable, either on account of its being vested in him as a personal trust and confidence in the person who may be the prebendary, or otherwise. Would the nature of the right to present be varied, when a vacancy has happened? would it not be equally a fruit fallen and separated from the advowson, a right vested, a chattel personal, whether the patron be ecclesiastical or lay, and consequently *transmissible to executors, &c. in one case as well as in the other? unless there be found some established rule or principle of law to intercept it, as in the case of a bishop; and it does not appear to me that there is any such rule or principle of law established applicable to the case of a prebendary. None such is any where, that I know of, to be found. [*173]

That an advowson or right of presentation of a prebendary in right of his prebend is not at common law wholly inalienable or inseparable either on account of a personal trust and confidence in the person who may be the prebendary, or otherwise, appears, I think, by our books.

His being an ecclesiastical corporation, does not render it inseparable, for *F. N. B.* 34, O, shows that the vacant turn is not inseparable from the station or office of a prior, though an ecclesiastical and corporate office, so as where a vacancy has happened, to vest in his successor. For there it appears that the founder of a priory shall have a quare impedit against a sub-prior, and the convent, if they disturb him to present to an advowson which belongeth to the house, if it void during the vacation where the founder ought to have the temporalities during the vacation. So in *Poyner v. Chorleton, Dyer*, 135 a (cited also in 3 *Wils.* 327), it appears that the grantee of abbot and convent, of the next avoidance, recovered in quare impedit. *Winch's, Coke's*, and other entries, show

that ecclesiastical bodies and persons have been in the habit of granting away their spiritual preferment as well as lay persons, and that their grantees have been in the habit of suing in their own names. In the *Dean and Chapter of Hereford v. The Bishop of Hereford* (a), a grant of the next presentation by dean *174] and chapter, was held not good against the successor; but that was only by reason of the statute 13 *Eliz.*, and no doubt that it was good against the dean, the grantor himself, and his chapter. So in *Armiger v. The Bishop of Norwich* (b), a grant of advowson for twenty-one years by a bishop, which he had in right of his bishopric, was held good against himself, but not against his successor, or against the king during vacancy, though confirmed by dean and chapter, but it was void against them only by reason of statute 1 *Eliz. c. 19*. In *Smallwood v. Bishop of Coventry* there was a grant of the advowson of an archdeaconry by a bishop to A. B. for twenty-one years, who assigned to C. D. vacancy in C. D.'s life, and disturbance of him in his life, his executors sued. By the report of that case in *Lutw. 1*, and also in *Sav. 94* and *118*, though the writ was quashed as informal, the right to sue was decided in their favour; and afterwards in an action (see *Cro. Eliz. 207*,) the grant was held good against the bishop that made it, though not against his successor, by reason of the statute, and the executors had judgment.

Why, then, is such a right not equally grantable by a *prebendary*, and separable from the office, either in deed or by act or operation of law upon death? &c. It is no more a matter of trust and confidence in him than in the other cases of ecclesiastical bodies or persons. But an estate or interest, though coupled with a confidence and trust, is still in law assignable and grantable; and such assignment or grant will pass the estate or interest for so long time as the same continues to subsist in the assignee or grantee, and the creator of the confidence or trust cannot by law deprive the estate or interest (even by express words and *175] declaration) of such assignable or grantable quality. It is so in conveyances of lands or tenements to trustees in fee, or for terms of years; and the estates will, if not assigned or granted away by them, vest by law in heirs, or executors, &c. as long as their respective estates continue to exist, whatever the conveyance or conveyer may declare shall be the contrary. So *Com. Dig. Grant* (C), says, "A present estate or interest may be granted, though it be accompanied with a trust, as guardian in chivalry or soccage may grant his guardianship," and cites 2 *Roll. Abr. 46, H*. So as to archbishop's options, which may be disposed of by his will, and will pass to his executors, as appears in *Potter v. Chapman* (c).

The case of a donative, supposing it to be a settled case, is to be considered as an exception, at least the rule of law in that respect not only has never been applied to a presentative right, but the very contrary. But there may be also this distinction, that according to the cases above referred to, a right of *presentation*, when a vacancy has happened in a presentative living, is not a mere right or chose in action, but is a *chattel* personal and *vested*; but it does not, that I am aware of, appear that the right of *nomination* is so, in the case of a donative. It may not be a *separate* thing or right from the advowson itself of a *donative*, when a vacancy has arisen, as in the case of a *presentative* living, but may, instead of becoming in law a right separated from such donative advowson, and a *chattel* personal vested, continue a right, part of the advowson, unseparated from, and merged in, the general right to the advowson, and to be exercised only by him who has that general right, unless where it has been expressly separated *176] from such general right to the advowson itself by a grant or conveyance of the right of nomination on such next vacancy. This consideration alone would be sufficient to account for its not going to the bishop by lapse, although its not going to the bishop by lapse, I admit, is otherwise accounted for in our books.

(a) *Cro. Eliz. 440*.(b) *Cro. Eliz. 690*.(c) *Amb. 98*.

But it has been urged that (besides that this is to be considered as a confidence and trust to be exercised only by such person as holds the prebend), the prebendary is a body corporate, and, therefore, that the right of presentation for that turn, though the vacancy arise in his lifetime, has vested in his successor, and not in his administratrix, who represents him only in his *natural* character as an individual, and not as a body corporate, but there is no authority or principle of law to support this position; on the contrary, the authority and principle of law appear to me to be directly in opposition to it. For in *Co. Litt.* 90 a, Lord Coke states this case: "A tenant holdeth land of a bishop by knight's service, which seignorie the bishop bath in the right of his bishopric, the tenant dieth, his heir within age, the bishop, either before or after seizure, dieth, neither the king nor the successor of the bishop shall have the wardship, but his executors. For albeit the bishop hath the seignorie en auter droit, yet the wardship being but a chattel he hath in his own right, and 'a chattel' cannot go in succession of a sole corporation, unless it be in the case of the king." So that a chattel could go in succession in the case of the king, though it could not in the case of the bishop; and although the seignory was in the bishop in auter droit, yet neither the king nor the succeeding bishop should have the wardship, because it was a *chattel*, and, therefore, the former bishop had the wardship as a chattel in his own right, and his executors shall have it, though *the seignorie [*177 was in him as a bishop; and Lord Coke in p. 46 b, of *Co. Litt.* says, "If a lease for years be made to a bishop and his successors, yet his executors or administrators shall have it in auter droit, for regularly no chattel can go in succession, in a case of a sole corporation, no more than if a lease be made to a man and his heirs, it can go to his heirs." So that the rule extends to chattels, whether real or personal. And in 4 *Co.* 65, a, and 1 *Roll's Abr.* 515, L, the rule of law as laid down by Lord Chief Baron Comyns in his *Digest, Biens*, O, from those authorities appears to be, that all chattels of a corporation sole, as a bishop, parson, &c., go to his executors or administrators, and not to his successor, and this according to Lord Coke, and as laid down by Comyns, extends to chattels in action as well as in possession. As the right now in question, therefore, was a fruit fallen, separated from the advowson, and a right and *chattel vested* in the deceased prebendary, I think that after his death it went to his administratrix, as it would have done if he had had the advowson in his own right as a mere individual, and not in his corporate character, and that it has not vested in his successor. It stands on the same footing, as it appears to me, with rent due to the deceased as prebendary, and remaining in arrear at his death, which would go to his administratrix, and not to his successor.

I think, therefore, that the judgment of the Court of Common Pleas should be reversed.

BAYLEY, J. This was a writ of error from C. B. in a case of quare impedit. The declaration stated, that *William Dodwell*, D. D. was seised of the prebend or canonry of *South Grantham*, founded in the cathedral *church [*178 of *Salisbury*, to which prebend or canonry the advowson of the rectory of the parish church of *Welby* (the church in question) belonged in his demesne as of fee, in right of the said prebend or canonry, that he presented *William Dodwell*, and died; that *Price* succeeded Dr. *Dodwell*, and died; that *Rennell* succeeded *Price*; that the church became vacant by Mr. *Dodwell's* death, whereby it belonged to *Rennell* to present; that he died intestate, without presenting; that administration was granted to the plaintiff, and that thereupon it belonged to the plaintiff as administratrix to present, but that she was hindered by the defendants. She complains, therefore, not of a disturbance in the intestate's time, but of a disturbance in her own, and the question is, Whether upon an advowson, circumstanced as this advowson is, if a right of presentation accrue in the lifetime of the prebendary, and he dies without filling it up, that right passes to his personal representative? The declaration does not describe the prebendary as seised of the advowson in right of the prebend or canonry, or

indeed as being seised of the advowson at all; but it states him to be seised of the prebend or canonry in his demesne as of fee in right of the said prebend or canonry, and describes the advowson as belonging to the prebend or canonry, I think it must be taken that it was in right of the prebend and canonry only that Mr. *Rennell* had any seisin of or right in the advowson. But though the title to the advowson be in right of the prebend or canonry, the question is, whether the right of presentation, when a vacancy has happened, is still attached to the prebend and canonry, and to be exercised only in right of the prebend or canonry upon a continuation of the prebendary's estate in the prebend or canonry, or *whether it does not become an independent personal right, vesting *179] indeed in him because he was prebendary when the vacancy happened and the right accrued, but severed altogether from the inheritance and the advowson, and becoming in him a detached personal right, to be exercised by him in his own right, whether he should continue prebendary or not, and in case he should die without exercising it, transmissible by him as a personal right to his executors or administrators. The latter is the right which the declaration states. It does not state that Dr. *Dodwell* presented in right of his prebend or canonry, but simply that Dr. *Dodwell* presented; and upon the vacancy in question, it does not state that it belonged to Mr. *Rennell* in right of his prebend or canonry but simply that it belonged to Mr. *Rennell* to present, and upon the best consideration I have been able to give this case, I am of opinion, that in the absence of any custom to control it, this is the correct mode of statement; and that though the prebendary acquires the right of presentation because he is prebendary, and in right of his prebend or canonry, the right when once acquired becomes his own private personal right as the right to the underwood he has cut, or the grass he has mown, or the fruit he has gathered from his prebendal lands. I have no difficulty in saying that I came to the argument in this case with a very strong impression upon my mind against the plaintiff's right, but the light which was thrown upon the subject by the powerful argument of Mr. *Patteson*, and the authorities to which I have referred, have induced me to think that my first impressions were erroneous; and though I might think it would be better if the right were to be inseparable from the stall, I cannot find legal principles to carry me to that conclusion.

*180] *The first point I shall consider is, what is the effect of a vacancy, in case of a presentative living, and I take it to be clear that it immediately gives a new personal right, a right arising from property in the advowson, but from the moment of its creation, ceasing to depend upon, or to be influenced by it. Whatever may become of the advowson, though the right to it instantly ceases, the right of presentation continues untouched. In the common case, where a church becomes vacant and the patron dies, the advowson descends upon his heir; but to whom does the right of presentation pass? To his heir? No; but to his personal representative. And why? Because it is no part of the advowson; it is a personal right yielded by the advowson, a fruit created by it, but it is no part of the advowson, it is wholly independent of it. *Fitz. N. B.* 33, P, puts the case and gives his reason. If a man be seised of an advowson in gross or in fee appendant unto a manor, and the church become void, and he die, his executor shall present, and not his heir. Why? *Because it was a chattel vested, and severed from the manor.* The same point, without the reason, is put 21 *H. 7*, pl. 6, *Bro. Present. à l'Eglise*, 34. If *A.* be tenant in tail of an advowson, and the church become vacant, and *A.* die, *A.*'s executor shall present, not the issue in tail, *F. N. B.* 34, B. If tenant in tail of a manor to which an advowson is appendant, make a lease (before or not within the statute of *H. 8.*) which will end with his death, and the church becomes void, the tenant in tail dies, so that the lease is become void, the issue shall nevertheless have the presentment, 10 *Ed. 3.* (a) If I grant land,

(a) Taken from the index to the Year Book,—not to be found in the book itself

*to which an advowson is appendant to husband and wife in tail, the husband dies, the widow marries J. S., the church becomes void, the woman dies without issue, J. S. shall present, for though the right to the land is wholly in me, the right to present is in him, 38 H. 6, 36 B. If baron be seised of an advowson in right of his wife, and the church become void, and the wife die before issue had, still the husband shall have the presentment, 21 H. 6, B. *Bro. Presentment à l'Eglise*, pl. 22, *Co. Litt.* 120. If a manor, with an advowson appendant, be assigned to a widow for dower, and she marry again, and the church become void, and she dies, her second husband shall present, 14 H. 4, 12. If whilst a church is void, the patron be outlawed in trespass, which works a forfeiture of goods and chattels, the king shall present, *Br. Presentment à l'Eglise*, 22. "If a man have an advowson for a term, and the church during the term become void and the term expire, the termor shall nevertheless present," *F. N. B.* 34 B. *Bro. Presentment à l'Eglise*, 22. Lastly, if a vicarage become void, and before the parson present he be made bishop, he shall nevertheless present, because *it was a chattel vested in him*, *F. N. B.* 34 N. These authorities appear to me to prove, beyond all question, that upon a common presentative benefice a vacancy creates a new right from thenceforth, detached from and independent of the advowson, and liable to go in a different line from the advowson; and the next point I shall consider is, what is the legal character of this right? And I take it to be a chattel, and a chattel only. I am aware that in different books different names are given to it, that it is called a personal thing, annexed to the person of him who is patron in expectancy at the time of the vacancy *(*Dyer*, 283 a, *Gibs.* 797); a thing in right, power, and authority (*Dyer*, 283 a, *Gibs.* 797); a chose [*182 in action (*Dyer*, 283 a, *Gibs.* 797, *Co. Litt.* 90.) The fruit and execution of the advowson, not the advowson itself (*Dyer*, 283 a, *Gibs.* 797), and a trust in the hands of the patron, by consent of the bishop, for the benefit of the church and religion (*Gibs.* 796); but notwithstanding all these descriptive and figurative expressions, its legal character seems to me that of a chattel only. I am aware, too, that in *Rex v. The Archbishop of Canterbury* (a), where the question was, whether a grant from the crown of the goods and chattels of felons and outlaws would pass a right to present to the advowson of an outlaw, where the church became vacant after the outlawry, *Anderson*, C. J., said (according to *Owen*) that an avoidance was no chattel, or right of chattel, which *Periam* denied, but, according to the reports in *Leonard*, *Anderson* considered it as a right, a thing in action, a jus presentandi, but he thought the words "goods and chattels," not proper words to pass it, and that they were confined to household goods, money, and the like personal things, and things in possession; but *Shuttleworth*, Serjt., who argued against its passing by the grant, admitted it was a special chattel capable of being granted; and *Walmsley* and *Periam*, Justices, both stated it was a chattel, and though it may be immaterial to the decision of this case, what particular species of chattel this may be, which seems there to have been the question, it appears to me, upon other authorities, that it clearly is a chattel of some description. The right to present upon a grant of the next presentation cannot differ in nature from *the right which devolves upon the patron [*183 in case of vacancy where there has been no grant, and in such case *Brooke* considers the right granted clearly as a chattel. In 34 H. 6, 27, pl. 38, a grant of the two next presentations was made to J. N. and his heirs, and it was alleged upon the first vacancy J. N. presented, and upon the second his heir, and per *Moile*, J., the heir had no title to present, for the executors ought to present in this case, and not the heir, notwithstanding the form of the grant. *Brooke* abridges this case, title *Chattels*, pl. 20, and *Estates*, pl. 51, and he has a similar case, title *Chattels*, pl. 6, and in each he gives as the reason, that the right to present in such case is a chattel. If one grant the two next presentations of a church to A. these are chattels, and if A. die the executors shall have

them, not the heir, *Bro. Chattels*, pl. 20. A man grants the next presentation to a church to A. and his heirs, or lease for years to him and his heirs, the executor shall have this and not the heir, for the heir shall not have *chattels*, *Bro. Est.* pl. 51. A man grants to another the next presentation to a benefice, and the grant was to him, his heirs, and assigns; and, yet, it was admitted clearly that it was *but a chattel* notwithstanding this word *heirs*, for it is but for a term, and where a thing is *but a chattel*, this word *heirs* cannot make it an inheritance. The same law of a lease for twenty years to A. and his heirs, *Bro. Chattels*, pl. 20. In the cases I have mentioned from *F. N. B.* 33 P, and 34 N, the right to present, which accrues to the patron upon a vacancy, is called a chattel, and so it must have been considered, *Co. Litt.* 398. Indeed, how can an executor or administrator have any right to it, except on the ground of its being a chattel? The statutes relating to administrators, use the words *184] "goods" only. By the *13 *Ed.* 1, c. 19, the ordinary shall answer the debts as far as the goods of the deceased will extend. By the 33 *E.* 3, c. 1, c. 11, the ordinary shall depute the next and most lawful friends of the deceased to administer the *goods* of the deceased, and the 21 *H.* 8, c. 5, speaks of commission of the administration of the *goods* of an intestate. Upon these grounds it appears to me, that upon the vacancy of a presentative advowson, a right and interest independent of the advowson accrues to the patron, and that this is a chattel right and chattel interest.

It remains to be seen, whether there be any thing particular in this case to take it out of the ordinary rule of chattels. And one ground insisted upon is, that this right accrues to the prebendary in right of his prebend, and that it is commensurate with his continuance as prebendary, and that when he ceases to be prebendary the right is gone. But is there any authority to warrant this conclusion? I agree that the right accrues to him in right of his prebend, because he is prebendary; but when the right has accrued by the vacancy, I deny that it is dependent upon the prebend or to cease with it, but I insist that, like all the instances I have put in the early part of what I have been stating, it is independent of, and unconnected with the advowson, and a distinct independent chattel. The case put, *F. N. B.* 34, of the parson who is made a bishop, is upon principle in point, but it is not the only case. *Co. Litt.* 90 a and 388, in the case of a ward, is in point also. The objection is, that the chattel interest is acquired not in his personal, but in his corporate character. The parson in *F. N. B.* acquires his right, the very same species of right, in the same way. In *Co. Litt.* 90 a, this case is put, "A tenant *185] holds of a bishop by knight's service, the bishop has the *seigniorship in right of the bishopric, the tenant dies, his heir within age, the bishop either before or after seizure dies, neither the king nor successor shall have the wardship, but the executors. For albeit the bishop hath the seigniorship en auter droit, yet the wardship being but a chattel, he hath *in his own right*, and a chattel cannot go in the succession of a sole corporation unless it be in the case of the king." The same point is put more shortly, *Co. Litt.* 388 a, "If a bishop hath a ward fallen and dieth, the king shall not have the ward, nor the successor, but the executor, and the ward shall be assets in his hands. So it is of a heriot, relief, or the like." Now this, as it seems to me, bears a strict analogy to the present case: the bishop there has a seigniorship in right of his see; here, the prebendary has an advowson in right of his prebend; a chattel accrues from each; a wardship in the one case, a right of presentation in the other. The wardship goes to the bishop in his own right. Why shall not the right of presentation in the other? The former goes to the executor, why shall not the latter? The only difference between the two cases is, that the wardship is assets; the right of presentation is not, though the damages for an obstruction to it would be. But is this difference material? A right of presentation, though not assets, goes to the executor in ordinary cases. The only recognized exception is in the case of the king. The constituting assets, therefore, is not the

criterion. But in the very case of bishoprics, there is a difference between the case of wardships and the case of a right of presentation; the former went to the executor, the latter to the king. Will this, therefore, furnish a ground upon which the defendant in error can stand in this case? Can he show *that this is founded upon the nature of the right, viz. a right of presentation, [*186 and that it extends to all cases of such a right; or will it not appear that it extends to all cases of the king upon a tenure in capite, and that it is confined to the king and that peculiar species of tenure? The case I have already mentioned from *Fitzherbert*, viz. the case of the parson made bishop, shows that it is not founded upon the nature of the right, viz. the right of presentation; and the fact that it extends to cases of wardship, upon a tenure in capite in the king's case, shows that the peculiarity results from the peculiarity of tenure and the rights of the crown, and not from the nature of the right. The general rule is, that a chattel cannot pass by succession from predecessor to successor; *Co. Litt.* 9 a, 46 b, 90 a. But by custom it may; as in the case of *The Chamberlain of the City of London*, where, by the custom of the city, a bond to the chamberlain for orphanage-money will pass to the successor; *Fulwood's case (a)*, *Byrd v. Wilford (b)*; or it may be the terms and conditions of a tenure. And it is to this I attribute the peculiarity in the case of the bishops, upon which great stress was laid in the argument, rather than to the spiritual right in respect of which they hold their possessions. If, for instance, a living becomes vacant, of which a bishop, in right of his see, is patron, and the bishop dies, the right to fill up that living passes with the other temporal rights of the see to the crown. And though the crown restore the temporalities to the successor, without filling up the vacancy, the right to fill it up remains with the crown. But I do not find this to be the case with *respect to advowsons in the patronage of any other corporations sole; [*187 and I find, that in the case of the crown there is a similar peculiarity in the case of every tenure in capite. If the king's tenant in capite hold an advowson as parcel of his advowson, and the church become void, and the tenant die without presenting, the right of presentation, if the heir be of full age, will be in the tenant's executors; but if the heir be within age, the right will be in the crown. Upon what, then, does this right in the crown depend? Clearly not upon the spiritual nature of the property, because it is a right of presentation; for if the heir were of full age he would have it, but upon this, that according to the terms and conditions of the tenure, if the land came to the crown for wardship or otherwise, whilst the church was void, the right of filling up the church should be not in the executors of the tenant, but of the crown. And in the same way in the case of a bishopric, the right of the crown may be founded upon this, that according to the terms and conditions of a tenancy of the bishop (for every bishop always held of the crown), whenever a bishopric became vacant, the right of filling up all vacant churches within the patronage of the see should be, not in the executors of the bishop, but in the crown. This, as it seems to me, accounts satisfactorily for the peculiarity of the case of bishops, puts them upon the same footing as other tenants in capite (*Co. Litt.* 70 b), and makes the peculiarity of their case inapplicable to the present.

The only remaining argument against the plaintiff below (I believe) is founded upon the case of donatives. But when the distinction between donatives and presentative *benefices is considered, and attention is paid to the ground [*188 upon which *Repington v. Tumworth School (c)* was decided, the case of donatives, as it seems, will furnish no argument which can bear upon this case. In case of a presentative benefice there is a duty upon the patron to present. The public is considered as having an interest in there being a prompt and speedy presentment. A neglect is punished by lapse. This is, I apprehend, the foundation of the right the law creates when a vacancy occurs. The right is the consequence and offspring of the duty. But in case of a donative, the

law recognizes no such duty, and the miserable report of the case we have in *Wilson*, states as the ground of the decision, that in the case of a donative there is no lapse. I am aware that it was said arguendo in *Colt v. Glover* (a), that it had been agreed in *Gaire* ats. *Fairchild*, that the ordinary might sequester a donative if the patron would not present; and that according to the report in *Yelv.* 61, *Gandy*, *Fenner*, *Yelverton*, and *Williams* (against *Popham*, C. J.) held, that the ordinary might compel the patron to collate some clerk; but this point was not necessary to be decided in that case, for the only points were, whether the incumbent could resign to his patron, and whether his resignation was good. I do not find this point mentioned in the contemporaneous reports, *Cro. Jac.* 63, *Moore*, 765, or in *Co. Litt.* 344 a, which contains the substance of this case. I have never heard of any instance of a proceeding in the spiritual court to compel the filling up a donative, and the case of *Repington v. Tamworth School* appears to me to have proceeded on the supposition, that there was no power

*189] to compel the patron of a donative to fill the church, and that the necessity, therefore, of raising a personal right detached from and independent of the advowson did not arise. Why should the question of lapse have been mentioned, except to show this distinction between a common benefice and a donative, that in the latter it was optional in the patron to fill the church or not; and that the law, therefore, did not raise a chattel out of the inheritance, as in the case of a common benefice, because until the patron took the step to fill the church, it was not certain he would ever fill it, and until he chose to exercise his right, it would remain in the inheritance as part and parcel of the estate. Upon these grounds I am of opinion that the case of a donative is distinguishable from this case, and that we are not warranted by the case in *Wilson* to take this out of the ordinary case of presentative benefices. The point, that the prebendary is a *spiritual*, and not a *lay* corporation, I do not particularly notice, because it is clear the prebendary has no cure of souls, his functions are not of necessity spiritual, the filling up his church is not a *spiritual* function. Until the statute of 13 & 14 *Car.* 2, c. 4, he might have been a layman, and though spiritual persons have an advantage over laymen in knowing the merits and talents of the members of their own profession, it is to be presumed, that when laymen have the distribution of any church preferment, they will act conscientiously in bestowing it according to the best judgment they can form for themselves, or can obtain from the opinion of others. Upon the whole, therefore, I am of opinion, that in the case of a presentative benefice, as this is, a vacancy separates from the inheritance a right of presentation, that that

*190] right is a chattel interest, that it vests in the prebendary, not in his corporate but in his individual capacity, and that there is nothing which will justify us in saying that it shall not take the direction and be subject to all the incidents of an ordinary chattel.

Whilst I was considering this case, I thought it proper to endeavour to get what light I could upon the position in *Co. Litt.* 90 and 388, that the bishop's ward would go to his executors, because that is one of the main grounds upon which my opinion rests, and had that position appeared erroneous my opinion might have been different. In my search I met with two cases, which I think right to mention, one in 40 *Ed.* 3, 14, and the other in 2 *H.* 4, 19. In the first the Bishop of *Lincoln* brought a writ of ward, and counted that the infant's ancestor held of him by knight's service. *Belknap* pleaded in abatement that the ancestor died in the lifetime of the preceding bishop. *Candish*, for the bishop, said, he might hold of us in our own right. *Belknap* thereupon pleaded that he held of the predecessor as in right of his church, and died in his time, and said that in such case the plaintiff should have supposed in his writ that the ancestor held of the preceding bishop, and he prayed judgment, not in bar, but of the writ. The plaintiff was driven to maintain his writ, and then he pleaded

that he died after the preceding bishop. Sed per *Thorpe*, C. J., he might have died whilst the temporalities were in the king's hands, and then the ward would belong to the king. You must plead that he died in your time: which was done, and issue was joined thereon. Upon this the reporter makes this note: "It seems to me by the opinion here of this book, that if a ward fall in the time of a bishop, and the bishop die, and the king present another bishop, the *infant being within age, the king shall not have the ward, nor the executors of the former bishop, but the successor. But that if it fall whilst the [191 temporalities are in the king's hands, the king shall have it. This certainly is the inference from the defendant's pleading the matter in abatement, and not in bar; for it assumes that it would have been a better writ had it stated that the tenant died in the preceding bishop's time. *Brooke* notices this case, *Gard.* pl. 9, and adds, quod nota et videtur, if he die in the life of the predecessor, the executor shall have it, and not the new bishop; and he refers to 2 *H.* 4, 16, and 11 *H.* 4, 80, (which I cannot find). I do not find this case in *Füz.* In 2 *H.* 4, 19, the Bishop of *Lincoln* brought a writ of ravishment of ward, and it was said to have been held for clear law, that if a bishop's tenant die, his heir within age, and the bishop die without seizing the ward, the successor may seize him, and shall have a writ of ravishment of ward against any that takes him out of his possession, and some said the successor might have a writ of ward. Quod quære. And it was laid down there, as it had been in 2 *H.* 4, 14, that upon ravishment of ward, it was not sufficient to impeach the plaintiff's title, defendant must show a title to remove him, for possession is sufficient except against title. *Fitzh. Gard.* pl. 73, notices the position, that some said, "Successor might have a writ of ward;" and makes no comment or query. *Bro.* notices it also, *Gard.* 23, and *Ravishment de Gard.* 7, and in the former case inserts "Q," and in the latter "Quod quære;" but whether the query is to note his own doubt, or the query in the Year Book, may perhaps be inferred from his quod nota, &c. to the case of 40 *Ed.* 3, but not otherwise. The latest of these two cases is two centuries before the time when Lord *Coke* published his *comment upon *Littleton*; and from the decisive manner in which he [192 states the point, there can be little doubt, but that was what matter of doubt in the time of *Henry IV.* had become matter of legal certainty before the time of *James I.* The matter would be likely frequently to occur, and, therefore, was not likely to remain unsettled for two centuries.

I have not relied on the *Prebendary's* case, 24 *Ed.* 3, 26, because he might proceed for damages only, and not for a writ to the bishop. And yet his right to damages would be founded upon this, that the right of presentation was a chattel and part of his personal estate. Upon the whole, I am of opinion, that the plaintiff is entitled to our judgment, and has a right to a writ to the bishop.

Lord TENTERDEN, C. J. This was a proceeding in a quare impedit brought by the administratrix of the late prebendary of the prebend or canonry of *South Grantham*, founded in the cathedral church of *Salisbury*, and to which prebend the advowson of the rectory of *Welby* is alleged to belong, claiming to be permitted to present a fit person to that rectory, being void. It appears by the pleadings that the rectory became void in the life of the late prebendary the intestate, and so continued until his death.

The question is, whether the administratrix be entitled to present?

The Court of Common Pleas held that she was not entitled, and gave judgment for the defendants; upon which a writ of error has been brought, and the case has been argued before us with great ability and learning. It does not appear that such a question has ever been presented to a court of law before the present occasion, nor what practice has prevailed in such cases.

*Some points are settled by many decisions. If a person seised in his natural capacity of an advowson of a presentative benefice, either [193 appendant or in gross, whether seised in fee or for life, dies after the avoidance

of the benefice, the presentation for that turn belongs to the executor, and not to the heir or remainder-man.

So if a wife seised of an advowson dies after vacancy, the husband shall present, although she die without having had issue, and he does not become tenant of the advowson by the curtesy. For this the 21 *H. 6*, 26 *b* has been quoted.

It is clear, also, that if the next presentation be granted, either by a natural or politic person before avoidance, this is considered in law as the grant of a chattel, and the turn shall go to the executor, and not to the heir of the grantee, even though the grant be made in words to the grantee and his heirs. In this case the thing granted must necessarily be a chattel, is not for the life of any one or more, nor does it convey an interest in fee or tail, for those are perpetual, and this only temporary.

In the case of a presentative benefice and a natural person, the void turn in the hands of the owner of the advowson is also called a chattel, and on that account said to pass to the executor. In the time of Queen *Elizabeth* a question arose whether it should pass by a grant of bona et catalla utlagatorum made by King *Edward* the Fourth. The Court of Common Pleas, in which the case arose, was not unanimous on the question. It does not appear that any judgment was given. Another point arose, upon which, it should seem, that judgment might have been given for the Queen, without deciding this point. The case will be found in **Owen*, 155, and 1 *Leon*. 201, and 4 *Leon*. 107. *194] *Periam*, J., is reported to have said that "the presentation was a chattel, for if the patron dieth, the executor shall present, for it was a chattel vested in the testator." *Anderson*, C. J., appears to have thought otherwise; he says, "A man cannot be said to have a chattel, but where he is possessed of it, and here this interest is but jus presentandi."

In the case of a donative whereof a natural person dies seised, a contrary rule has been laid down, and it has been decided that the executor is not entitled, 2 *Wils*. 150.

I have not, however, found any sufficient reason for a distinction. The reasons of the judgment do not appear in the report. It may have been that the Court thought the rule as to presentative benefices not well founded, and, therefore, not to be extended. A donative, however, is of so peculiar a nature that it does not seem to furnish any argument of general weight.

There is one instance mentioned in the books, which I must own I cannot but consider as an exception to the rule even in the case of a presentative benefice and a natural person.

If the king's tenant by knight service in capite died after vacancy, his heir within age, the king presented. It is said that this was a prerogative right, and that, therefore, no argument can be drawn from it. The king certainly may take a chattel by virtue of his prerogative, but there is no reason for his doing so when there exists another person capable of taking. And if the void turn had been severed from the advowson, and become a chattel, the prerogative right of wardship could not attach upon it, for that could only attach upon what *195] descended to the ward. If the heir were of full age, there is no authority for saying that the nature of the tenure would prevent the executor from presenting as in the case of tenure in socage. If the void turn were not considered as severed from the inheritance, but still remaining parcel of it, the king's right to present would be clear, and the right having once vested in the crown would remain in the crown by virtue of the prerogative, notwithstanding the heir attaining his age; and this upon the general rule, that a matter once vested in the crown cannot pass but by special grant of record. If the case of the tenant in capite be considered as an exception to the general rule, that case, as well as the case of a donative, will show, that even where a natural person is seised of the advowson, the right of the executor is not universally acknowledged. But the question now before the Court does not arise on the case of a natural person. The intestate was seised of the advowson in his politic, and not in his natural

capacity. If he had presented he would have presented not in his personal right, but in right of his prebend. And the question, therefore, is, Whether the rule admitted to prevail generally in the case of natural persons, and so far as regards a presentative benefice, with one exception only, if there be one, is to be extended to a person seised in a politic capacity? and I must say, I think it is not. I have not found any reason satisfactory to my own mind for considering the void turn as a chattel, on a question between the heir and executor of a natural person. The turn is not assets; nothing can be made of it for the payment of debts; and, therefore, the rule cannot be founded upon any consideration of that kind. I do not think the want of a satisfactory *reason [*196 to be a sufficient ground for overturning a rule grounded upon the authority of decisions, and of a practice long continued. But when, as at present, a question arises, whether such a rule shall be applied to a new case, I think the want of such a reason authorizes me to say that it ought not to be so applied, if any distinction between the cases can be discovered. It is true, that a successor in a sole corporation cannot, according to general rules, take a chattel by succession; but it is also true, that a sole corporation cannot in that character take a chattel; and though granted to the corporator and his successors, it will vest in him, not in his politic or corporate, but in his natural capacity; *Arundel's case* (a). And if a sole corporation cannot take a chattel by grant, how happens it that the void turn shall become a chattel vested in the corporator? Can vacancy so far change the nature of the thing as to vest that right in him in his natural capacity, which before vacancy he had in his politic capacity? The only authority that I have met with in support of such a doctrine is in *Fitzherbert, N. B.* 34 N. It is there said, "If a vicarage happen void, and before the parson presents he is made a bishop, yet he shall present to this vicarage, because it was a chattel vested in him." This proposition is not supported by a reference to any decision, and rests, therefore, upon the authority of *Fitzherbert*, which is certainly entitled to great respect. But if the opinion of that learned judge was grounded only upon the prevalent notion that a void turn was a chattel, and this can be shown inapplicable to the case of a politic person, it will lose its weight. Standing alone as it does, I cannot think it *sufficient to [*197 bind the judgment of the Court. In the case itself, however, there is no necessary change in the nature of the right; the presentment would be made by a person in whom the right had at one time vested. The same events might happen on the translation of a bishop, but I have not found by whom the presentation has been made under those circumstances. The presentation of the crown on the death of a bishop appears to me, for the reason that I shall mention hereafter, to be inconsistent with this opinion of *Fitzherbert*. And if this opinion of *Fitzherbert* be law, a presentation by the prebendary himself, will not be made in his politic, but in his natural capacity; not in right of his prebend, but in his personal right, and he might make his presentation in the same form as a natural person, and without naming himself prebendary, which I apprehend to be contrary to all practice, as it certainly is contrary to the last presentment to this very benefice, of which a copy is quoted at length by the Lord Chief Justice.

It is clear that the administratrix cannot present in right of the prebend, because the prebend is not vested in her. If, therefore, she be allowed to present, she must present in a right different from that in which the intestate would have presented, and this will not be conformable to the general rights of an administrator, which are those only that belonged to the person or personal property of the intestate. She is the administratrix of the personal rights and property of the intestate, but I find no authority for saying that she is the administratrix of his politic rights or property also.

It is not necessary in the present case to decide in whom the right is. It is

sufficient for the purpose of this judgment to say that it is not in the plaintiff. My *opinion would, however, have been less satisfactory to my own
 *198] mind, if I had not been able, also, to form an opinion as to the person entitled to present. Whether, with that addition, it will be satisfactory to others it is not for me to say. In my opinion the right is in the successor. But, if the nature of it be such as that, according to any rule of law, it cannot pass to the successor, yet it will not necessarily follow that it should pass to the executor; it may devolve upon the crown for want of title in any other person.

If the right be considered as parcel of the inheritance, it will pass with the inheritance to the successor. The only ground for saying that the right shall not pass to the successor, is that it has been severed from the inheritance, and is become a chattel. I have already intimated that I have found no satisfactory reason for preferring the executor to the heir, even of a natural person. The case in *Dyer* 283 a, has been often quoted on this point. The case was this: A patron granted the first and next presentation and advowson of a church, and the right of presenting to the same then being vacant, so that the grantee might nominate and present a fit person for that one turn only. Neither party presented within the six months, and the ordinary collated by lapse. The church became void again. Both parties presented; the clerk of the grantor was admitted. The grantee brought a quare impedit, and judgment was given against him. Six judges appear to have held that the grant of the present avoidance was void; "for," says the reporter, who was one of the six, "it is a mere personal thing annexed to the person of him who was patron in expectancy at the time of the vacancy; and also a thing in right, power and authority; and
 *199] also a chose in action, and in effect, the fruit and *execution of the advowson, and not any advowson. And yet the executors shall have it by privie of law." It is to be observed, that this was the case of a natural person. The expression "a mere personal thing," is suited to such a case; the phrase *a mere prebendal thing* would not be less suited to the case of a prebendary; the words "a thing in right, power, and authority," may be applied to a prebendary, a prebendal right, power, and authority; the words "the fruit and execution of the advowson and not the advowson," are applicable to either case. The only phrase that leads to the exclusion of the heir or successor is the expression "a chose in action;" and this is altogether unnecessary to the judgment, which may be well supported upon the other expressions used by the reporter. In the present times, I apprehend, such a question would be decided upon a more solid and less technical and subtle ground, namely, the prevention of simony.

If in the case before the Court it be held that the administratrix is entitled to present, it cannot be denied that a right generally annexed to a prebend will in the particular instance be exercised not merely by a person who has not the prebend, but by a person claiming as if he from whom the title is derived, and who had the advowson in his politic capacity, had, in fact, held it in his natural capacity. A decision to this effect will be contrary to the nature of the right. A decision against the administratrix will be contrary to the general rule by which a void turn is considered as a chattel in the case of a natural person. A choice must be made between these two difficulties. In my opinion the principles of law will be less violated by holding that the void turn is not a chattel in
 *200] this case of a corporation *sole, and thereby giving the presentation to the successor, who will present in right of the prebend to which the advowson belongs, than by holding it to be a chattel, and thereby severing the presentation for this turn from the prebend.

If it be said that such a severance takes place under a grant of the next presentation, which before the restraining statutes would have been good against the successor of a prebendary or bishop, and may still be good against the grantor himself (as in the case of the archbishops' options, which take effect under grants of the next avoidance made by the bishops of the province), and that in these

cases the right is exercised by a person in whom the politic character to which the right belonged, is not vested, I answer, that in those cases the right of the grantee is derived from the politic character of the grantor, who is capable of making the grant, and does, in fact, make it in his corporate capacity. Whereas an administrator can derive nothing from the politic character of the intestate, not being the representative of that character, but of the person only. And although a right to present on the next avoidance may be made a chattel by the act of a party, it does not follow that it shall become a chattel by operation of law. I am not aware that in any case the nature of a right is changed by the mere operation of the law working by itself without any act of the party. In the case of a natural person the nature of the right is not changed by giving the presentation to the executor. It is only a preference of one representative to another, the heir as well as the executor being a representative of the deceased. It may be asked, how, then, does the executor become entitled to rent due in the life of the prebendary? *I think there is a manifest distinction between [*201 a rent and a presentation. The rent is intended for the maintenance of the prebendary; it can be enjoyed and used in his personal capacity only, and not in his politic capacity. It is assets in the hands of his executor, and nothing remains to be done to give or to accompany the present right to receive it; whereas a presentation is an act to be done, and must be accompanied by a right to do it.

Thus far I have treated the question on principle only, and as if the law furnished no decision or authority in favour of my opinion. But the case of a bishop dying after avoidance, and before presentation, does, as I think, furnish an authority. In that event the king is entitled to the presentation, *Co. Litt.* 388 a, as he is if the benefice become void during the vacancy of the see. This is, however, said to be by virtue of the prerogative; and so in one sense it is, but the matter is open to observations similar to those which I have already made on the case of the tenant in capite. It seems agreed that the king's right is by reason of the temporalities vested in him. A ward, relief, heriot, &c. passed to the executor, and were assets in his hands. All of these, however, were considered in law as chattels from the beginning, and came to the bishop as chattels. Guardian in chivalry may grant, by deed or without deed, the wardship of the lands, or of the heir, or both, to another, *Lit. s.* 116. The reason for the power of assigning without deed given by Lord Coke, is, that the wardship is an original chattel during the minority, derived out of no freehold. *Co. Litt.* 85 a. If the turn had become a chattel, it must have ceased to be parcel of the temporalities, and must have vested in the bishop in his personal or *natural character, and so have passed to his executors, [*202 as the void turn in the present case is alleged to do. The inference to my mind, therefore, is, that the void turn in that case of a corporation sole has not been considered as a chattel, but as still remaining parcel of the inheritance and of the temporalities, and being thus vested in the crown, the prerogative right would attach upon it in full force, and it would remain in the crown notwithstanding restitution of the temporalities to the successor, such restitution not being accompanied with a special grant of the particular presentation. In *Co. Litt.* 388 a, the reason given against the right of the executor of the bishop is, that nothing can be made of the presentment. It is obvious that this reason will apply with equal force to the executor of a natural person, and it seems, therefore, that this reason cannot have been the foundation of the rule, nor can I think that the rule is founded upon any other reason, except that of the presentation remaining and passing as part of the temporalities.

I have hitherto purposely abstained from offering any argument from the presumed intention of the founder of the prebend. We are not judicially informed of the foundation of this particular prebend. Speaking of prebends generally, I believe their foundations to be various, some by the diocesan, some by the crown, and some by private persons. But whoever may have been the founder, I con-

ceive the object of the foundation to have been the maintenance of the prebendary, and that where an advowson formed part of the foundation, it was, at least, thought probable by the founder that the prebendary might become the incumbent, and so derive his maintenance from the benefice, if it was not absolutely *203] intended that he should do so. This opinion or intention of the founder will be best carried into effect by holding the void turn to be parcel of the inheritance, and so to pass to the successor, because the successor will be thereby enabled to present himself, which he cannot do if the turn passes to the executor of his predecessor. And if the annexation of the advowson to the prebend be considered as a trust intended to be vested in the prebendary, and to be executed only by the prebendary, this intention will certainly be defeated by allowing an executor to present. It is true, that before the statute 13 & 14 *Car. 2*, a prebendary might have been a layman, and incapable of holding the benefice; but this was certainly contrary to general practice, and I apprehend, also, contrary to the general policy of the law. And although this fact may diminish the weight of observations derived from the ecclesiastical character of a prebendary, yet it does not affect his corporate character nor the nature of the supposed trust. My judgment is grounded upon that character, and it is upon consideration of the nature of the right, as vested in the politic and not in the natural person, and upon the want of any sufficient reason for the rule that has prevailed, and must still prevail, unless altered by an authority superior to that of this court in the case of natural persons, that, I think, that rule ought not to be applied to the case of a corporation sole, and that the void turn must be considered as parcel of the inheritance passing to the successor, and not as a chattel severed from it and passing to the personal representative of the prebendary.

Judgment reversed.

*204] *BROWNING and another *v.* AYLWIN and another.

In an action against a sworn broker of the city of *London* for negligence in making a contract, the Court will, on motion, compel him to produce his books, in order to enable the plaintiff to inspect and take a copy of the contract.

In *November* 1826 the plaintiffs employed the defendants, who were sworn brokers of the city of *London*, to purchase for them thirty-nine casks of fine olive oil, then the property of one *Barto Valle*. The defendants delivered to the plaintiffs a bought note, purporting that defendants bought for plaintiffs' account the oil in question. *Barto Valle* refused to deliver it, alleging that he was not bound by any contract so to do. In fact, the sold note delivered by the defendants to *Barto Valle*, differed from the bought note delivered to the plaintiffs. The latter, therefore, could not enforce the contract, and they brought the present action against the defendants, to recover damages for the loss which they had sustained in consequence of their being unable to enforce the contract. The sold note delivered to *Barto Valle* had been returned by him to them. It is a part of the condition of the bond entered into by the defendants with the corporation of the city of *London*, on their becoming brokers, that they shall enter in a book to be kept for that purpose, all contracts made by them, and that either of the parties to such contracts, whether buyer or seller, shall be at liberty to inspect the original entries of such contracts. The plaintiffs had applied to the defendants for liberty to inspect their books, which was refused. *Parke* had obtained a rule nisi, calling upon the defendants to produce their books, in order

that the plaintiffs might inspect and take a *copy of the original contract entered in the defendants' books. [*205]

F. Pollock now showed cause, and contended that the Court ought not in an action against a party for negligence, to compel him to produce his private books, as evidence against himself.

Parke contrâ, contended, that where an instrument was in the hands of an opposite party, as a trustee, the Court would compel him to produce that instrument; and that here the broker was a public officer, and had entered into a bond with the city of *London* to make entries in his books of all contracts, and to allow the parties to inspect the same. He cited *King v. King (a)*, *Morrow v. Saunders (b)*, and *Tidd's Practice*, 623. The entry of a contract in the broker's book, signed by him, is the best evidence of the contract. *Groom v. Affalo (c)*, only shows that where there is no such entry signed by the broker, the bought and sold notes are sufficient.

BAYLEY, J. We think the broker is the agent of the parties, and in the nature of a public agent, and, therefore, that the parties are entitled to the inspection of the documents.

Rule absolute.

(a) 4 *Taunt.* 686.

(b) 1 *Brod. & B.* 318.

(c) 6 *B. & C.* 117.

*MEMORANDUM.

[*206]

In this term *Thomas Andrews, Henry Storks, Edward Lawes, Edward Ludlow, Henry Alworth Merewether, William Oldnall Russell, David Francis Jones, John Scriven, Henry John Stephen, and Charles Carpenter Bompas*, were called to the degree of the Coif, and gave rings with the following mottos: the first seven, "More majorum;" and the last three, "Lex ratione probatur."

W. MORRANT and ANN his Wife v. GOUGH, Devisee, and T. SANDY, as Heir, of certain Lands, &c. of THOMAS SANDY, deceased (a).

Where a party, who by writing obligatory (without any penal sum), had bound himself to pay to *A. B.* an annuity of 20*l.* a year for her life, devised his estates to trustees upon certain trusts, until his son should attain the age of twenty-one years: Held, that the estate of the trustees ceased upon the death of the son under the age of twenty-one, all the purposes of the trust being then at an end; and that the trustees were only liable to pay to *A. B.* such arrears of the annuity as became due before the son's death.

DEBT on bond, made by *T. Sandy*, whereby he bound himself unto the plaintiff *Ann*, "in the sum of 20*l.*, to be paid yearly during her natural life (at the decease of the said *Ann* to return to the heir of *T. Sandy*). The declaration averred, that on the 20th of *March* 1797, *T. Sandy* died; that after his

(a) The judges of this court sat, as on former occasions, from *Thursday* the 5th day of *July* to *Wednesday* the 11th day of *July* inclusive, and again from *Monday* the 29th day of *October* to *Monday* the 5th day of *November* inclusive. During that period, this and the following cases were argued and determined.

*207] death, viz. on the 5th of *September* 1824, 50*l.* for two years and a half *of the said yearly payment or sum of 20*l.*, became and was still due and in arrear to the plaintiffs," &c.

The defendant, *Gough*, pleaded (amongst other things), thirdly, that *T. Sandy* on, &c. made his will, whereby he bequeathed to *Mary Sandy*, his wife, the sum of 20*l.* yearly, during her natural life, to be paid her by his executors, from such of his estates as were thereby devised to them in trust; and he appointed the defendant and *C. Sandy* his executors and trustees, and gave and devised to them all his freehold and leasehold messuages, tenements, and lands, &c., and also all his bonds, notes, and securities for monies, in trust for his son, *T. Sandy*; and that they, defendant and *C. Sandy*, should receive the rents, profits, and interests thereof, and apply the same for the purpose of maintaining and educating his son, *T. Sandy*, until he should attain the age of twenty-one years; and the testator did thereby authorize, empower, and direct his said executors, from and after his decease, and until his son should attain the age of twenty-one years, to manage and improve the estate and fortune of his said child, according to their discretion; and that they should pay unto and account with his said son for such rents, interest, produce, and improvements as should arise from or be made or produced from such estates and monies, when he should attain the age of twenty-one years; and if *Mary Sandy*, testator's wife, should be living when the son attained that age, then the executors and trustees should retain and hold in trust as much of the testator's estates as would secure to his said wife the 20*l.* a year. Averment, that testator's wife died on the 13th of *July* 1794, before the testator, and that he died on the 20th of *March* 1797,

*208] without revoking or altering his will; that the son *was then living, and afterwards, on, &c. and before the exhibiting of the plaintiff's bill, died under the age of twenty-one years; "whereupon all the estate, interest, right, and title of the said *C. Sandy* and defendant in and to the said premises in the will mentioned, the same being all the lands, tenements, and hereditaments whereof the said testator was seised at the time of his death, utterly ceased and determined." And before the exhibiting of the bill of the plaintiffs, to wit, on, &c., all the monies which at any time during the lifetime of the said *T. Sandy*, the son, became due and payable, for and in respect of the yearly sum of 20*l.*, in the bond mentioned, was paid and satisfied to the plaintiffs. Replication, that before the commencement of this action and after the death of *T. Sandy*, the testator, and during the life of *T. Sandy*, the son, to wit, on, &c. defendant had notice of the bond having been made as aforesaid, and being then outstanding in the hands of the plaintiffs; and that the rents, issues, and profits of the said lands, tenements, and hereditaments so devised to the defendant as aforesaid, arising and issuing thereout, for and during the time which elapsed between the death of the testator and the death of *T. Sandy*, his son, did amount to much more than sufficient to pay and satisfy to the plaintiffs all the monies which at any time during the lifetime of the said *T. Sandy*, the son, became due and payable for and in respect of the said yearly sum of 20*l.* in the bond mentioned, and wherewith the said debt in the declaration mentioned, and the damages could, might, and ought to have been satisfied. Demurrer and joinder.

*209] *Carter* in support of the demurrer. The defendant is charged as devisee of the real estate of the testator, but the plea shows that he neither has it now, nor had it at the time when the demand accrued. The devisees in trust took only a chattel interest. The son took, by implication, a vested remainder in fee, and upon his death the estate of the trustees ceased. *Goodtitle v. Whitby* (a), *Tomkins v. Tomkins*, there cited by Lord Mansfield, *Lomas v. Holmeden* (b), *Mansfield v. Dugard* (c), *Goodright v. Parker* (d). If the trustees received during the son's life more than sufficient to discharge all de-

(a) 1 Burr. 228.

(b) 1 Eq. Ca. Ab. 195.

(c) 3 P. Wms. 176.

(d) 1 M. & S. 692.

mands that accrued before his death, they are bound to account for the surplus to the personal representative of the son, and cannot apply it to the discharge of any demand which became due at a time subsequent to his death.

Manning contra. The devisees in trust took an estate in fee. They were directed to apply the rents and profits in a certain mode during the minority of the testator's son, and on his attaining full age, they were to retain so much as would suffice to pay the annuity devised to the testator's wife. [*Bayley, J.* That devise lapsed. *Holroyd, J.* If she had survived her husband would the estate of the trustees have extended beyond her life?] They were to exercise their own discretion as to what should be retained. But, secondly, supposing they had an estate only co-extensive with the life of the son, still the whole profits received are liable to the payment of this debt by force of the statute *3 & 4 W. & M. c. 14, which enacts that all devises shall be deemed fraudulent as against specialty creditors. Now if the estate had been devised in fee to the defendant, the plaintiff would at any time have had a right to recover the annuity out of the rents and profits whenever received, and the testator had no power to place the creditor in a worse situation by devising particular interests. [*Littledale, J.* Upon these pleadings would the devisee be liable personally, or would the execution be against the land?] The heir and devisee are liable in the debt, and, therefore, they must be personally liable. [*Littledale, J.* Not unless they plead a false plea, and if the execution is against the land, that cannot affect the present defendant, who has nothing to do with it.]

Carter in reply. This is not an ordinary debt coming within the provisions of the 3 & 4 W. & M. c. 14. There is no debt which was due from the testator, the bond was not made with a penalty which could, on a forfeiture, become a debt in law; each annual payment when it becomes due, constitutes the only debt, and when that has been paid, there is no debt until the next day of payment arrives.

BAYLEY, J. It appears to me that the plea in this case is good, and that the replication does not give a sufficient answer. The bond in question is not an ordinary money bond, but an instrument whereby the testator bound his heirs, &c., to pay the plaintiff *Ann 20l.* per annum for her life. By a devise in fee, the devisee becomes the *hæres factus* for ever, and would therefore be liable to pay the annuity as long as it *endured; but if the devise be for a shorter period, then the devisee is only liable during the period for which he is made the heir, and when he ceases to have the estate it descends to some other person, and the obligation passes along with it to that person. Had, then, the present defendant an estate in fee? It appears by the will as stated in the plea, that the trustees had certain duties to discharge until the son should attain the age of twenty-one years; but after that period there was nothing to be done by them, and it is a general rule that a devise to trustees ceases as soon as the purposes of the trust are at an end. The provision for the annuity to the wife, if she should be living when the son attained twenty-one, was conditional, and as she died before the testator, the whole burthen that attached upon the estate during the son's life had been discharged when that event happened, and the estate, consequently, would, before the commencement of this action, go to the person next entitled. Inasmuch, then, as the present claim did not attach upon the estate while it was in the hands of the devisee, the action against him cannot be maintained.

HOLROYD, J. It is perfectly clear that the trustees took an estate only until the son died. As to the other point, this is not the case of a bond with a penalty which could be forfeited, and so become a debt in law; and, therefore, the person to whom the land was given, was only bound to pay the annuity during the period for which he had the land.

LITTEDALE, J. I am entirely of the same opinion. Here the trustee took a particular interest only, and is not liable for any thing which accrued due after that *interest expired. Had the bond been made with a

penalty and became due in the lifetime of the testator, or during the existence of the interest devised to the trustee, he might have been liable to pay the whole; but this bond is for a sum of 20*l.* accruing due year by year, and the devisee could only be bound to pay what accrued due in the time of the testator, or during his own interest. The statute 3 & 4 *W. & M. c. 14*, says, that devises shall be deemed fraudulent against creditors of the testator. The plaintiffs were not creditors in the time of the testator, and they have received all that for which they became creditors in the time of the devisee. That statute, therefore, does not affect the question, and as the defendant no longer has the land, he cannot be charged in this action.

Judgment for the defendant.(a)

(a) On the subject of fraudulent devises, see 2 *Wise. Saund.* 7, n. 4.

HOLDERNESS and another, Assignees of FOXTON, a Bankrupt, v. W. and J. COLLINSON.

A wharfinger at *Hull* claimed a general lien for wharfage, labourage (comprising landing, weighing, and delivery), and warehouse rent. The claim for wharfage was admitted; but as to the residue, upon a case, stating that in *Hull* such claim had, in a great majority of instances, been acquiesced in, but in others had been rejected, and that the right had long been, and still was, a disputed point there: Held, that the claim could not be supported, as the right of general lien arises out of an express or implied contract, of which the former had not been made, and the latter could not be inferred from the circumstances stated in the case.

TROVER for flax and other goods of the bankrupt. Plea, not guilty. At the trial before *Bayley, J.*, at the last *Leint* assizes for *York*, a verdict was found for the plaintiffs, subject to the opinion of this Court upon the following case. The defendants are wharfingers and owners of a wharf and warehouse at *Hull*.

*213] *Foxton* the bankrupt was a merchant at *Hull*, and previous to *his bankruptcy, from time to time landed goods at the defendants' wharf, and placed them in their warehouse, part of which were delivered by the defendants to the bankrupt before his bankruptcy. At the time of *Foxton's* bankruptcy there were lying in the defendants' warehouse above 9 tons of flax, 848 bags, and 20 bundles of mats, the property of *Foxton*. The flax was the remainder of a larger parcel of 17½ tons, which had been landed at the defendants' wharf, placed for some time in their warehouse, and in part delivered to *Foxton* previous to his bankruptcy. At the time of the bankruptcy there was due to the defendants by *Foxton*, the sum of 72*l.* 14*s.* 2*d.*, which included not only the charges due for the wharfage, labourage (which comprises landing, weighing, and delivery), and rent of the entire 17½ tons of flax, and the bags and mats; but also charges of the same nature, due to them in respect of other goods which had been delivered to *Foxton* before his bankruptcy. After that event, and before the commencement of this action, the plaintiffs tendered to the defendants the sum of 41*l.* 10*s.* 3*d.*, which included the entire amount of all the charges due to the defendants for wharfage generally; and also all charges of every kind (including wharfage, labourage, and rent), up to the time of the tender, due to them in respect of the entire 17½ tons of flax, and the bags and mats, and demanded of the defendants the delivery of the flax and bags, and mats in their possession. This the defendants refused, claiming a general lien on the said goods for wharfage, labourage, and rent; whilst the plaintiffs insisted that their general lien extended to wharfage charges alone, and not to labourage or rent;

and it was agreed by both parties, that it should be taken as *proved, [*214 that in many instances where proprietors of goods have become insolvent, the wharfingers in *Hull* had claimed to have a lien on the goods in their possession, for the amount of their running account with such insolvent, comprising therein charges for wharfage, labourage, and rent, not only of the goods then in the wharfingers' possession, but of such as had been delivered before the owner's insolvency, and which claim had been acquiesced in and paid by the insolvents or the persons legally representing them; but that in other instances such claim for a general lien had been made, but not acquiesced in; and the same has long been and continues to be a disputed point, but that the instances of acquiescence in the claim greatly preponderate. And it was further agreed, that the Court might draw such inference from these facts as a jury might have drawn.

F. Pollock for the plaintiffs. The tender made in this case was sufficient to cover any claim for which the defendants had a lien on the bankrupt's goods. The courts have always taken a distinction between specific and general liens; the former have been considered as a matter of the purest equity and justice, but the latter have been looked at with jealousy and suspicion. The right of general lien does not exist by the common law, it must, therefore, arise out of an agreement between the parties, *Rushforth v. Hadfield* (a). Usage may be evidence of an agreement, but as in this case it is found that the usage has been both ways, and that the point has always been in dispute at *Hull*, no inference from the usage can be drawn in favour of the defendants. A general lien for wharfage must be admitted, and if *any labourage be a part of wharfage, for that [*215 also the defendants had a lien, but for that they have been satisfied, and the residue of the claim for labourage is the same as that for warehouse rent, which cannot be supported.

Parke, contra. The only question is, whether the general lien of a wharfinger (which is admitted as to part,) extends to the residue of the claim set up in this case? It ought, in reason, to extend to all charges connected with the business of a wharfinger. The labourage here described is the landing, weighing, and delivering of the goods; and wharfage, as used here, means merely the use of the wharf. But it has been settled in many cases that a wharfinger has a general lien "for the balance of his account as a wharfinger," not "for the use of his wharf;" and the question is, Whether the former expression does not include a compensation for something more than the mere use of a wharf? In *Naylor v. Mangles* (b), Lord Kenyon said, that the usage for wharfingers to have a general lien had been so often proved, that it should be considered a settled point. It is not expressly stated in that case for what demands the lien was claimed, but as the goods are described as lying in the warehouses of the defendant, a wharfinger, it must be inferred that a part of the claim was for warehouse rent. The law, as laid down in that case by Lord Kenyon, was afterwards adopted by Lord Eldon in *Spears v. Hartley* (c), and by Lord Alvanley in *Richardson v. Goss* (d). It was not necessary to prove an universal practice in favour of the right claimed; the *Court will, from the great [*216 preponderance of instances in which it has been acquiesced in, infer that the parties in this case contracted to have a general lien. But it will suffice to defeat the plaintiff's action if the defendant be entitled to a lien for labourage; it is not necessary to contend for the more extensive claim of warehouse rent, as to which, however, there was a difference of opinion amongst the learned Barons of the Exchequer in *Rex v. Humphrey* (e).

BAYLEY, J. The onus of making out a right of general lien lies upon the wharfinger. There may be an usage in one place varying from that which prevails in another. Where the usage is general, and prevails to such an extent

(a) 7 East, 224.

(b) 1 Esp. 109.

(c) 3 Esp. 81.

(d) 3 B. & P. 119.

(e) 1 M'Leod & Young, 175.

that a party contracting with a wharfinger must be supposed consant of it, then he will be bound by the terms of that usage. But then it should be generally known to prevail at that place. If there be any question as to the usage, the wharfinger should protect himself by imposing special terms, and he should give notice to his employer of the extent to which he claims a lien. If he neglects to do so, he cannot insist upon a right of general lien for anything beyond the mere wharfage. An attempt has been made to draw a distinction between the claim for labourage and that for warehouse rent, but the right to either arises out of an express or implied contract, and the case states that the claim to both those items is a point in dispute at *Hull*. In the face of such a statement, it is impossible to infer that the bankrupt landed his goods at the defendants' wharf upon the terms of giving a general lien in respect of those demands, and waiving the dispute. Many of the instances of acquiescence may have proceeded upon the smallness of the demand, a desire to avoid litigation, or to have immediate possession of the goods, and this greatly diminishes the effect of them. For these reasons I think that the plaintiffs are entitled to recover.

HOLROYD and LITLEDALE, Js., concurred.

Postea to the plaintiffs.

R. JONES v. FLEEMING and J. JONES.

A. was employed as storekeeper by B. and C., who were joint adventurers in a mine, and he was authorized to draw bills on B. for money laid out on account of the mining company. The bills were discounted by a banker, and the payment of them was guaranteed to him by B. and C. B. having been arrested, A., in order to provide funds to procure B.'s discharge, drew on B. a bill purporting to be on account of the mining company. The banker discounted the bill, and paid the amount to B. C. was afterwards compelled to take up the same in consequence of his guaranty. In an action brought by A. against B. and C. for his salary, it was held that C. could not set off the amount of the bill.

ASSUMPSIT for work and labour. Plea, by *Fleeming*, non assumpsit, and notice of set-off for money paid, had, and received, &c.; by *J. Jones*, non assumpsit. At the trial before *Burrough, J.*, at the last Spring assizes for *Cornwall*, it appeared that the defendants were co-proprietors and adventurers in the *Friendly* and *St. Agnes* mines, in *Cornwall*. In June 1824, the plaintiff entered into their employ, at a yearly salary of 80*l.*, as storekeeper of the *St. Agnes* mine, and as such was in the habit of drawing bills upon *J. Jones* and Son for the use of the mine, which were discounted by *Magor, Turner* and Co., bankers at *Truro*. On the 17th of September 1824, the defendants wrote and sent the following letter to that firm: "Agreeably to your request, we guarantee that such bills as may hereafter be drawn for the *Friendly* and the *St. Agnes* consolidated mines by Mr. *Richard Jones* shall be regularly retired, and he will produce to you at the time a letter specifying the amount required." At the end of September 1824, *J. Jones* having been arrested in *Cornwall*, the plaintiff (his brother) drew and delivered to *J. Jones* the following bill, directed to *J. Jones* and Son: "Two months after date pay to my order the sum of 120*l.* for value received on account of *Friendly* mines." *J. Jones* accepted the bill in the name of the firm, and sent it to *Magor, Turner* and Co., who discounted it, and he paid the money to the sheriff's officer, and procured his discharge. *R. Jones* when he drew the bill knew to what purpose the money was to be applied. The bill having been dishonoured, *Fleeming* was called upon and paid it, under his guaranty, out of his own funds; and having discovered the nature of the transaction, in December 1824 dismissed

the plaintiff from his employment. The plaintiff claimed a year's salary, for which this action was commenced. The learned Judge thought that the defendant *Fleeming* had a right to set off the amount of the bill for 120*l.* which the plaintiff had drawn for the purpose of paying the private debt of *J. Jones*, and directed a nonsuit. In *Easter* term a rule nisi for a new trial was obtained, and now

Carter showed cause, and contended that as the money produced by the bill for 120*l.* was not applied to the use of the mines, and the plaintiff *R. Jones* was consensual of and a party to the misapplication of it, he was responsible for the amount, which must be considered as paid to his use, or as received by him to the use of the defendants, his employers. [*Bayley*, J. How can *J. Jones* insist upon a right of set-off, on the ground that money has been misapplied, when he concurred in the payment?] When the set-off is relied on by the defendant **Fleeming*, an innocent party, the plaintiff ought not to be allowed to set up his own fraud as an answer. [*219]

Halcomb contra, was stopped by the Court.

BAYLEY, J. I think that there must be a new trial in this case. It appears that an order was made by the plaintiff upon the partnership, but *Fleeming* alone paid that draft, when at maturity, out of his own funds. *Fleeming* and *J. Jones* have never jointly paid any money to the use of the plaintiff, and the payment by one cannot be set off in this action. Besides, it appears that the money produced by the bill was not in fact paid to the plaintiff, but to *J. Jones*. It, therefore, seems to me that the nonsuit was wrong, although the plaintiff by his share in the transaction may have subjected himself to a special action on the case.

Rule absolute.

BISHOP and another v. PENTLAND.

A ship having goods on board which were insured, but warranted free from average, unless general, or the ship should be stranded, was compelled in the course of her voyage to put into a tide-harbour, and was there moored alongside a quay, in the usual place for ships of her burden. It became necessary, in addition to the usual moorings, to fasten her by tackle to posts on the shore, to prevent her falling over upon the tide leaving her. The rope with which she was so fastened, not being of sufficient strength, broke when the tide left the vessel, and she fell over upon her side, and was thereby stove in and greatly injured: Held, that this was a stranding within the meaning of that word in the policy, and that the underwriters were liable for a partial loss, although the stranding might have been occasioned remotely by the negligence of the crew in not providing a rope of sufficient strength to fasten the vessel to the shore.

ASSUMPSIT on a policy of insurance on goods warranted free from average, unless general, or the ship should be stranded. The defendant paid into court 49*l.* 11*s.* 11*d.*, the amount of the general average on the goods. The plaintiffs claimed particular average and a partial loss. At the trial before [**220* *Hullock*, Baron, at the last Spring assizes for *Lancaster*, a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case:

On the 21st of *November* 1824, the ship on which the goods were loaded was, whilst proceeding on her voyage, necessarily obliged to go into the harbour of *Peel*, in the *Isle of Man*, which is a tide harbour, and dry every tide. She was brought in by some fishermen belonging to *Peel*, who had gone out to her assistance, and under whose directions she was moored alongside the quay where ships of her burden and build coming into the harbour of *Peel* usually

are moored, and in as safe a situation as could be found. The ship was very sharp built, which rendered it necessary, in addition to the usual moorings, to lash her, by a tackle fastened to the mast, to posts upon the pier, to prevent her falling over upon the tide leaving her. For this purpose, *J. Sayle*, one of the fishermen, and acting as pilot, asked the mate of the vessel for a rope, who gave him one, and which rope one of the witnesses stated that the mate informed him was a new rope, though the witness did not see it. The fisherman objected to it, stating that it was insufficient for the purpose intended; to which objection the mate replied, "that it was sufficient to drag the mast out;" and the rope was thereupon made use of in lashing the vessel to the pier. The state of the harbour where the vessel lay would have had no effect upon her if she had been properly lashed; and she would have sustained no damage in the harbour if the rope and lashing had not given way, and which rope was used contrary to the opinion of *J. Sayle*, the fisherman. On the morning of the 23d November, when the tide was *out, the tackle by which the ship was lashed to the posts broke, and the ship fell over upon her side, by which she was stove in, and greatly injured. But for the breaking of the tackle, the ship would have remained in the same situation that ships usually are in *Peel Harbour* during ebb, and no accident would have occurred.

F. Pollock for the plaintiff. The ship was stranded within the meaning of that word in the policy; and if so, the underwriters are liable, although the stranding may have been caused by the negligence of the crew. *Busk v. The Royal Exchange Assurance Company (a)*, and *Walker v. Mailand (b)*, are authorities to show that the underwriters on a policy of insurance are liable for a loss arising immediately from a peril insured against, but remotely from the negligence of the master and mariners. Then, if the property insured in this case was damaged by a peril insured against, viz. from coming in contact with the salt water, although that may have been remotely occasioned by the negligence of the crew, the underwriters are liable. *Carruthers v. Sydebotham (c)* is expressly in point. There a pilot having charge of a ship, negligently run her aground, and that was held to be a loss by stranding. So in *Barrow v. Bell (d)*, where in the course of the voyage the ship was by tempestuous weather forced to take shelter in a harbour, and, in entering it, struck upon an anchor, and being brought to her moorings, was found leaky and in danger of sinking, *and on that account was hauled with warps *higher up the harbour, where she took the ground, and remained fast there for half an hour, it was held that this was a stranding within the meaning of the policy.

Kaye contra. There was not any stranding within the meaning of the policy, and if there was, it was occasioned by the negligence of the crew; and the underwriters, therefore, are discharged. This case differs from *Carruthers v. Sydebotham (e)*, because there the vessel was moored contrary to the usual way, out of the usual place, and against the express orders of the harbour-master; but here the vessel was moored in the usual way and in the usual place. It is quite clear, that the mere taking of the ground in the ordinary course of the voyage is not a stranding within the meaning of the policy; *Hearne v. Edmunds (f)*. Besides, the vessel in this case fell over by the breaking of the rope. The supposed stranding, therefore, was occasioned not by a peril of the sea, but by the breaking of the rope. In *Thompson v. Whitmore (g)* a ship was hove down on the beach, within the tide-way, to repair; the tide knocked away the shores which supported the vessel, and she was thereby bilged and damaged; and this was held not to be a loss by the perils of the sea. That case is in point to show that the vessel going over in this case was not occasioned by a peril of the sea, but by the breaking of the rope, which was not a peril insured against.

(a) 2 B. & A. 73.

(d) 4 B. & C. 736.

(b) 5 B. & A. 171.

(e) 4 M. & S. 77.

(c) 4 M. & S. 77.

(f) 1 Brod. & Bing. 388.

(g) 3 Taunt. 227.

P. Pollock in reply. *Thompson v. Whitmore* is at variance with a later decision of this court in *Fletcher v. Inglis* (a). In that case a transport, in the service of *government, was insured for twelve months, during which [*223 time she was ordered into a dry harbour, the bed of which was uneven, and on the tide having left her she received damage by taking the ground; and, after argument and time taken for consideration, that was held to be a loss by a peril of the sea. In *Rayner v. Godmond* (b), during the voyage of a ship upon an inland navigation, it became necessary, in order to repair the navigation, to draw off the water; and the ship having been placed in the most secure situation that could be found, when the water was drawn off, went by accident upon some piles, which were not previously known to be there; it was held that this was a stranding within the usual memorandum in the policy, the accident having happened not in the ordinary course of the voyage. So here the loss happened from the breaking of the rope, which was an unforeseen accident, not in the ordinary course of the voyage.

BAYLEY, J. There are two questions in this case. First, Was the ship stranded? and secondly, if it was, Was there such negligence in the master and mariners of the vessel as to exonerate the underwriters from the loss? The cases of *Busk v. The Royal Exchange Assurance Company* (c) and *Walker v. Maitland* (c), establish as a principle, that the underwriters are liable for a loss, the proximate cause of which is one of the enumerated risks, though the remote cause may be traced to the negligence of the master and mariners. Assuming, therefore, that those who had the care of the ship were guilty of negligence, in not *providing a rope of sufficient strength to fasten the [*224 vessel to the shore, and that their negligence was the remote cause of the loss, still, if the proximate cause was a peril insured against, the plaintiffs are entitled to recover. Then, Was this ship stranded? A stranding may be said to take place where a ship takes the ground, not in the ordinary course of the navigation, but by reason of some unforeseen accident; and that rule is consistent with the decision in *Hearne v. Edmunds* (d). In *Curruthers v. Sydebotham* (e) a ship fastened by a rope to the shore fell over on her side when the tide left her, and that was held to be a stranding; and in a subsequent case of *Rayner v. Godmond* (f), it was held, that a ship taking the ground from accident, and not in the ordinary course of the voyage, was a stranding. Did the vessel in this case take the ground in the ordinary course of navigation, or from an unforeseen accident? It appears that she was obliged to go into a tide harbour, which was dry every tide, and was there fastened by a rope to posts on the shore, to prevent her going over. Upon the ebbing of the tide, the rope not being sufficiently strong, gave way, and the vessel fell over upon her side. I think, that so long as the vessel was on the ground, and lashed to the posts on shore, she was not stranded; but when she fell over on her side, and lay on the ground in that position, she was stranded. The falling over, then, was not in the ordinary course of the voyage, but in consequence of an unforeseen accident, out of the ordinary course of the voyage, viz. the breaking of the rope.

*HOLROYD, J. It seems to me that in this case there was a stranding [*225 within the meaning of the policy. It is clearly established, that if there be an actual stranding, although it arise from the negligence of the master and mariners, the underwriters are liable. Here the damage accrued in consequence of the vessel's falling over and taking the ground. That falling over was caused by an accident not in the usual course of navigation. I think, therefore, that the vessel was stranded within the meaning of the policy, and that the plaintiffs are entitled to recover.

LITLEDALE, J. There seems to be some contrariety of opinion as to the meaning of the term stranding. That term, in its ordinary sense, means taking

(a) 2 B. & A. 315.

(b) 5 B. & A. 225.

(c) 5 B. & A. 171.

(d) 1 Brod. & B. 388.

(e) 4 M. & S. 77.

(f) 5 B. & A. 225.

the ground, or being on the strand, but that is not the meaning of the word in a policy of insurance. For this vessel's taking the ground in the first instance was not a stranding within the meaning of the policy. I think it immaterial whether a vessel takes the ground when she is in the course of or at the end of a voyage. But when a vessel is on the ground, or strand, in such a situation as she ought not to be in while prosecuting the voyage on which she is bound, that is a stranding within the meaning of the policy. In *Hearne v. Edmunds* (a), the taking the ground was no more than was usual with vessels of the same class proceeding up the river to *Cork*. When the vessel was on the ground, she was in that situation in which such a vessel proceeding on that voyage usually is in the river when the tide is low. So here, as long as the vessel lay on the ground fastened to the shore by the rope, she was not stranded; but *226] when the rope broke, and she fell over on her side, and *lay on the ground, in that position I think she was stranded within the meaning of the policy, because she then ceased to be in a situation in which a vessel driven by stress of weather into the port of *Peel* usually is.

Postea to the plaintiff.

(a) 1 B. & B. 368.

REX v. The Inhabitants of *Lytchet Matraverse*.

A pauper, twenty years of age, whose father was settled in the parish of *A.*, contracted to serve the captain of a ship two summers and a winter. He continued in the service until he attained twenty-one years of age; but before that time his father acquired a settlement in another parish: Held, that the pauper was not emancipated before he attained the age of twenty-one, and consequently, that his settlement followed that of his father.

Upon appeal against an order of two justices, whereby *J. Orchard* and his wife were removed from the parish of *Lytchet Matraverse*, in the county of *Dorset*, to the parish of *Saint James*, in the town and county of *Poole*, the sessions quashed the order, subject to the opinion of this Court on the following case:—

The pauper never acquired any settlement in his own right: his father was settled in the parish of *Lytchet Matraverse*; and whilst he was so settled, the pauper hired himself by contract to serve for two summers and a winter on board a ship trading to *Newfoundland*. In the month of *February* or *March* 1816, being then twenty years of age, he entered upon that service, in which he continued during the stipulated time. There was no evidence that the father exercised any control over him during the period of his service. He attained his age of twenty-one years before his return from the voyage. Shortly after he had left this country, and before he had attained his age of twenty-one years, his father acquired a settlement in the parish of *St. James*, in the town and county of *Poole*. On the pauper's return from *Newfoundland*, he went to reside in his father's house, who before that time had left *Poole*, and returned *227] to *Lytchet Matraverse*. After a few weeks he left his father's residence, and lived with his sister, working on his own account as well then as during his residence with his father. The sessions were of opinion that the pauper was emancipated at the time when his father acquired the settlement in *Poole*.

Barstow in support of the order of sessions. The pauper was emancipated at the time when his father gained a settlement in the parish of *St. James, Poole*. For when he was only twenty years of age he had entered into a contract to

serve for two summers and a winter, and he served for the stipulated time. The pauper, therefore, contracted a relation which wholly and permanently excluded the parental control during his minority, and *Rex v. Wilmington* (a) is an authority to show that he was thereby emancipated. In *Rex v. Rotherfield Greys* (b), *Bayley, J.*, speaking of a soldier, says, "If he had remained in the army till the age of twenty-one years, his emancipation would undoubtedly relate back to the time of his enlistment." So in this case, the emancipation relates back to the time of the contract, and, consequently, the settlement of the pauper did not shift with that of his father.

Bond and Gambier contra. The pauper's emancipation does not relate back to, and is not spread over the whole period of, his absence. The doctrine of relation is confined to those cases in which the son contracts an engagement, which wholly and permanently excludes the parental control. This is not a case of *that description. *Rex v. Cowhoneyburne* (c) only shows that [*228 the pauper became emancipated when she attained twenty-one, but not from the time when, being under age, she ceased to be part of her father's family. *Rex v. Uckfield* (d) shows that a child being away from his father, and having a separate provision, is not thereby emancipated. The dictum of *Bayley, J.*, in *Rex v. Rotherfield Greys* (e) is the only authority to show that the doctrine of relation applies to the subject. That was the case of a soldier, and is very different from the present. He had enlisted for life, and by his enlistment put himself wholly under the control of the crown. The king is pater patriæ. His authority is paramount to that of the subject, and wholly supersedes it. But between subject and subject the case is different. Where the child enters into an engagement with a subject, the parental authority is delegated, and not wholly destroyed. If it was held to be wholly annihilated, then it would follow that about one-third of the poorer part of the infant population of the country would be in a situation entirely independent of parental control. The present case, therefore, is not one in which the engagement is inconsistent with the relation of father and child. But *Rex v. Huggate* (f) is an authority to show that the pauper in this case was not emancipated before he attained the age of twenty-one years. There the relation contracted was that of master and apprentice. The apprentice was bound, and served till the age of twenty-one. He could not gain a settlement by that service, because it took place in a parish where his master resided under a certificate. But the certificate did not alter the nature of the engagement, the only *effect of a [*229 certificate being to protect some particular parish, and not to prevent parties contracting as servants or apprentices. It was in that case urged in argument that the relation was inconsistent with the father's authority. But the Court held, that during the whole time of the son's service, his domicile continued to be in his father's house. There, indeed, the son occasionally visited the father; but those were visits of mere indulgence, which could not affect the question of settlement or domicile. He was virtually absent from his father's house during the whole of his service. In the present case the son was *actually* absent; but such absence does not occasion any change of domicile; for a minor cannot, except under the provisions of some positive law, change his domicile at all; conjuges et liberi, quamquam alibi forte agentes, tamen apud maritos parentesque domicilium habere videntur, Huber. lib. 5, tit. 1, s. 45. His domicile, even when he was in *Newfoundland*, continued to be in *England*; and if in *England*, where was it but in his father's house?

BAYLEY, J. The question in this case, is, whether at the time when the father gained a settlement in the parish of *Saint James, Poole*, the pauper was emancipated? If he was not, then his settlement would shift with that of his father. The father was settled in the parish of *Lytchet Matraverse*, and whilst

(a) 5 B. & A. 525.
(d) 5 M. & S. 214.

(b) 1 B. & C. 348.
(e) 1 B. & C. 348.

(c) 10 East. 89.
(f) 2 B. & A. 582.

he was so settled, the pauper, his son, being then a minor, hired himself to serve for two summers and a winter. He entered into, and continued in the service until he attained twenty-one years of age, but before he had attained that age his father had acquired a settlement in *Poole*. There can be no doubt that the settlement of a son, if he have none of his own, shifts with that of the parent

*230] *so long as the son continues part of the parent's family. When he ceases to constitute part of the parent's family, he is emancipated. The different instances of emancipation put by Lord *Kenyon* in *Rez v. Offchurch* (a), and *Rez v. Witton cum Twambrooks* (b), and recognized by Lord *Ellenborough* in *Rez v. Uckfield* (c), are the child's attaining its full age, or being married, or gaining a settlement, or, as in the case of the soldier, contracting a relation inconsistent with the idea of his being in a subordinate situation in his father's family. In *Rez v. Roach* (d), Lord *Kenyon* qualified what he was reported to have said as to a son's being emancipated on his attaining the age of twenty-one years, by limiting that observation to cases where the son at that age was severed from his father's family; and then adverting to the case of the soldier, he observes that the soldier had ceased to be under the control of his parents, and had become subject to the control of others; and that as he did not return to the father until after he was of age, the case was thought too clear for argument. It is insisted that this case falls within the fourth class of cases mentioned by Lord *Kenyon*, and that the pauper, as soon as he entered into the contract, like the soldier who had enlisted, was emancipated, because he had subjected himself to the control of others, and continued so subject until he had attained twenty-one. But there is this distinction between the case of the soldier and the present: the soldier, by enlisting, became subject to an authority paramount to that of his parent: here the pauper, by contracting to serve the owner or captain of the ship, subjected himself to an authority not paramount, but subordinate to that of his parent; for, by the law of

*231] **England*, the parental authority continues until the son attains the age of twenty-one. This distinction is pointed out by *Holroyd* and *Best, Js.*, in *Rez v. Rotherfield Greys* (e): the latter there says, "By the general policy of the law of *England* the parental authority continues until the child attains the age of twenty-one years; but the same policy also requires, that a minor shall be at liberty to contract an engagement to serve the state. When such an engagement is contracted, it becomes inconsistent with the duty which he owes to the public, that the parental authority should continue." *Laurence, J.*, in *Rez v. Roach* (f) seems to take the same view of the subject, and to consider the authority of the state paramount to that of the parent so long as the minor continues in the public service, but as soon as he leaves it, then the parental authority is restored. He there says, "In the case of the soldier, the son was enlisted when he was under age, and if he had returned home before he was twenty-one, he would have been considered as part of his father's family; or, if he had quitted the army before twenty-one without returning home, the father might have reclaimed him by suing out a *habeas corpus*." *Blackstone*, in his *Commentaries*, vol. i. p. 453, says, "The legal power of a father over the persons of his children ceases at the age of twenty-one, for they are then enfranchised by arriving at the years of discretion, or that point which the law has established, when the empire of the father or other guardian gives place to the empire of reason. Yet, till after that age arrive, the empire of the father continues, even after his death; for he may by his will appoint a guardian to

*232] his children. He may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child, who is then in *loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer

(a) 3 T. R. 114.

(d) 6 T. R. 247.

(b) 3 T. R. 355.

(c) 1 B. & C. 348.

(e) 5 M. & S. 216.

(f) 6 T. R. 254.

the purposes for which he is employed." It appears, then, that in ordinary cases the authority of a father over his child continues until the age of twenty-one. But the case of a soldier is an exception from the general rule. For an infant may by law enlist, and become bound to serve the state; and if he does contract to serve and the state adopt him as their servant, that adoption severs him from his father's family, and he then becomes subject to the paramount control of the state. In *Rex v. Woburn (a)*, the son enlisted at the age of sixteen into the same regiment of militia in which his father served, and lived with him to the age of twenty-three. Lord *Kenyon* thought, as he lived in his father's family, the parent's control was not altogether destroyed, the guidance and direction of the child to a certain extent not being inconsistent with the occasional military situation in which he was. He seems to have thought that such a person might be subject to a double control. So in this case, if the father did not interfere, the son might be subject to the control of his master whom he had contracted to serve, but being part of his father's family, and subject to his paramount authority, the latter might have claimed his services at any time before he attained the age of twenty-one years. But in the case of a minor who enters into the army, the state will be entitled to his services, and against the public the father cannot claim them. Considering the principle upon which a minor who enlists as a soldier becomes emancipated to be, that he thereby contracts a *relation inconsistent with a subordinate situation [*233 in his father's family, and considering that a minor who contracts to serve a subject thereby makes himself liable to the double control of his father and his master, the authority of the parent being paramount to that of the master, I think that the pauper, in this case, when he agreed to serve the owner or captain of the ship, did not contract any relation inconsistent with a subordinate situation in his father's family; but that until he attained twenty-one he continued part of his father's family, and subject to his paramount authority. Consequently the sessions were wrong in holding that the pauper was emancipated, and his settlement shifted with that of his father. Their order must therefore be quashed.

Order of sessions quashed.

(a) 8 T. R. 479.

REX v. The Inhabitants of Ynyscynhanarn, in the County of Carnarvon.

A man, by marrying a woman who was a yearly tenant of premises under the annual value of 10*l.*, held to gain a settlement.

UPON appeal against an order of two justices, whereby they removed *H. Hughes*, his wife, and children, from the parish of *Aberdaron*, in the county of *Carnarvon*, to the parish of *Ynyscynhanarn* in the same county, as the place of settlement by birth of *H. Prichard*, the pauper *H. Hughes's* father, the sessions confirmed the order, subject to the opinion of this Court on the following case.—

It appeared that *Hugh Prichard*, the pauper's father, was born in the parish of *Ynyscynhanarn*, and that the pauper had gained no settlement in his own right; that one *Hugh Williams*, the father of one *Elizabeth Hughes* herein-after named, resided as tenant on a small farm called *Peny Cwin*, in the parish of *Aberdaron*, and *which he held at the rent of 3*l.* 5*s.*, and died there on the 9th of June 1782; that previous to the said *Hugh Williams's* [*234

death, he made a will, dated the 3d of *May* 1782, bequeathing all his personal estate and effects, subject to the payment of some small legacies, to his daughter, the said *Elizabeth Hughes* before named, and appointed her sole executrix thereof; that *Elizabeth Hughes* continued to reside at *Peny Cwin* from the time of her father's death until the time of her marriage as after mentioned; that *Hugh Prichard*, the pauper's father, never saw *Hugh Williams*; that the first time *Hugh Prichard* saw the said *Elizabeth Hughes* was, when on her return, after taking her land; that on the 27th of *July* 1782, *Hugh Prichard* married *Elizabeth Hughes*, and thereupon went to reside with her at *Peny Cwin*, where they continued many years; that *Elizabeth*, the wife of *Hugh Prichard*, proved her father's will on the 23d of *May* 1783; that *Hugh Williams* never paid any taxes in *Aberdaron*, nor did *Elizabeth Hughes* while sole, nor *Hugh Prichard* after his marriage (except county-bridge rate), until after the year 1795, and that *Hugh Prichard* never paid more rent for *Peny Cwin* than 7*l.* 18*s.*

The sessions confirmed the order of removal, subject to the opinion of this Court as to the correctness of that conclusion upon the evidence as stated.

Russell, Serjt., in support of the order of sessions. The case states that the first time *Hugh Prichard* saw *Elizabeth Hughes* was on her return from taking her land. She took the land clearly before her marriage, and probably within forty days of her father's death; but if she took it before her marriage, the estate which she took as executrix being thereby surrendered, she had no

*235] estate which would vest in her *husband, so as to give him a settlement. In *Rex v. Ilmington* (a), the wife, before marriage, had purchased a lease for years, and that having vested by operation of law in her husband, he was held to gain a settlement by forty days' residence upon it; but here the wife was only tenant from year to year.

R. V. Richards contra. *Rex v. Stone* (b) is an authority to show that there is no distinction in this respect between a lease for years and a lease from year to year.

BAXLEY, J. The wife in this case was executrix of a tenant from year to year. *Rex v. Stone* shows that an executor of a tenant from year to year of an estate under 10*l.* a year may gain a settlement by residing on it forty days. If, therefore, the wife took the interest as executrix, and in that character became tenant from year to year and married, a settlement would be gained by her husband. If she took the land as tenant for a year, she became tenant from year to year, and the term would vest by marriage in her husband. *Rex v. Ilmington* shows that a man will acquire by marriage the same right to a settlement which an executor or administrator does by the death of the person whom he represents. In that case a woman purchased a leasehold tenement for 6*l.*, and afterwards married, and her husband resided on the premises and died. It was held that the husband by marrying gained a settlement, for upon marriage his wife's estate vested in him by law; and although she could not gain a settlement by purchase, yet her husband having acquired one by it, the widow thereby

*236] derived a settlement through him. Here the husband *by marriage acquired, by operation of law, the same interest in the property of his wife which an executor does by death in the property of his testator. The executor of a tenant from year to year, of an estate under the value of 10*l.*, may gain a settlement by residing upon it forty days, because the interest vests in him by operation of law. And, upon the same principle, a husband may gain a settlement by residing forty days upon an estate vesting in him by marriage, although it be of less annual value than 10*l.* I think, therefore, that a settlement was gained in *Aberdaron*, and that the order of sessions must be quashed.

Order of sessions quashed.

REX v. The Inhabitants of the Parish of Kingswinford.

A canal company is rateable to the relief of the poor in every parish through which the canal passes, in proportion to the profits which the land occupied by them in such parish yields, and, therefore, where a canal passed through several parishes, in which the tonnage dues payable varied, it was held, that the company were rateable to the relief of the poor of each parish for the amount of tonnage dues actually earned there, and not for a part of the *whole* amount earned along the *whole* line of the canal, in proportion to the length of the canal in that parish.

UPON appeal by the company of proprietors of the *Dudley Canal Navigation* against a rate made for the relief of the poor of the parish of *Kingswinford*, in the county of *Stafford*, whereby the company were rated for their canal, reservoirs, path, and tonnage dues, estimated as of the annual value of 604*l.* 2*s.* 2*d.*, at 25*l.* 3*s.* 4*d.*, the sessions reduced the rate to 9*l.* 16*s.* 11*d.*, subject to the opinion of this Court on the following case:—

By the 16 G. 3, c. 66, entitled “An Act for making and maintaining a navigable canal within and from certain lands in the parish of *Dudley*, in the county of *Worcester*, to join and communicate with the *Stourbridge* navigation in the parish of *Kingswinford*,” it was enacted, that certain proprietors therein [*237] named should be united into a company for the better carrying on, making, and maintaining the said canal.

By the 25 G. 3, c. 87, entitled “An Act for extending the *Dudley Canal* to the *Birmingham Canal*,” it was, amongst other things, enacted, that from and after the making and completing the said intended canal, the shares created by virtue or in pursuance of that act should become consolidated with the shares in the then *Dudley Canal Navigation*, and all distinction between the same should cease and determine, and the *Dudley* canal, and all matters and things relating thereto, and the canal and other works to be made and completed by virtue of that act, should from thenceforth be and become one joint navigation and concern, and the whole of the income and profits arising from such joint navigation concern should be paid unto and equally divided amongst all and every the proprietors thereof, according to their respective shares therein.

By the 33 G. 3, c. 121, which was passed for making and maintaining a navigable canal from the *Dudley Canal* to the *Worcester and Birmingham Canal*, it was enacted, “that all subscribers, towards carrying on and completing the intended navigation, should be entitled to and should receive, after the said navigation should be completed, a proportion of the profits arising as well from the intended navigation as from the *Dudley Canal Navigation*, according to their number of shares; and every body politic or corporate, person or persons, having such property in the said undertaking, should respectively be deemed proprietors in the whole concern in proportion to every such part or share which they or he should be possessed of towards carrying on the same.” [*238]

By section 34, it was further enacted, “that the company of proprietors should from time to time be rated to all parliamentary and parochial taxes, rates, and assessments for and in respect of the lands and grounds taken and used by the said company, and all warehouses and other buildings erected or to be erected by the company of proprietors, in the same proportions as other lands, grounds, and buildings lying near the said canal and collateral cuts were or should be rated.”

Neither of the recited acts of the 16, 25, or 30 G. 3, contained any clause respecting the mode in which the company should be assessed either to the parliamentary or parochial taxes. The company were empowered to take different rates of tonnage upon those parts of the canal which were made under each of the said recited acts of the 16, 25, and 33 G. 3.

By the 16 G. 3, s. 44, the company were authorized to take certain rates or

dues for tonnage therein specified, on goods thereafter to be carried upon any part of the said intended canal, or which should pass through any lock of the said canal.

By the 25 G. 3, the company were empowered to take other and different rates of tonnage from those granted by the 16 G. 3, and therein set out, for all goods thereafter to be carried upon the intended canal; and by section 22, to induce the proprietors of the *Birmingham* and *Birmingham and Fazley Canal*, to agree to the aforesaid junction with that canal at *Tipton Green*, and as a compensation for their probable loss of tonnage, in consequence of the intended canal, they were empowered to take certain rates and dues upon all *239] coals and *merchandises navigated along the intended canal, according to the rates therein set forth.

By the 33 G. 3, the company of proprietors were authorized to take various and different rates of tonnage from those mentioned in either of the acts of the 16 and 25 G. 3, and which were there enumerated, for tonnage and wharfage of goods, &c. to be thereafter carried upon the intended canal and collateral cuts, &c.; and by section 22., the *Worcester and Birmingham Canal Company* were enabled to receive certain rates of tonnage and wharfage therein mentioned, for such coals and other things which should pass from the intended canal into or upon the *Worcester and Birmingham Canal*, and from the *Worcester and Birmingham Canal* into or upon the intended canal.

The land occupied by the company of proprietors in the parish of *Kingswinford*, for the purposes of the canal, is 12 acres, 2 roods, 36 perches, the whole of which was taken under the recited act of the 16 G. 3, and is one-twelfth part of the land occupied by the said company of proprietors, for the purposes of the whole of the *Dudley Canal*, made under the recited acts of the 16, 25, and 33 G. 3, and extending through the several parishes of *Kingswinford*, *Dudley*, *Tipton*, *Sedgley*, *Rowley Regis*, *Hales Owen*, and *Northfield*.

The account of the tonnage arising upon the whole of the canal made under the said recited acts, and of the expenses and outgoings thereon, is kept as one joint concern and not separately, and the profits of the whole are divided amongst the proprietors generally according to their shares therein.

The total amount of tonnage received by the company of proprietors for the *240] last year on the whole of the canal, *after deducting the expenses, is 5670*l.* 13*s.* 1*d.*, one-twelfth part of which is 472*l.* 11*s.* 1*d.*, a rate on one-half of which sum (236*l.* 5*s.* 6½*d.*) at 10*d.* in the pound is 9*l.* 16*s.* 11*d.*, to which the sessions have reduced the rate. The tonnage received during the same period for goods, &c. carried on that part of the canal, made under the recited act of the 16 G. 3, which is situate in the parish of *Kingswinford*, after deducting expenses, is 1208*l.* 4*s.* 4*d.*, and a rate on the half of that sum (604*l.* 2*s.* 2*d.*.) at 10*d.* in the pound is 25*l.* 3*s.* 4*d.*, at which sum the company of proprietors were rated.

The only question for the opinion of this Court was, Whether the different parts or extensions of the canal made under the several recited acts of parliament ought to be taken as one joint concern as far as related to the poor rates, or whether that part thereof, made under the 16 G. 3, ought to be rated as a distinct and separate concern?

Russell and *Whately* in support of the order of sessions. By the acts of parliament under which the different parts of this canal were made, the whole tolls and profits of the canal are to be one entire concern, and are to be divided among the proprietors without any distinction. The tolls collected in the parish of *Kingswinford* are payable to the company as a compensation for the use of the whole line of the canal, and not merely for the use of that part which lies within the parish, *Rex v. Milton* (a), *Rex v. Palmer* (b), and *Rex v. The Oxfordshire Canal Company* (c); and if that be so, then the whole of the tolls

(a) 3 B. & A. 112.

(b) 1 B. & C. 546.

(c) 4 B. & C. 74.

constituted the profits of all the land *which the company used for the purpose of their canal, and they are rateable in the parish of *Kingswinford*, for that proportion only of the entire profits which the land occupied by them in that parish bears to the whole of the land occupied by them for the purposes of the canal. [*241]

BAYLEY, J. It seems to me that in amending this rate the sessions have not adopted the correct rule. The canal company are to be rated under the statute of the 43d of *Elizabeth*, as occupiers of land in the parish of *Kingswinford*. Tolls, eo nomine, are not rateable; but if the subject matter out of which the tolls arise, be one mentioned in the statute of *Elizabeth* as the object of rate, then that may be rated by name, and the tolls which constitute its profits may be thus made to contribute to the relief of the poor. A canal company, therefore, is liable to be rated in respect of the land which they occupy in every parish through which the canal passes, and for that value which the land there produces. Where there is a long line of canal extending through different parishes, although the money produced by the tonnage collected in all the parishes, constitute one common fund out of which all the expenses are to be borne, still the proportion which those expenses may bear to the tolls collected, even in cases where the rates are the same along the whole line of the canal, may vary in different parishes. The traffic on the canal may be greater in some parishes than others, or the rates may be unequal, and thus the net profits, which constitute the value of the land used for the canal, may vary in different parishes. There are twelve *miles in length of the canal in the parish of *Kingswinford*. Assuming that the different branches of the canal [*242] had been made under one act of parliament; I am of opinion that the company ought to be rated in each particular parish in proportion to the profit which they derive from the land there used by them for the purpose of the canal. If a canal runs through six different parishes, and there is the same traffic through the whole line of the canal, every part of the canal will earn an equal proportion of the tolls. But it may happen that in that part of the canal situate in one parish, there may be double or treble the traffic which there is in any other of the six. Why are the other parishes to have any part of the tolls earned in that parish? The land in those parishes contributes nothing towards earning the sum derived in the other parish from the use of the land there. The true principle is this: a canal company is to contribute to the relief of the poor in each parish through which the canal passes in proportion to the profit which they derive from the use of their land in that parish. If the profit arising from a given quantity of land vary in different parishes, the rate must vary in the same proportion. The whole rate will be payable out of one common fund. But then each parish will receive from the company a sum in proportion to what the land in that parish produces. If in this instance this rule has the effect of making the rate in *Kingswinford* higher, it will also make the rate lower in other parishes. For these reasons it appears to me that in this case the sessions have not proceeded on the correct principle, but that they ought to have rated the company for the tonnage received by the company on that part of the *canal which is in *Kingswinford*, and that, therefore, the rate [*243] ought to be amended by making it 25*l.* 3*s.* 4*d.*

HOLROYD and LITTLEDALE, Js., concurred.

Rate amended.

Shutt was to have argued against the order of sessions.

DOE on the demise of R. WERE, W. WERE, and S. WERE, v. COLE.

Where the owner of certain lands, by deed, describing them as in the possession of himself and A. B., granted, assigned, transferred, and set over, directed, limited, and appointed the same to C. D. for life, but no livery of seisin was made: Held, that the deed operated as a valid grant of the reversion of that part of the premises in the occupation of A. B.

EJECTMENT for the recovery of the moiety of certain lands and premises, situate in the parishes of *Loddiswell* and *Churstow*, in the county of *Devon*. At the trial before *Gaselee, J.*, at the last assizes for the county of *Devon*, the plaintiff had a verdict, subject to the opinion of this Court on the following case:—

The lessors of the plaintiff made title under a deed of conveyance from one *Walter Prideaux*, which recited, that he was indebted to them in a sum of 3000*l.*, and that he had agreed to secure the same by demising and assigning the premises thereafter mentioned; that in pursuance of an agreement recited in the deed, and in consideration of 5*s.*, he *Prideaux* did demise, lease, grant, assign, transfer, and set over, direct, limit and appoint unto *R. Were, W. Were, *244]* and *S. Were*, as trustees, their executors, administrators, *and assigns, all that moiety or half part of and in all that messuage, &c. lying and being in the town of *Kingsbridge*, and therein particularly described, which said premises were then in the tenure or occupation of the said *Prideaux*, and the reversion, remainder, rents, issues, and profits thereof, and of every part thereof, and also all that the moiety of and in all that capital messuage *Barton Farm*, and demesne lands called or commonly known by the name of *Hatch Arundel*, situate, lying, and being in the parishes of *Loddiswell* and *Churstow*, in the county of *Devon*; and which said last-mentioned premises were heretofore in the possession of one *A. Rendell* and of the said *W. Prideaux*, and do contain in the whole by estimation 150 acres or thereabouts (be the same more or less), and are now in the possession of the said *W. Prideaux* and of *Samuel Cole*. The indenture then, after describing two other moieties or half parts undivided of a messuage and tenement, and of a barn situate in the parish of *Loddiswell*, in the possession of *Joanna Saunders*, proceeded as follows: “and all houses, outhouses, &c., profits, &c., hereditaments and appurtenances whatsoever to the said moieties belonging, and the reversion and reversions, remainder and remainders, rents, suits, and services thereof, and of every part thereof, and all the estate, right, title, interest, term and terms of years, use, trust, property, claim, and demand whatsoever of him, *W. Prideaux*, his heirs or assigns, either in law or equity, of, into, or out of the same or any part thereof, to have and to hold the said moiety, or half part of the said messuage, tenement, or dwelling-house in *Kingsbridge*, with the appurtenances, unto the said *R. Were, W. *245]* *Were, *and S. Were*, their executors, administrators, and assigns, from the date of the indenture, for and during, and unto the full end and term of 2000 years thence next ensuing, and fully to be complete and ended, yielding and paying, therefore, yearly and every year during the said term, unto him, *W. Prideaux*, his heirs or assigns, the rent of one pepper corn if the same should be lawfully demanded; and to have and to hold all and singular the several moieties or half parts hereby demised and assigned, or mentioned, or intended so to be, situate, lying and being in the several parishes of *Loddiswell* and *Churstow*, with their, and each and every of their several and respective rights, members, and appurtenances, unto the said *R. W., W. W., and S. W.*, their executors, from the day of the date thereof, for and during all the natural life of the said *W. Prideaux* without impeachment of waste.”

The trusts as to all the premises were declared to be for sale, when *R. W., W. W., and S. W.* should think proper. There were covenants by *W. Prideaux*, that he had full power to convey the same, and a right of entry given to

R. W., W. W., and S. W. This indenture was duly executed by *W. Prideaux* at the time of its date, no livery of seisin was indorsed on it, and no evidence was offered that any had in fact been made. The defendant, *Samuel Cole*, before and at the time of the execution of this indenture, was tenant from year to year to *W. Prideaux* of part of the lands and premises comprised in the deed, and therein described as being situate in the parishes of *Loddiswell* and *Churstow*.

After the execution of this indenture, viz. in *October 1825*, *W. Prideaux* became a bankrupt, and the defendant, **S. Cole*, having disclaimed to hold under the lessors of the plaintiff, defended this action of ejectment under an indemnity from the assignees of *W. Prideaux*. [*246]

Follett for the lessors of the plaintiff. The question in this case is, whether the deed was sufficient, without livery of seisin, to pass the estate in the lands in the parish of *Loddiswell* to the lessors of the plaintiff for the life of the grantor. The lessor of the plaintiff had a reversion expectant on the determination of *Cole's* tenancy, and that will pass by the word *grant* without livery. It is true, that in order to pass a freehold interest in possession, livery of seisin is essential, unless the conveyance takes effect under the statute of uses; but a reversion expectant on an estate of freehold, or for years, passed by grant with the attornment of the tenant before the statute of the 4 *Anne*, c. 16, s. 9. *Co. Litt.* 49 a, 2 *Blackst. Com.* 317. *Shepherd's Touchstone*, 210, 288. 1 *Saund.* 282 n. 3. *Bacon's Abridgment*, Lease N. And if it so passed then, it will, since the statute, pass by grant without the attornment of the tenant. It may, perhaps, be said, that although a reversion expectant on the determination of a freehold term would pass by the deed, yet that this being a reversion expectant on the determination of a term for years, it will not pass; but *Littleton*, ss. 567, 568, and *Lord Coke's Comment* on the latter section, and *Littleton*, s. 572, show, that there is no distinction in this respect between a reversion expectant on the determination of a freehold term, and one expectant on the determination of a term for years. A tenancy from year to year is a term for years; *Botting v. Martin* (a). Assuming that the deed was not intended to pass the reversion, it was clearly intended to pass the land; and if the words in the deed are sufficient for that purpose, the Court will give effect to the intent; *Roe v. Tranmer* (b), *Haggerston v. Hanbury* (c). [*247]

Coleridge contra. It must be conceded, that a person seised of a freehold, of which a lessee for years is in possession, may transfer his reversionary interest by deed without livery of seisin. But here, *Walter Prideaux* was in possession of some part of the premises intended to be conveyed, and those will not pass by this deed. This action is brought to recover those premises of which *Cole*, at the time when the deed was executed, was in possession. The deed does not profess to grant the reversion of any premises; it describes the premises sought to be recovered, as being in the possession of *Walter Prideaux* and of *Samuel Cole*. It is clear, therefore, that it was the intention of the parties that an immediate possession of the lands, and not the mere reversion of them, should pass. It is a presumption of law, resulting from the deed, that *Prideaux* and *Cole* were joint-tenants of the estate; and then the possession of one would be the possession of both. Now if a grantor and his tenant are in possession of an estate, and the deed of grant does not point out what part was in his own possession, and what in that of the tenant, but professes to pass an immediate freehold, the one will not pass without livery of seisin, and the other will not pass, because it was not the intention of the grantor.

BAYLEY, J. It is laid down distinctly, in *Co. Litt.* 49 a, "that if a man be seised of two acres in fee, and letteth *one of them for years, and intending to pass them both by feoffment, maketh a charter of feoffment, and maketh livery in the acre in possession in name of

(a) 1 *Campb.* 317.(b) 2 *Wils.* 75.(c) 5 *B. & C.* 101

both, only the acre in possession passeth by the livery. Yet if the lessee attorn, the reversion of that acre shall pass by the deed and attornment." And Lord *Coke* afterwards says, "So it is if any man make a lease, and by deed grant the reversion in fee, here the freehold with attornment of the lessee by the deed doth pass, which is in lieu of livery." Now that is an authority to show, that where lands are in possession of a tenant, the reversioner may convey his interest by deed. All lands lie in livery or in grant: and they do not lie in livery where the party intending to convey cannot give immediate possession. Here *Prideaux* had the freehold in him, but the right of possession was in his tenant. He, therefore, had a reversion expectant on the determination of the term. Now a reversion, which is a vested right, lies in grant. There can be no doubt that this instrument has words fully sufficient to operate by way of grant. On the short ground, that where the right of possession is in a tenant for years, the right of the landlord is a reversion expectant on the determination of the tenancy, and lies in grant, and not in livery, I am of opinion that the reversion of the lands sought to be recovered passed by the deed.

HOLROYD, J. The passage cited from *Co. Litt.* 49 *a* is decisive to show that the reversion passed by this deed to the lessors of the plaintiff.

LITLEDALM, J. If *Prideaux* had been in actual possession of these premises, and intended to have *conveyed his interest to a stranger, he *249] ought to have delivered seisin. But possession being in a tenant from year to year, *Prideaux* had only a reversion, and in order to convey that reversion to the tenant in possession, must have released his right; but the proper mode of passing a reversion to a stranger not in possession is by grant. Here *Prideaux* has granted the reversion by the deed in question to the lessors of the plaintiff, who are entitled to recover.

Judgment for the plaintiff.

REX v. the Inhabitants of Great Bowden.

Upon a special case, the court of quarter sessions found, that a pauper hired himself as ostler to an innkeeper, that no earnest or wages were given, but he was to have what he could get, as ostler, and he lodged and boarded in his master's house, and that either the master or servant might have determined the service when they pleased: it was held, that, upon this finding, this latter stipulation must be taken to have been part of the contract between the parties, and, consequently, that there was not any general or yearly hiring, and that no settlement was gained by serving under it.

Upon appeal against an order of two justices, whereby they removed *J. Harding*, his wife, and children, from the hamlet of *Sutton*, in the parish of *Castor*, in the county of *Northampton*, to the parish of *Great Bowden*, in the county of *Leicester*, the sessions confirmed the order, subject to the opinion of this Court on the following case:

The pauper, *J. Harding*, came to one *Hamshaw*, an innkeeper, residing in the parish of *Great Bowden*, and asked for a place. *Hamshaw* had no objection, and put him on as an ostler, but said that he did not mean him to have a settlement, as the parish was very particular. No earnest or wages were given, but the pauper was to have what he got as ostler. He had his lodging *250] and *his board in his master's house. The pauper could have left at any time he pleased, or the master might have turned him away at any time. The pauper lived with *Hamshaw* as ostler under these terms about a year and a half. The sessions were of opinion that this was a general hiring, followed by a service of above a year, and that the master's remarks at the time of hiring could not prevent the pauper from gaining a settlement.

Thesiger, in support of the order of sessions, contended it was a term implied in every general hiring, that either party should be at liberty to determine the service when he pleased. [*Bayley*, J. If that be so, it would not be a hiring for a year; under a yearly hiring the servant is bound to serve, and the master to employ him, during the whole year.] Then it must be admitted, that if it were part of the original contract that either party should be at liberty to determine the service when he pleased, there was not in this case any hiring for a year, but that is a fact found by the sessions, and a conclusion drawn by them from the evidence, and founded perhaps on the opinion entertained by the master and the servant of their rights under the contract. That opinion, however, cannot alter the effect of the contract, which, being general, was, in law, a contract for a year. *Rez v. Stockbridge* (a).

Nolan, contra, was stopped by the Court.

BAYLEY, J. This clearly would be a general hiring, unless it were a term engrafted upon the contract that *the pauper might leave, or that the master might turn him away at any time. It is said that this is a mere [251 conclusion drawn by the sessions from the evidence, and that it was not a condition engrafted on the contract; but inasmuch as a general hiring has been held to be a hiring for a year, and as in a yearly hiring there is no such condition implied by law that either party shall be able to determine the service at any time, I think we must take it upon the finding that it was part of the contract, that the parties should be at liberty so to do in this case; and if that be so, then the cases of *Rez v. Christ Parish, York* (b), and *Rez v. Trowbridge* (c), are decisive authorities to show that the contract in this case was not a hiring for a year. No settlement, therefore, was gained by the service under it, and the order of sessions must be quashed.

HOLROYD and *LITLEDALÉ*, Js., concurred.

Order of sessions quashed.

(a) *Burr. S. C.* 759.

(b) 3 B. & C. 459.

(c) Cited by *Bayley*, J., in *Rez v. Christ Parish, York*, 3 B. & C. 462.

**REX v. The Inhabitants of Trowbridge.*

[252]

A pauper first recollected himself in the workhouse of the parish of *A.*, when he was about four years of age. He remained there till he was thirteen or fourteen years of age. He afterwards married, and lived in another parish, but when out of work, he returned on two different occasions to the parish of *A.*, and was not only relieved by the officers of that parish, but received money from them to enable him to return to the parish where he lived. The sessions having found that he was not settled in the parish of *A.*, the Court affirmed their decision.

The fact of the pauper's remembering himself, when four years of age, in the parish of *A.*, is no evidence that he was born there.

Upon appeal against an order of justices, whereby *M. Acorn*, and his wife, and children, were removed from the parish of *Trowbridge*, in the county of *Wilts.*, to the parish of *Chatham*, in the county of *Kent*, the sessions quashed the order, subject to the opinion of this Court on the following case:

The pauper's first recollections were of his being in the workhouse at *Chatham*; he supposed he might be then about four or five years old. He never knew his father; and his mother was not in the workhouse with him. He stayed in the workhouse until he was thirteen or fourteen, when he entered on board a man-of-war, and served in various ships till the year 1814. He then

went to *Troubridge*, and married there. Being out of work at *Troubridge*, he went, with his wife, to the workhouse at *Chatham*, where he stayed more than three weeks, during which time he was maintained there by the parish of *Chatham*, and on going away was furnished by the parish officers of *Chatham* with one pound in money, and a pair of shoes, for him and his wife to return to *Troubridge*. He returned thither, and remained there about ten years, when being again out of work, he went to *Chatham* again, with his wife and family, and stayed there about three weeks in the workhouse, and whilst there, was maintained by *Chatham*, and at the expiration of that time *received one [253] pound in money, and a pair of shoes for himself, his wife, and each of his children, and provisions to return to *Troubridge*; at the same time he was desired by the *Chatham* overseers not to return to *Chatham* again without an order or pass. He then returned to *Troubridge*, at which place he was afterwards relieved, and thereupon moved, by order of magistrates, to *Chatham*. The parish registers of *Chatham* were searched by the pauper, but no entry was found of his baptism, nor of any person bearing his name.

Bingham in support of the order of sessions. Relief given to a pauper resident within the relieving parish, is no evidence to prove a settlement, because overseers are bound to give relief whether the pauper be settled there or elsewhere, *Rex v. Chadderton* (a). In that case the relief was confined to a single instance, but in *Rex v. Chatham* (b), relief had been given several times to the pauper's husband, and he had in two instances been received into the poor-house for a fortnight together, and had been buried at the expense of the parish; and there was no evidence to show a settlement in any other place, and still it was held to be no evidence of a settlement in the relieving parish. So in this case the parish officers were bound to maintain the pauper while he was resident within the parish, whether he was settled there or not, and, therefore, the relief given was no evidence of settlement. It is clear that there was no evidence that the pauper was born in *Chatham*, for the baptismal register has been held not [254] to be evidence of the place of *birth, *Rex v. North Petherton* (c); & fortiori, the mere circumstance of the pauper's recollecting himself to have been in a parish when he was four or five years of age, is not any evidence that he was born there. Besides, there was no registry of baptism found at *Chatham*, nor any entry of the baptism of any person bearing his name. Assuming that in this case there was some evidence for the sessions to presume that the pauper was settled in *Chatham*, it was a question of fact for their decision. The pauper was relieved in *Troubridge* as well as in *Chatham*, and the presumption is, that the relief given in *Chatham* was given to him as casual poor, and not as a person settled in the parish. It was for the sessions to draw their own conclusion from the evidence, and having done so, this Court will not disturb their decision.

Mercvether, Serjt. It is now too clearly established by *Rex v. Chatham* (d), to be disputed, that relief given to a pauper resident within the relieving parish, is not evidence of a settlement in that parish. But this case is distinguishable from that. The parish officers of *Chatham* not only continued to relieve the pauper for a great length of time, but after he had ceased to reside in *Chatham*, he returned on two different occasions, and was not only relieved by the parish, but had money given him to go elsewhere. That money was intended to support him after he had left the parish, and was in effect the same thing as if the parish officers had relieved him while he was resident in another parish. In the [255] *Duke of Banbury v. Broughton* (e), *Holt*, C., J. said, "where a child *is first known to be, that parish must provide for it till it find another;" that learned Judge seems, therefore, to have thought that that was sufficient to raise a presumption that he was settled in that parish by birth. He may be legitimate, and in that case would gain a settlement by birth.

(a) 2 East, 27.

(b) 8 East, 498.

(c) 5 B. & C. 608.

(d) 8 East, 498.

(e) *Comberback*, 364.

BAYLEY, J. If the decision in the case of *Rex v. Chatham* (a), establishes as a principle of law, that the bare fact of giving relief to a pauper while he is resident within a parish, is no evidence that he was settled there, it is manifest that the facts proved in this case could lead to no other legitimate conclusion, than that which the sessions have drawn from them. It is not necessary to decide in this case, whether the giving relief to a party resident within a parish, may or may not under certain circumstances be evidence from which the sessions may conclude that the party so relieved was settled in the relieving parish. For assuming that there was some evidence in this case to warrant such a finding, it was for the sessions to draw their own conclusion from the whole evidence. They have done so, and I think there is nothing stated in this case to warrant us in saying that their conclusion is wrong. It appears that the pauper first recollected himself in the workhouse at *Chatham*, and being in the workhouse at *Chatham*, the parish officers of that parish were bound to maintain him until they could ascertain where his settlement was, and that might be a very difficult matter. The relief given under such circumstances, was no evidence that the pauper was settled in the parish, because the parish officers were *bound by law to maintain him until they could ascertain [256 where his settlement was. It is true that the pauper on two occasions returned to *Chatham*, and was not only relieved by that parish, but had money given to him to take him back to *Trowbridge*, which, it has been said, was equivalent to relieving him while resident in another parish. Relief given to a pauper while he is resident in another parish, is a distinct acknowledgment by the relieving parish, that they believe him to be settled there. But giving the pauper money to enable him to remove to *Trowbridge*, was no acknowledgment by *Chatham* that he was settled there. Assuming, therefore, that it was questionable upon the evidence, whether the relief was given to the pauper as a settled inhabitant or not, and that the sessions might have inferred that the pauper had been relieved by *Chatham*, because he was settled there, that was not a necessary conclusion. Being a question of fact, it was for the sessions to draw their conclusion, and I cannot say that their decision is wrong. The mere fact of the pauper's having first remembered himself in *Chatham*, when he was four or five years of age, is not any evidence of his having been born in that parish. Upon the whole, I think that the sessions have drawn the proper conclusion from the evidence, and that their order must be confirmed.

Order of sessions confirmed.

(a) 8 East, 496.

*The Marquis of STAFFORD v. COYNEY.

[257]

Where a land-owner suffered the public to use, for several years, a road through his estate for all purposes, except that of carrying coals: Held, that this was either a limited dedication of the road to the public or no dedication at all, but only a licence revocable; and that a person carrying coals along the road after notice not to do so, was a trespasser. Semble, That there may be a limited dedication of a highway to the public.

TRESPASS for breaking and entering the plaintiff's close with carts and horses, and breaking posts and chains. Plea, first, not guilty. Secondly, a public highway over the locus in quo, and that the posts and chains were wrongfully placed there by the plaintiff. Replication, traversing the highway and new assignment of trespasses extra viam with carts laden with coals. Plea, a public highway over the locus in quo, for carts laden with coals, and issue

thereon. At the trial before *Garrow*, B., at the *Stafford* Lent assizes, 1827, it appeared in evidence, that in the month of *February* 1820, several persons residing at *Lane End*, being anxious to open a communication between that place and *Weston Coyney*, sent a petition to the plaintiff (who had lands lying between those two places) for his concurrence. The plaintiff's agent wrote and sent to several of the petitioners an answer containing the following observations: "It must not be forgotten, that Lord *Stafford's* estate, through which the projected road is wished to be carried, is full of coals open to the market, and in course of being worked. Under these circumstances, his Lordship considers the conveyance through this estate, of coals belonging to other proprietors, to be quite inadmissible, and if any road is opened, he will expect that a prohibition of the carriage of such coals through his estate shall be part of the plan. It will, of course, be understood that Lord *Stafford* considers the other land-owners fully entitled to lay *the same prohibition on the conveyance of coals through their estates, which it appears necessary to stipulate for in his own case." A communication, signed by several inhabitants of *Lane End*, saying that they should be glad to have the road made upon the terms above mentioned, was afterwards sent to the plaintiff's agent. The road was accordingly commenced; that part of it which ran through the plaintiff's estate was made by him at his own expense, the residue was made under the superintendence of the surveyor of the highways, and paid for by subscription. None of the other land-owners insisted upon any prohibition as to coal-carts passing through their estates. The road was completed and opened to the public in *October* 1820. About a year after, the plaintiff caused two posts to be erected, one at each side of the road running through his estate, and to one of these a chain was attached. Several instances were proved, in which a servant of the plaintiff had, by the directions of his agent, stopped coal-carts passing along that part of the road, by putting the chain across it. In 1826, the driver of a coal-cart being stopped, broke the chain by direction of the defendant, and passed along the road, through the plaintiff's estate, and for this alleged trespass the action was commenced. On the part of the defendant, many instances were proved, in which coal-carts had passed along the road in question without interruption, and it did not appear that carts or carriages of any other description had ever been interrupted. It was also proved that the plaintiff's steward, when applied to on the subject of repairing this part of the road, replied that Lord *Stafford* would have nothing more to do with it, and that the parish might repair it or suffer it to be indicted. It was afterwards repaired at the expense of the parish, and statute-duty was *done upon it. Upon this evidence for the defendant, it was contended that by throwing open the road to the public for a whole year without putting up a chain, the plaintiff had dedicated it to them for all purposes, and that he could not afterwards restrict the uses of it. Or if that were not so, still that the suffering the road to be repaired by the surveyor of the highways, at the expense of the parish, amounted to an abandonment of the restriction upon the original dedication. The learned Judge told the jury that a dedication to the public for a year was a dedication in the eye of the law, and that if there was a dedication, the agreement could not bind the public rights. And he left it to them to say whether there was a dedication. Under this direction the jury found a verdict for the defendant, but the learned Judge gave the plaintiff leave to move to enter a verdict in his favour for 1s., if the Court should think him entitled to recover upon the case as proved at the trial. A rule nisi for that purpose was obtained in *Easter* term; against which

Jervis, and *Russell* Serjt., showed cause. There are two questions in this case, first, Whether the plaintiff could make the exception in question? as he clearly intended to make, the road public sub modo. There is no instance of such a restricted public highway. [*Holroyd*, J. Could not the plaintiff give a public road for certain purposes only, ex. gr. for a footway?] Yes, but then he

could not exclude any persons on foot ; so here, having made a road public for horses and carts, he cannot exclude any carts. The next question is, Whether the restriction, if it could by law exist, was not in fact abandoned ? It appeared that the plaintiff's agent, when spoken to as to the state of the road, and *some threat of indictment, declared the plaintiff would have nothing more to do with it ; that the parish might repair or suffer it to be indicted, as [*260 they thought fit. That was a clear relinquishment to the parish of all right in the road ; and the surveyor of the highways from that time, with the knowledge of the plaintiff's agent, always repaired the road, and caused statute-duty to be done upon it.

Taunton and Campbell contrà, were stopped by the Court.

BAXLEY, J. I am of opinion that this rule must be made absolute. If in law there can be a partial dedication of a highway to the public, it seems to me that the road in question was so dedicated. I am disposed to think that there may be such a dedication, but if not, then in this case there was no dedication at all. The defendant contends, that there was a general dedication ; but looking at the whole of the evidence, it is impossible to say that the plaintiff ever intended so to give the road. The public must take *secundum formam doni* ; if they cannot take according to that, they cannot take at all. Neither was there any sufficient evidence of a subsequent unrestricted dedication to the public. User is evidence of dedication, but it is evidence only ; and most of the instances in which coal-carts had been stopped had occurred during the two years next before the trial.

HOLROYD, J. I am of opinion that the public have no right to the road in question, except according to the grant of Lord *Stafford*, to be proved either by user or by the letter of his agent. In principle I see no *objection to a partial dedication : and, at all events, the right given cannot be more ex- [*261 tensive than the gift imports. If a restriction cannot by law exist as to a public way, then the grant was only a licence revocable. Perhaps, indeed, an user of the way beyond the restricted right might not make an innocent party a trespasser ; for the sufferance of such more extensive user, without objection, would be evidence of licence. But in this case there was no such licence, and, therefore, the plaintiff is entitled to recover.

LITTLEDALE, J. I entertain some doubt as to the possibility of making a partial dedication ; but, at all events, there was not in this case any evidence of a general dedication, and therefore the plaintiff is entitled to have the verdict entered in his favour.

Rule absolute (a).

(a) See *Roberts v. Karr*, 1 *Campb.* 262, n. *Rex v. The Inhabitants of Northamptonshire*, 2 *M. & S.* 262.

REED v. DEERE.

Where a party declared upon two written agreements, by the second of which variations were made in the first, and there were also counts upon each separately ; and it appeared, when the instruments were produced in evidence by the plaintiff, that the first only was stamped : Held, that the second could not be read in evidence to support the plaintiff's case, but might be looked at in order to ascertain whether the first was altered by it, and that, therefore, the plaintiff could not exclude the second agreement and proceed upon the counts setting out the first only.

ASSUMPSIT. The declaration stated, that on, &c. at, &c. it was agreed by and between the plaintiff and defendant to refer two causes, in one of which *Reed*

was plaintiff and *Deere* defendant, and in the other *Reed* was plaintiff, and *Deere* and one *Cook* defendants, to *A. B.* on the usual terms, and that the costs should *be in his discretion, and the reference should be made a rule of court *262] in the usual manner; and afterwards, to wit, on, &c. it was further agreed between the said parties, that all costs should be in the arbitrator's discretion, and that the parties should abide by the arbitrator's decision, touching the subject-matters of the said two actions, and what he should see fit to be done by the parties thereto respectively, so that his award should be made on or before the first day of *Michaelmas* term then next, or such further day, not exceeding the first day of *Hilary* term then next, as the arbitrator might appoint. Breach, that defendant revoked the authority of the arbitrator, whereby plaintiff lost the benefit of great expenses incurred by him in preparing to proceed upon the reference. There was another count stating the first agreement only, and others stating generally that the parties had agreed to refer certain matters in difference, and that the defendant afterwards revoked the arbitrator's authority. Plea, the general issue. At the trial before *Bosanquet*, Serjt., at the *Hereford* Spring assizes, 1827, on behalf of the plaintiff a letter was produced written by the defendant, wherein he said, "I consent to the causes (those mentioned in the declaration) being referred to *A. B.* in the usual terms, and the costs to be in his discretion, and the reference to be made a rule of court in the usual manner." The plaintiff's attorney sent an answer accepting the proposal, and this was stamped with an agreement-stamp. The defendant and the attorney for the plaintiff afterwards met before the arbitrator, and then indorsed and signed upon the back of the letter above mentioned, written by the defendant, the second agreement *263] stated in the first count of the declaration. This was not stamped. **Campbell*, for the defendant, contended, that this second agreement varied materially from the first, and could not be read in evidence for want of a stamp; and that the first agreement could not support the action, that having been put an end to by the second. For the plaintiff it was contended, that he might rely upon the count stating the first agreement only. The learned Judge being of a different opinion, directed a nonsuit. In *Easter* term a rule nisi for a new trial was granted; and now

Campbell showed cause. The decision of the learned Judge at the trial was perfectly correct. The counsel for the plaintiff produced both the agreements in support of the action; the second was not allowed to be read for want of a stamp. Then he contended for a right to rest his case upon the first agreement alone; but as a second had been produced, which, in the opinion of the learned Judge, varied materially from the first, the plaintiff was in the same situation as if that first agreement had never been made. Suppose the plaintiff had recovered upon the first agreement, then by stamping the second he would have been in a situation to maintain another action. *Hill v. Patten* (a) is directly in point. [*Bayley*, J. There the party declared upon the policy as altered.] Another action was afterwards brought by *Hill's Assignees v. Patten* (b), describing the policy as it stood before the alteration, but the result was the same.

Russell, Serjt., contra. An instrument altered whilst in fieri requires only *264] one stamp. [*Holroyd*, J. The second *letter accepting the proposal for a reference made it binding; it was, therefore, no longer in fieri.] Then the plaintiff had a right to go upon the first agreement, and the defendant could not have the second read in evidence to show that it varied from the first, because it was not stamped. In *Robson v. Hall* (c) an agreement to make a bet was produced in evidence duly stamped: it appeared that after the agreement was made, the parties wrote upon it that they agreed to double the bet: this was held to be a new agreement requiring a new stamp; but the paper was received as evidence of the first agreement, and upon that the plaintiff recovered. [*Holroyd*, J. That might be treated as two distinct bets, each of which required

(a) 8 East, 373.

(b) 1 Campb. 72. 9 East, 351.

(c) Peake, N. P. C. 127.

a stamp, but the first was not varied by the second.] The case of *Hill v. Patten* has already been distinguished from the present ; and in *French, Assignee of Hill, v. Patten* (a) Lord *Ellenborough* treated the policy as defaced, and altogether destroyed, so that no stamp could render it available.

BAYLEY, J. I am of opinion that the nonsuit in this case was right. In *French v. Patten* it was established, that if the parties to an agreement, after they have signed it, introduce an alteration which cannot be read in evidence for want of a stamp, still the old agreement is at an end. There the alteration was upon the face of the instrument, here upon the back of it ; but that does not appear to make any material distinction ; for if the Judge sees that the first agreement has been determined, he may act upon that knowledge. It would be against the policy of the revenue laws to allow a party in such a case to resort to the first agreement. It has been argued that there might be two agreements subsisting, and that the plaintiff had a right to rely upon either that was [*265 in a condition to be read. But if they are inconsistent, one must supersede the other. Now the original agreement left the time for making the award unlimited, and that was fixed by the second. Putting aside all consideration of the stamp laws, the first agreement was no longer in force after the second had been made.

HOLROYD, J. I am of the same opinion. According to the judgment of *Le Blanc, J.*, the case of *French v. Patten* differs in one respect from this. He observes, that the alteration was made upon the very face of the instrument, and proceeds, "I cannot say that it is the same thing as if the memorandum had been written on a different instrument." But it seems to me that as soon as it appeared on the plaintiff's case that some further arrangement had been made after the first agreement was signed, he was bound to show what that new arrangement was, in order to prove that the old agreement was still in force. It has been urged that the new agreement could not be received in evidence at all, either for or against the plaintiff. But although, under such circumstances, the Court cannot notice the particulars of the agreement, it may take notice that an agreement has been made relating to the subject-matter of the action. It is every day's practice, when a witness gives parol evidence of a contract, to ask, whether it was reduced into writing ? If he says it was, the Court must take notice of the existence of that writing, and require it to be produced. And if it be not stamped it cannot be read in evidence, and the plaintiff's case fails.

*LITLEDALE, J. The terms of the first agreement were qualified by the second. Then the first agreement taken by itself is at an end. As [*266 to the alteration not being upon the face of the instrument, I cannot understand how it makes any difference whether the alteration is so made, or upon another part of the same paper, or upon a different paper. The effect is the same in each case. Then, as to looking at the second agreement, the Court may, in all cases, so far allow parol evidence of a written agreement as to ascertain that it relates to the subject-matter in discussion. If, indeed, a plaintiff gets through his case without giving the defendant any opportunity of mentioning the written agreement, the latter must produce it, and he cannot avail himself of it unless it be duly stamped.

Rule discharged.

DE BEAUVOIR v. WELCH and another.

By the general turnpike act, 3 G. 4, c. 126, s. 86, it is enacted, "That after any new road shall be completed, the lands or grounds constituting any former roads or road, or so much and such part or parts thereof, as in the judgment of the trustees may thereby become useless or unnecessary, shall and may be stopped up, and discontinued as public highways (unless leading over some moor, heath, common, uncultivated land, or waste ground, or to some church, mill, village, town or place, lands or tenements, to which such new road does not immediately lead, and which may therefore be deemed proper to be kept open, either as a public or private way or ways, for the use of any inhabitant at large, or any individual or individuals):" Held, that the exception did not take away from the trustees the power of stopping up the roads therein mentioned, but left them at their discretion to do so or not, and, therefore, that the trustees might stop up, and give up to the owner of the adjoining land an old road leading to a church, &c., to which the new road did not immediately lead.

TRESPASS for destroying gates and fences. Pleas, first, not guilty. Secondly, public right of foot and carriage way over the locus in quo. Issue thereon. At *267] the trial before *Burrough, J.*, at the *Berkshire Summer Assizes* in 1826, the plaintiff had a verdict subject to the opinion of this Court on the following case :

The locus in quo had formed a part of an old turnpike road, leading from the south end of *Bostock Lane*, in the *Bath* road, to *Hogmoor Coppice*, on the way towards *Pangbourn*. It was bounded on both sides by lands, which, with the exception of two fields, belonged to the plaintiff. In 1825, the trustees of this road formed a new line of road from the south end of *Bostock Lane* to *Hogmoor Coppice*, over the plaintiff's lands. After the new road was opened to the public, they made an order, dated the 6th of *February* 1826, that so much of the old turnpike road leading from the south end of *Bostock Lane* towards *Hogmoor Coppice*, as lay between the point at which the said old turnpike road touched the road leading from *Reading* towards *Speenhamland*, and the point at which the said old turnpike road touched the road leading from the said *Reading* and *Speenhamland* roads towards *Bradfield*, and containing in length four furlongs, twenty-nine poles, and three yards, or thereabouts, and so much of the said old turnpike road as lay between the point at which the same road touched the said before-mentioned road leading towards *Bradfield*, and the point at which the said old turnpike road touches the road leading by the parish church of *Englefield*, towards *Theale*, and containing in length three furlongs and ten poles, or thereabouts, and also so much of the said old turnpike road as lay between the point at which the same road touched the road leading from the parish church of *Englefield*, towards *North Street*, and the point at which the new line of turnpike road crossed the said old turnpike road, and containing *268] in length seven furlongs and six poles, or thereabouts, should be stopped up, and wholly discontinued to be used as a highway, and that the several pieces of old turnpike road so ordered to be stopped up, should be given up to the plaintiff, the owner of the adjoining lands, pursuant to the agreement of the same date between them. By this agreement, after reciting the above order, the trustees agreed to give up to the plaintiff so much of the old road as was ordered to be stopped up in exchange for his lands occupied by the new line of road. Possession of the old road was afterwards given to the plaintiff by the trustees. The distance from the south end of *Bostock Lane* to *Hogmoor Coppice*, was thirty-six poles less by the new than the old road. The distance from the defendant *Welch's* house at *Englefield*, to *Tyll Mill*, at which the inhabitants of *Englefield* had been accustomed to grind their corn, was considerably increased by the stoppage of the old road. The distance, also, of the village of *Englefield* itself from the *Bath* road was increased by the stoppage ; and the distance from the houses of several parishioners of *Englefield* to the parish church was also rendered considerably greater. On the 10th *March*

1826, the alleged trespasses were committed, in order to assert a continuing right of way over the locus in quo.

Tyrolhitt for the plaintiff. The trustees had such a general jurisdiction over the subject-matter as authorized them to make the order. By the 3 G. 4, c. 126, s. 83 (a), *the trustees of every turnpike road are empowered from time to time to divert, shorten, vary, *alter*, and improve the course of any road under their care. By *section 84, they are empowered to treat for the purchase of lands necessary for diverting, altering, and improving any such road. By section 86, after a new road is completed, the old one may be stopped up and discontinued as a public highway, except in certain cases therein mentioned. And the first question is, whether the exception absolutely ousted the trustees of their general power to stop up roads in the particular cases there specified, of a road to a church, mill, &c. That section provides, "that after such new road shall be completed, the lands constituting any former roads, &c. or such part thereof, as in the *judgment* of the trustees may thereby become useless or unnecessary, shall or may be stopped up and discontinued as public highways (*unless* leading over some moor, heath, common, uncultivated land or

(a) The 3 G. 4, c. 126, s. 83, enacts, "That it shall be lawful for the trustees or commissioners of every turnpike road, and they are thereby fully authorized and empowered, from time to time, to make, divert, shorten, vary, alter, and improve the course or path of any of the several and respective roads under their care and management, or of any part or parts thereof, and to divert, shorten, vary, alter, and improve the course or path of any of the said several and respective roads, through or over any commons, or waste-grounds, or uncultivated lands, without making satisfaction for the same; and also through or over any private lands, tenements, or hereditaments, tendering and making satisfaction to the owners thereof, and persons interested therein, for the damage they shall sustain thereby."

Sect. 86 enacts, "That after any new road shall be completed, the lands or grounds constituting any former roads or road, or so much and such part or parts thereof as in the judgment of the said trustees or commissioners may thereby become useless or unnecessary, [or] ⁽¹⁾ *shall or may* be stopped up and discontinued as public highways, (*unless* leading over some moor, heath, common, uncultivated land, or waste ground, or to some church, mill, village, town or place, lands or tenements, to which such new road or roads doth not or do not immediately lead, and which may therefore be deemed proper to be kept open, either as a public or private way or ways, for the use of any inhabitant at large, or any individual or individuals,) and shall be vested in, and shall and may be sold and conveyed by the said trustees or commissioners in the manner herein mentioned, for the best price that can be gotten for the same; and the money arising by such sale shall be applied for the purposes of the act, for repairing and maintaining such turnpike road."

Sect. 88 enacts, "That when any turnpike road shall be diverted or turned, and the new road shall be made and completed, such new road shall be in lieu of the old road, and shall be subject to the said provisions and regulations in any act of parliament contained, or otherwise, to which the old road was subject, and shall be deemed and taken to be a common highway, and shall be repaired and maintained as such; and the old road shall be stopped up, and the land and soil thereof shall be sold by the trustees or commissioners to some person or persons whose lands adjoin thereto, as hereinafter mentioned, with regard to pieces of ground not wanted; but if such old road shall lead to any lands, house, or place, which cannot, in the opinion of the said trustees or commissioners, be conveniently accommodated with a passage from such new road, which they are hereby authorized to order and lay out if they find it necessary, then, and in such case, the old road shall be sold, but subject to the right of way and passage to such lands, house, or place respectively, according to the ancient usage in that respect."

By 4 G. 4, c. 95, s. 87, it is enacted, "That if any person shall think himself aggrieved by any order, judgment, or determination made, or by any matter or thing done, by any justice or justices of the peace, or by any trustees or commissioners of any turnpike road, in pursuance of this act or the said recited act, or any local act for making, repairing, or maintaining any turnpike road, (except where the order, judgment, or determination of any such justice or justices, trustees or commissioners, are hereby declared to be final and conclusive, and except under the particular circumstances hereinafter mentioned,) and for which no particular method of relief hath been already appointed, such person may appeal to the justices of the peace at the next general or quarter sessions of the peace to be held for the county, &c., wherein the cause of such complaint shall arise: provided always, that no appeal shall be allowed against any conviction for any penalty or forfeiture which shall not exceed the sum of forty shillings."

(1) *Sic* in the statute, apparently interpolated by mistake.

waste ground, or to some church, mill, village, &c. to which such new road doth not immediately lead, and which may therefore be deemed proper to be kept open either as a public or private way *for the use of any inhabitant at large, or any individual"). This clause is not imperative on the trustees, or in restraint of their general power to stop a turnpike road on completing a new one, but is merely directory to them in the exercise of such power in the particular instances there enumerated. It will be contended, that the exception beginning with the word *unless* is absolute, and that as the new line of road does not lead immediately from the defendant's house to *Till Mill*, this case falls within it. But if such is the true construction of this clause, no part of any old turnpike road leading over any moor, &c. or to any mill, &c. could be stopped. For if such a road be turned, there must always be some place which stood on the old line, the communication from which, to some mill, village, place or lands, will not be immediate by the new line. The object of the exception was to indicate, that if the old road led not towards but to some church, mill, &c. to which the new road did not immediately lead, the trustees might stop up the old road under the act, and might at the same time, if they thought fit, reserve a right of way to any inhabitant, &c. Thus if trustees stopped up a road leading to a church, mill, &c., only, as to a cul de sac, they might yet reserve a communication over the old road, if the new line did not lead to such church, mill, &c., or if a new passage could not, in their opinion, be conveniently laid thereto from the new road, pursuant to the 3 G. 4, c. 126, s. 88. Then if the old line of road here stopped did not lead immediately to, but only towards some church, mill, &c., it is not such a road as falls within the exception, whatever be the effect of that exception; for *Wright v. Rat-tray* (a), shows that a claim *of a prescriptive right of way from A. to C. is not sustained by proof of a way leading from A. towards C., but interrupted at B. Now the old road from the defendant's house to *Till Mill* was not immediate, but led to many other places. The new road is as immediate, though longer. The expressions in the exception, "and which may, therefore, be deemed proper to be kept open, either as a public or private way," show a manifest analogy to the 88th section. That section is in pari materia, though applying only to cases where the old road is sold, and not exchanged as in s. 86, and clearly vests a discretion in the trustees to sell the old road, subject to a right of passage thereon to any house, &c., which cannot, in their opinion, be conveniently accommodated with a passage from the new road. The trustees having a discretion vested in them by the act to turn this road, exercised it for the benefit of the public by making a shorter line, and followed the maxim "discretio est scire per legem quid sit justum" (b), by consulting the parallel act respecting stopping highways not turnpike, viz. 55 G. 3, c. 68, s. 2, which enacts that highways may be diverted so as to make the same nearer or more commodious to the public. The statute 13 G. 3, c. 78, s. 19, repealed by the 55 G. 3, c. 68, s. 1, was to the same effect. Secondly, if the trustees, having a general jurisdiction to order the road to be stopped, exceeded it by selling or exchanging the old road without reserving to the defendant a right of passage to *Till Mill*, he should have appealed to the next sessions, according to the statute 4 G. 4, c. 95, s. 87, to quash the order. The words "may appeal" have always been construed to be *compulsory on the party seeking a remedy, *Bonnell v. Beighton* (c), *Durrant v. Boys* (d). In *Davison v. Gill* (e) the order was defective on the face of it. *Welch v. Nash* (f) turned on an ex parte order of justices, to which no plan was annexed as required by the 13 G. 3, c. 78, s. 19.

Talfourd for the defendants. The single question in this case is, Whether the trustees had jurisdiction under the statutes, to stop up the road which they

(a) 1 East, 377. (b) *Keighley's case*, 10 Coke, 140 a. See *Roake's case*, 5 Coke, 100 a.
 (c) 5 T. R. 182. (d) 6 T. R. 580. (e) 1 East, 64. (f) 8 East, 394.

have conveyed to the plaintiff? for if they had no jurisdiction, it can scarcely be contended that the parties aggrieved were bound to appeal to the sessions; and if they had jurisdiction, it must be conceded that this Court has no power to enquire into the manner in which they have exercised a discretion confided to them by law. The case has been argued, as if the only objection which could be raised to the stoppage was, the individual grievance of the defendant *Welch*, in the increase of distance to the mill where he and the other inhabitants of *Englefield* were accustomed to grind their corn; but this is not so, for the old road led to the village and parish church of *Englefield*, and to two closes not belonging to the plaintiff, to which there is now no access; and if in consequence of these circumstances the trustees had no power to stop up the old road, it remains a public highway, along which any of his Majesty's subjects have still a right to travel. The exception in 3 G. 4, c. 126, s. 86, includes a road thus circumstanced, for having given to the trustees a discretion to stop up roads generally, when they shall deem it fitting, it proceeds to qualify that discretion by the words, "unless *leading over some moor, &c. or to some church, mill, village, town, or place, lands or tenements, to which such new road does not immediately lead;" and here the case expressly finds that the old road led to the village of *Englefield*. It is obvious that, however indifferent or beneficial to the public at large the alteration may be, it has been productive of great prejudice to all the inhabitants of the village of *Englefield*, whose houses are now to be reached only by circuitous roads, and this was the precise evil against which the exception was intended to guard. It is to be observed, that the statute 3 G. 4, c. 126, gave no appeal whatever; and, therefore, under the construction contended for, there was no remedy against the judgment of the commissioners, even if they took away the only road which an individual might have to his own premises, as they have done in the instance of the closes which are described in the case as excepted from the lands of the plaintiff on each side of the old road. The discretion, therefore, of the trustees was limited, that limitation extended to the locus in quo, and consequently the right of the public was not extinguished, and the defendants are entitled to judgment.

Cur. adv. vult.

BAYLEY, J. This was an action of trespass, to which there was a plea of a public right of way. The locus in quo at one time had been part of a public highway. The question was, If it had or had not been properly stopped up, so as to destroy the right of the public, and so as to vest the right of possession in the plaintiff? The case turned on the construction of the 3 G. 4, c. 126, s. 86. It was insisted that the trustees had no right to make the order for stopping up the road in question, *because the old road led to a church, mill, village, &c. to which the new road did not immediately lead. Section 86 provides, that after such new road shall be completed, "the lands or grounds constituting any former road, or so much and such part thereof as in the judgment of the trustees may thereby become useless or unnecessary, shall or may be stopped up and discontinued as public highways, (unless leading over some moor, heath, common uncultivated land, or waste ground, or to some church, mill, village, town, or place, lands or tenements, to which such new road or roads doth not, or do not immediately lead, and which may therefore be deemed proper to be kept open either as a public or private way or ways, for the use of any inhabitant at large or any individual or individuals.)" The whole question turns on this exception. If it takes away from the commissioners the power to stop up every road of the description there specified, then they had no jurisdiction to stop up the road in question. But if it does not take away from them the power, but only authorizes them to leave open roads of that description when in their discretion they shall think fit, then the order in question will be a valid order. Undoubtedly, the trustees would have had no jurisdiction to stop up the road in question if the early part of the excepting clause had stood by itself. But upon a careful consideration of the whole of this clause, it seems to me to

be clear that the legislature intended to give the commissioners a discretionary power either to stop up or leave open those roads as they might think fit. The clause contains two branches; the first points out the description of the roads to which the power of the trustees may be applied; the second leaves it to the discretion of the trustees to apply it or not; and it even gives them a remarkable power of converting that *which had previously been a public into a private way. If the first branch of the exception had stood by itself, it would take away from the commissioners all power of stopping up any road leading over a moor, heath, &c. or to a mill, church, &c. It would be singular, however, that the commissioners should be precluded from stopping up any old road leading over a moor, heath, &c., when the new road might perhaps open in a new direction over that very moor, heath, &c., and the termini might be the same, though the line of direction might be somewhat different from the old road. It would be singular, too, that they should be precluded from stopping up an old road leading to a church, mill, &c. in every case where the new road did not lead immediately to such church or mill, though it might lead to some other road which would perhaps give a good access to the church, mill, &c. It seems to me that the latter words of the clause were introduced to qualify the more general expressions used in the former sentence, and to point out to the trustees in what instances that power might be exercised, but leaving it to their discretion to exercise it or not as they might think proper. This is the only reasonable construction of the clause. The clause says, first, that the road shall be stopped up, unless it is a road of a particular description; and secondly, unless it be a road which, on account of its leading to that heath, moor, &c. or to that mill, church, &c. *may be deemed proper* to be kept open as a public or a private way. The latter words import that a discretion is to be exercised. To be exercised by whom? Clearly by the trustees and commissioners. If we were to hold that it was only to be exercised by a judge or jury, it would lead to great litigation, for different juries might form very different judgments *as to the propriety of continuing the road open. Besides, the old road or roads are to be kept open, either as a public or private way or ways. If it be deemed proper that an old public way shall be a private way, the public rights are at an end; and it will become a way to be used only by particular individuals. But unless the commissioners have this power of making it a private way, how can it become such by law? There is no legal mode of converting that which has been a public way into a private way, except by act of parliament. It seems to me, therefore, that there is an obligation on the commissioners, when they are dealing with a road of this description, if they in their judgment shall think fit that it shall continue a public road, to say so in express terms on the face of their order. The true construction of this clause is, that the road is to be stopped up, unless, first, it is a road of one of the description specified in the act; and, secondly, unless the trustees deem it proper to be kept open as a public or private road. In this case the commissioners have made an order for stopping up and discontinuing, but have made no provision for keeping it up, either as a public or a private road; and, as it seems to me, the consequence is, that it has ceased to be a public road, and that the justification, therefore, is not made out. The statute 3 G. 4, c. 126 gives no appeal, and, therefore, under that statute the judgment of the trustees or commissioners (if they were the persons to exercise a judgment on the subject) would be final and conclusive. But that defect, if it be one, is remedied by the stat. 4 G. 4, c. 95, s. 87. For these reasons, it appears to me that the locus in quo had ceased to be a public way; and that, as the right of possession and right of property were vested in the plaintiff, he is entitled to recover.

*278] *HOLROYD, J., concurred.

LITLEDAL, J. The words of the exception manifestly import that a discretion is to be exercised by the commissioners. First, the word "*may*" prima facie has that import. It is true, that in some acts of parliament (as in

the 8 & 9 W. 3, c. 11, s. 8) the word "*may*" has been held to mean "*must*," but if the word "*must*" had accompanied the words "*be deemed proper*" in this case, the whole passage would have been insensible. The word "*must*" is wholly inapplicable to that act of the mind which the trustees by the other words are called upon to put in operation. The word "*may*" cannot in this case, therefore, mean "*must*." The word *deemed* imports also that a judgment is to be exercised, and the words "either public or private ways" describe the subject matter on which that judgment is to be exercised.

Judgment for the plaintiff.

ATTWOOD et al. v. MUNNINGS.

A. B., who carried on business on his own account, and also in partnership, went abroad, and gave to certain persons in this country two powers of attorney; by the first of which, authority was given for him, and in his name, and to his use, to do certain specific acts, (and, amongst others, to indorse bills, &c.) and generally to act for him, as he might do if he were present; and by the second, authority was given "for him and on his behalf, to accept bills drawn on him by his agents or correspondents." *C. D.*, one of *A. B.*'s partners (and who acted as his agent), in order to raise money for payment of the creditors of the joint concern, drew a bill, which the attorney accepted in *A. B.*'s name by *procuration*. In an action against *A. B.* by the indorsee of the bill: Held, first, that the right of the indorsee depended upon the authority given to the attorney; secondly, that the powers applied only to *A. B.*'s individual and not to his partnership affairs; thirdly, that the special power to accept extended only to bills drawn by an agent in that capacity, and that *C. D.* did not draw the bill in question as agent, but as partner; and, lastly, that the general words in the powers of attorney were not to be construed at large, but as giving general powers for the carrying into effect the special purposes for which they were given.

ASSUMPSIT by the plaintiffs, as indorsees, against the defendant, as acceptor of a bill of exchange for 1560*l.* Plea, the general issue. At the trial before Lord *Tenterden, C. J., at the *London* sittings after *Michaelmas* term [*279 1823, a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case:

The plaintiffs were bankers carrying on business in the city of *London*: the defendant was a merchant engaged in extensive mercantile business, and also, in joint speculations to a considerable amount, with *Thomas Burleigh*, Messrs. *Bridges* and *Elmer*, *S. Howlett*, and *W. Rothery*. In the year 1815 the defendant went abroad on the partnership business, and remained abroad till after the bill upon which this action was brought became due. By a power of attorney, dated the 18th of *May* 1816, the defendant granted power to *W. Rothery*, *T. Burleigh*, and *S. Munnings*, his wife, jointly and severally for him, and in his name, and to his use, to sue for and get in monies and goods, to take proceedings, and bring actions, to enforce payment of monies due, to defend actions, settle accounts, submit disputes to arbitration, sign receipts for money, accept compositions; "indorse, negotiate, and discount, or acquit and discharge the bills of exchange, promissory notes, or other negotiable securities which were or should be payable to him, and should need and require his indorsement;" to sell his ships, execute bills of sale, hire on freight, effect insurances; "buy, sell, barter, exchange, export and import all goods, wares, and merchandises, and to trade in and deal in the same, in such manner as should be deemed most for his interest; and generally for him and in his name, place, and stead, and as his act and deed, or otherwise, but to his use, to make, do, execute, transact, perform, and accomplish all and singular such further and

other acts, deeds, matters, and things as should be requisite, expedient, and advisable to be done in and about the premises, and all other his affairs and *concerns, and as he might or could do if personally acting therein." By *290] another power of attorney, dated the 23d of July 1817, and executed by the defendant when abroad, he gave to his wife, *S. Munnings*, power to do a variety of acts affecting his real and personal property; "and also for him and on his behalf, to pay and accept such bill or bills of exchange as should be drawn or charged on him by his agents or correspondents as occasion should require, &c.; and generally to do, negotiate, and transact the affairs and business of him, defendant, during his absence, as fully and effectually as if he were present and acting therein." *T. Burleigh* corresponded with the defendant, and acted as his agent, both before and after the receipt of this power. The defendant, while abroad, employed part of the produce of the joint speculations in his individual concerns, and during his absence, *T. Burleigh*, for the purpose of raising money to pay to creditors of the joint concern, who were become urgent, drew four bills of exchange for 500*l.* each upon the defendant, dated May 22d 1819. The proceeds of those bills were applied in payment of partnership debts; they were accepted by the defendant by procuration of *S. M.*, his wife. The bill in question was afterwards, in order to raise money to take up those bills, drawn and accepted in the following form:—"Six months after date pay to my order 1560*l.*, for value received: *T. Burleigh*. Accepted per procuration of *G. G. H. Munnings*.—*S. Munnings*." This bill was discounted by the plaintiffs. The defendant returned to England in October 1821, and he, and each of the partners to the joint speculations, claimed to be a creditor on that concern.

Parke for the plaintiffs. The question is, Whether *under either of *281] the powers of attorney, the defendant's wife was authorized to accept bills drawn by *Thomas Burleigh*, to raise money to discharge debts owing by the partners in the joint concern? By the second power express authority was given to Mrs. *M.* to accept bills drawn by agents of the defendant as occasion might require. *Burleigh*, the drawer, is found to have acted as agent of the defendant, and, therefore, the only circumstance necessary to complete the authority is to show that occasion did require that the bill should be drawn. That, however, cannot affect third persons. They are bound to see the power to accept, but not to ascertain how far the bill was necessary. Powers are often construed differently as to the attorney and third persons. In *Howard v. Bailie* (a), *Eyre*, C. J., puts an instance, viz. a power to pay debts in course of administration; payment of a simple contract before a specialty debt would be good, quoad the creditor, but not as to the attorney. It is not possible for strangers to have such a knowledge of the party's affairs as to be enabled to judge whether the occasion did make the bill requisite. The agent, of course, has such knowledge; and the power as to this part must be considered directory only. The party is protected by having the choice of his own agent, and may derive great benefit from giving him power to draw or accept bills in cases of expediency as well as in cases of absolute necessity. The power in question may fairly be read, as if the words "at the discretion of my attorney," or, "as my attorney shall think fit," had been inserted, instead of "as occasion shall require." If the words had been "as shall be necessary," a different construction might have prevailed. The case of *The East India Company v. *282] Hensley* (b), differs from the present. There the agent had a special and limited power to buy silk of a particular quality. If the order to him had been general, to purchase such silk as occasion should require and he had bought silk of a second quality, although the occasion required him to buy it of the first, the principal would have been bound by his act. But, secondly, the occasion did require this bill to be accepted. The case states that the defend-

ant was engaged in various speculations individually and in partnership. He had applied to his own use funds of the joint firm. The joint concern was in debt, and the bill in question was drawn and accepted for the purpose of paying those debts. [*Bayley, J.* There is nothing said in the power as to partnership concerns, and as to them it was unnecessary, for the other partners had, without any power of this sort, authority to bind the defendant.] The words of the power are general; there is nothing in them to limit the authority to the private concerns of the defendant, and the words must be construed most strongly against him. But if it be held that the special authority to accept bills did not extend to this case, still the general power in the first instrument was sufficient to authorize the acceptance: that relates to the management of *all* the defendant's affairs; and if any words are sufficiently comprehensive to give both special and general powers, they have been used in that instrument.

Pollock contra. If the first power had been capable of receiving the construction now attempted to be put upon it, the second would have been wholly unnecessary; but it manifestly was not intended to apply to the acceptance of bills. The question, therefore, turns upon "the authority to accept given by the second power. Much argument has been addressed to the question how far the power was restricted by the introduction of the words "as occasion shall require." But supposing no such words to have been used, then the power would have been to accept bills drawn by his agent or correspondent, but that must mean an agent or correspondent in that transaction. Nor would any difficulty arise out of such a construction; for the acceptance being by procuration, ought to put parties taking the bill on their guard, and they should require the production of the letter of advice accompanying the bill.

BAYLEY, J. This was an action upon an acceptance importing to be by procuration, and, therefore, any person taking the bill would know that he had not the security of the acceptor's signature, but of the party professing to act in pursuance of an authority from him. A person taking such a bill, ought to exercise due caution, for he must take it upon the credit of the party who assumes the authority to accept, and it would be only reasonable prudence to require the production of that authority. The plaintiff in this case relies on the authority given by two powers of attorney, which are instruments to be construed strictly. By the first of the powers in question the defendant gave to certain persons authority to do certain acts *for him, and in his name, and to his use*. It is rather a power to take than to bind; and, looking at the whole of the instrument, although general words are used, it only authorizes acts to be done for the defendant singly; it contains no express power to accept bills, nor does there appear to have been an intention to give it: the first power, therefore, did not warrant this acceptance. The second *power gave an express authority to accept bills *for the defendant and on his behalf*. [284] No such power was requisite as to partnership transactions, for the other partners might bind the firm by their acceptance. The words, therefore, must be confined to that which is their obvious meaning, viz. an authority to accept in those cases where it was right for him to accept in his individual capacity. Besides, the bills to be accepted are those drawn by the defendant's agents or correspondents; but the drawer of the bill in question was not his agent quoad hoc. The bills are to be accepted, too, "as occasion shall require." It would be dangerous to hold that the plaintiff in this case was not bound to enquire into the propriety of accepting. He might easily have done so by calling for the letter of advice; and I think he was bound to do so. For these reasons, I am of opinion that judgment of nonsuit must be entered.

HOLROYD, J. I agree in thinking that the powers in question did not authorize this acceptance. The word *procuration* gave due notice to the plaintiffs, and they were bound to ascertain, before they took the bill, that the acceptance was agreeable to the authority given. The case does not state sufficient to show that this bill was drawn by an agent in that capacity, but rather the

contrary; for it appears that it was drawn to raise money for the joint concern in which the drawer was a partner; it does not, therefore, come within the special power. Then, as to the general powers. These instruments do not give general powers, speaking at large, but only where they are necessary to carry the purposes of the special powers into effect.

*285] LITTLEDALE, J. I am of the same opinion. It is *said that third persons are not bound to enquire into the making of a bill; but that is not so where the acceptance appears to be by procuration. The question then turns upon the authority given. The first power of attorney contains an authority to indorse, but not to accept bills; the latter, therefore, seems to have been purposely omitted. Neither is this varied by the general words, for they cannot apply to any thing as to which limited powers are given. The second power gives authority "to accept for me and in my name, bills drawn or charged on me by my agents or correspondents, as occasion shall require." The latter words, as to the occasion, do not appear to me to vary the question; and, reading the sentence without them, it authorizes the acceptance of bills drawn by an agent. The present bill was not drawn by *Burleigh* in his character of agent, and therefore the acceptance was without sufficient authority, and the plaintiff cannot recover upon it.

Postea to the defendar.t.

WATSON v. HOME.

By lease, lessor demised for a term of years a piece of ground at a fixed annual rent. The tenant covenanted not to build on the land without the licence of the lessor. The lessor covenanted to pay all taxes already charged or to be charged upon or in respect of the demised piece of ground during the continuance of the term. At the time when the lease was executed, the lessor gave a licence to the lessee to build on the land demised. The lessee did build, and thereby increased the annual value of the premises: Held, that the landlord was liable upon his covenant to pay the taxes in proportion to the rent reserved, and not to the improved value.

The tenant compounded for his taxes under the provisions of a local act, and in consequence of such composition, his premises were assessed at a less annual sum than the improved annual value: Held, that the tenant paid taxes in respect of the whole improved annual value, and that the landlord was to pay that proportion of the taxes paid which the rent bore to such improved annual value.

COVENANT by the plaintiff, as assignee of the lessee, against the defendant, as lessor, to recover the amount of taxes and rates paid by the plaintiff in *286] *respect of a certain piece or parcel of ground by indenture of lease demised by the defendant to one *L. Prendergast* for a term of eighteen years and three quarters, and assigned by him to the plaintiff. Plea, that the defendant had paid all taxes and rates charged upon or in respect of the ground so demised as aforesaid. At the trial before *Littledale, J.*, at the *Middlesex* sittings after *Michaelmas* term 1826, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case, as to the amount of damages:

By indenture of lease, dated the 9th *March* 1819, between the defendant of the first part, the plaintiff of the second part, and *L. Prendergast* of the third part; the defendant demised to *Prendergast* all that piece or parcel of ground situate, &c. (stating local situation and abutments.) Habendum for eighteen years and three quarters, from the 25th *March* then next, at the yearly rent of 79*l.* 12*s.* 6*d.*, which the lessee covenanted to pay without any deduction whatsoever, except for taxes, charges, rates, and assessments charged or to be charged upon, for, or in respect of the said piece or parcel of ground,

and paid for by *Prendergast* or his assigns, and then the lessee covenanted that he would not, without the previous consent in writing of the defendant, erect or suffer to be erected, any messuage, or tenement, or other building upon the said demised premises. The defendant's covenant as to taxes, upon which this action was brought, was as follows: "And also, that he, the said *W. Home*, his executors, &c., shall and will bear, pay, and discharge, as well the land-tax as all other taxes, charges, rates, assessments, and impositions, parliamentary, parochial, or otherwise, *already charged or *to be charged upon or in* [*287 *respect of the said demised piece or parcel of ground*, or any part thereof, during the continuance of the said term hereby granted, or any renewed term or terms to be granted, or upon the said *L. Prendergast*, his executors, administrators, or assigns, in respect thereof." The defendant at the time of executing the lease on the said 9th day of *March* 1819, signed a licence or consent for the plaintiff to build on the demised ground. Fourteen messuages were afterwards built thereon at an expense of upwards of 2500*l.*, and to each of the messuages was attached a garden, being respectively parts of the demised ground. The whole of these houses let at rents amounting together to 584*l.*, subject to the risk of tenants' taxes, repairs, and all outgoings, which were paid by the plaintiff. In 1819 the lease was duly assigned to the plaintiff. At the time of the execution of the lease the defendant was assessed for the whole land, about fifteen acres, including three messuages, at a valuation of 200*l.* per annum, and after he had let off the part to *Prendergast*, his rate was reduced to 180*l.*, deducting 20*l.* for the portion let off, it having been customary in the parish to assess land unbuilt upon at 5*l.* per acre per annum. The plaintiff claimed in respect of the following parochial rates which he paid from *Christmas* 1821 to *Michaelmas* 1824, amounting to 152*l.* 15*s.* 6*d.* for two years and three quarters, viz. the poor and church-yard rates, the paving and watch rates, and the sewer's rate. By the local acts of 22 *G.* 2, c. 50, and 42 *G.* 3, c. 13, the watch and paving rates are charged upon the occupier of any messuage, &c. And by a local act of the 53 *G.* 3, c. 112, s. 45, the poor and church-yard rate are also charged upon the inhabitants and occupiers; but by section 54 of the last act, the trustees under the last-mentioned act, and the trustees under the former-mentioned paving acts, [*288 are empowered jointly to compound for all the above rates with land-lords, when the premises shall not exceed 18*l.* per annum, or where the houses are let in lodgings. The sewer's rate is assessed by virtue of the 54 *G.* 3, c. 219, and is directed to be charged upon the occupier, and allowed by the land-lord. Immediately after the fourteen houses were completed, and the gardens fenced in, *Prendergast* the lessee, and afterwards the plaintiff as assignee, under the 53 *G.* 3, c. 112, s. 54, entered into a composition for payment of the poor and other parochial rates and assessments on the houses and gardens, and the same were compounded for at an average of 12*l.* for each of the houses and gardens, making an aggregate sum for the whole of 168*l.* per annum. The plaintiff proved that he had paid the taxes and rates in respect of the said houses and gardens from *Christmas* 1821 to *Michaelmas* 1824, amounting to 152*l.* 15*s.* 6*d.*, being two years and three quarters upon the said sum of 168*l.* so compounded for, and he claimed to recover the proportion of the said sum of 152*l.* 15*s.* 6*d.*, calculated upon the sum of 79*l.* 12*s.* 6*d.*, the rent reserved by the lease to, and received by the defendant for the demised premises: by which calculation, as 168*l.* had to bear 152*l.* 15*s.* 6*d.*, so 79*l.* 12*s.* 6*d.* ought to bear 79*l.* 7*s.*

Chitty for the plaintiff. The defendant expressly covenants to pay all taxes charged or to be charged upon or in respect of the demised piece or parcel of ground during the continuance of the term. In *Hyde v. Hill* (a), there was no express covenant by the lessor *to pay taxes, but the covenant was by [*289 the lessee to pay all taxes except the land tax. *Graham v. Wade* (b)

turned on the construction of a deed couched in very special terms, and does not apply to the present case. Besides, it is evident, that at the time when the lease was executed, both the parties contemplated that the premises were to be built upon, for the licence to build was signed on the very day the lease was executed.

Overwood contra. If the covenant were construed literally it might follow, that in consequence of the tenant's improvements the taxes might exceed the whole rent payable to the landlord, and in that case he would not receive any compensation for the use of his land. That could not have been the intention of the lessor. The covenant, therefore, must receive a reasonable construction to effectuate the intention of the parties, and giving it that construction, it binds the lessor to pay all taxes charged or to be charged upon the piece or parcel of ground demised, being of the annual value of 79*l.* 12*s.* 6*d.* *Yeo v. Leman* (a), and *Hyde v. Hill* (b), are authorities to show, that under such a covenant as this the landlord is liable to pay taxes in proportion, not to the increased rate of taxation, but in proportion to the rent he receives. In the latter case the covenant was contained in a building lease.

BAYLEY, J. The question turns entirely upon the construction of that clause in the lease by which the lessor covenants to pay and discharge, as well the land
*290] tax as all other taxes, charges, rates, and assessments, *parochial, parliamentary, or otherwise, already charged, or to be charged upon or in respect of the said demised piece or parcel of ground, or any part thereof, during the continuance of the term. The annual rent reserved was 79*l.* 12*s.* 6*d.*, and there was a covenant, by the lessee, not to build upon the demised premises without the consent of the lessor. If the land had not been built upon, but had remained in the same state as when the lease was executed, it is quite clear that the lessor would be liable to pay such taxes only as would have been payable in respect of property of the annual value of 79*l.* 12*s.* 6*d.* By the lease the parties have agreed that that sum should be taken as the annual value of the premises. It is the annual sum which the property yields to the lessor, and in respect of which he would have been liable to be assessed to the land tax and poor rates if they had been payable by him; but the lessee afterwards built upon the land, and thereby increased its value. The question is, whether the lessor is bound to contribute to the tenant's taxes in proportion to the rent reserved, or in proportion to the increased rate at which the premises are now assessed by reason of the improvements made by the tenant. The covenant, in terms, is to pay all taxes charged or to be charged upon the demised piece or parcel of ground during the continuance of the term; but that covenant must receive a reasonable construction. If it were literally construed, so as to make the landlord liable for all taxes charged in respect of the improved value, it might possibly happen, in consequence of the improved value of the premises and the increased rate of taxation, that the landlord would have nothing to receive for
*291] the use of his land. Now that could not *have been the intention of the lessor. As soon as the lease was executed the property might have been assessed at the annual value of 79*l.* 12*s.* 6*d.*; and when improvements were made, and greater rates consequently imposed, the increased burden ought in justice to fall upon that person who enjoys the benefit of the improvements. It seems to me, therefore, that when those improvements were made and the premises assessed in respect of their improved value, the tenant was entitled to deduct from the rent not the whole taxes charged, but that proportion of the taxes which would have been payable in respect of the original value of the premises. *Yeo v. Leman* (c), and *Hyde v. Hill* (d), proceeded on the principle that the landlord is to be charged in proportion to his rent, and not to the improved value. It seems to me that the landlord in this case ought to be charged that proportion

(a) 2 Str. 1190.
(c) 2 Str. 1190.

(b) 3 T. R. 377.
(d) 3 T. R. 377.

of the taxes paid by the tenant, which would have been payable in respect of the premises, if they had continued to be of the original value of 79*l.* 12*s.* 6*d.* And, although the tenant has compounded to pay rates as if his premises were assessed at 168*l.*, yet he has in fact paid in respect of the improved annual value 584*l.*, and the sum payable by the landlord must be calculated accordingly.

HOLROYD, J. The assessments ought to be made on the land in proportion to its annual value. If these taxes, therefore, had been payable in the first instance, partly by the landlord and partly by the tenant, each of them must have been assessed in proportion to that annual value which the land produced to him; but by *law these taxes are payable by the tenant. It seems to me that the effect of the covenant in this case is to make the landlord and [*292 tenant contribute respectively to the taxes, in proportion to the benefit which they receive from the land. The defendant in terms covenanted to pay all taxes charged or to be charged upon the demised piece or parcel of ground during the continuance of the term. The parties by the *reddendum* agreed that the annual value of that piece or parcel of ground should, during the continuance of the term, be of the annual value of 79*l.* 12*s.* 6*d.* The covenant to pay taxes must, therefore, be construed with reference to that value. By this construction each party will contribute to the taxes in proportion to the benefit which he receives from the land. The lessor will pay taxes upon the original value, and the tenant upon the improved value, of which he alone reaps the whole benefit. I think, therefore, that the landlord must pay that proportion of the taxes which would have been payable by the tenant if the premises had remained in their original state, and of the annual value of 76*l.* The improved value is 584*l.*; and although the tenant has compounded under the act of parliament, and pays only an annual value of 168*l.*, still he pays taxes in respect of the full improved value. The landlord, must, therefore, pay a share of the taxes in the proportion of 79*l.* to 584*l.*

LITLEDALE, J., concurred.

*HAYNES v. HAYTON, Esq.

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By the statute 3 G. 4, c. 46, the court of quarter sessions are empowered to discharge a forfeited recognizance in those cases only where the party has been committed to gaol, or has given security to appear at the sessions, and, therefore, where a party, whose recognizance had become forfeited for not appearing to an indictment, and against whom process had issued, paid to the sheriff the sum mentioned in the recognizance, in order to prevent a sale of his goods, and the justices at sessions afterwards by an order mitigated the recognizance to a small sum, and directed the sheriff to discharge the residue from the recognizance: it was held, that such order was void, and that the party was not entitled to recover from the sheriff the sum which the justices had ordered to be discharged.

ASSUMPSIT against the defendant, late sheriff of *Herefordshire*. The declaration contained the common money counts. On the trial of the cause before *Bosanquet*, Serjt., at the Spring assizes for the county of *Hereford* 1827, the following appeared to be the facts of the case:

The plaintiff had, in *May* 1824, entered into two recognizances in 40*l.* each, one conditioned for his own appearance, and the other for that of his wife, at the then next quarter sessions for that county, to plead to an indictment found against them and three others for a forcible entry. These recognizances were returned to the clerk of the peace, and were estreated at the sessions, the plaintiff and his wife making default of appearance. The forfeited recognizances were included in the copy of the *estreat* roll sent to the defendant, as sheriff,

with the writ, according to the provisions of the 3 G. 4, c. 46, s. 2, and on the 30th of August following one of the defendant's officers proceeded to levy under the writ on the plaintiff's goods for the sum of 80*l.*, being the amount of his forfeited recognizances; *which sum the plaintiff immediately paid, in order to prevent a sale.* At the Michaelmas sessions following, to which the defendant had returned the writ and the estreat roll, with the word "Received" written *294] in the margin against the plaintiff's recognizances, an application was made to the Court, under the sixth section of the before-mentioned act, to discharge the plaintiff from the money so paid in satisfaction of the forfeited recognizances; and the justice made an order to mitigate each of the forfeited recognizances to 13*s.* 4*d.*, and also an order in each case on the defendant, as sheriff, in the form given in the act, schedule (C), to discharge the sum of 39*l.* 6*s.* 8*d.* (the residue of the forfeited recognizance) from the estreat roll. In the accounts rendered by the under-sheriff to the Court of Exchequer, 13*s.* 4*d.* was the sum stated to have been levied on each recognizance, and the residue discharged by order of sessions. Applications were made on the part of the plaintiff to the defendant's under-sheriff (after the order of sessions), requiring him to pay back to the plaintiff the two sums of 39*l.* 6*s.* 8*d.* and 39*l.* 6*s.* 8*d.*, which he promised to do on being allowed sheriff's poundage, and receiving separate receipts for the two sums. The present action was brought to recover the full amount of the two sums remitted by the sessions. The jury found a verdict for the plaintiff for 74*l.* 13*s.* 4*d.* *Tuunton*, in Easter term last, obtained a rule nisi for a new trial, on the ground that the legislature, by the statute 3 G. 4, c. 46, had given no power to the sessions to discharge a forfeited recognizance in a case where the party thought fit to pay the money, but only where he had been committed to gaol or become bound to appear at the sessions.

Maule and *Whitcombe* now showed cause. Supposing that the sessions had no power to remit the forfeited recognizances, still the acts and admissions of the defendant's under-sheriff would entitle the plaintiff to recover on either *295] of the counts for money had and received, or on the account stated. He has expressly promised to pay the amount remitted by the sessions, deducting only his poundage, which was all he originally claimed to be entitled to hold; and although it was maintained that he could make no such claim on money levied by process issuing from sessions, yet on the trial it was conceded for the sake of peace. The sum, therefore, for which the verdict now stands, is that which he expressly promised the plaintiff to pay over to him. The account rendered by him to the Court of Exchequer, whereby he takes credit for the sums ordered by the sessions to be remitted, is a recognition and adoption by the sheriff of that order, and an acknowledgment that he holds the money to the plaintiff's use. It is unnecessary, however, to urge this view of the case, because the plaintiff's right to recover is well founded on the order made by the sessions; and that order was one which they had full authority to make, under the 3 G. 4, c. 46 (a). That is an act which should receive a liberal construction for the relief of parties, and not such an one as would enable the sessions to order the discharge of recognizances, only where a party has been lodged in gaol, or has given security, but would preclude them from making such an order, where the party has paid the whole sum forfeited. The writ directed by the statute, s. 2, and schedule (A), is a *feri facias* and *capias*: it commands the sheriff to levy on the goods, &c.; and if there are no goods, &c. then to take the person. The sessions, in the latter case, have authority to "inquire into the *296] circumstances," (s. 6.) and order the discharge of the whole or part of the forfeited recognizance; and it clearly was not the intention of the legislature to exclude them from such enquiry and order, where the party has goods, and pays the full amount of the forfeiture. Such a payment may be considered as the party's binding himself to appear, and then when he does appear

(a) See the clauses of the act set out in the judgment delivered by the Court.

the sessions have full power. But it is not necessary, in order to invest them with that power, that security should be given either expressly or by implication. The sixth section gives them a discretionary jurisdiction on the subject-matter. The court of quarter sessions is thereby empowered, "at its own discretion, to order the discharge of the whole or part of the forfeited recognizance, or *sum of money paid or to be paid in lieu or satisfaction thereof.*" The latter clause has no meaning if such a case as the present is not within its operation. It is also to be observed that the order by the sessions to the sheriff, to discharge the forfeiture from the estreat roll, prescribed by the statute, schedule (C), does not recite either that the party had been taken into custody or that he had given security to appear and abide the decision of the Court, but merely, that he has appeared and has made it appear to the satisfaction of the justices that he should be relieved.

Taunton contra. The legislature has given no power to the sessions to interfere where a party has thought fit to pay the whole money on the writ coming in. If he chooses to abide the decision whether the whole or part of his forfeited recognizance should not be remitted, he may do so on giving security under section 5. And by the sixth section, by which alone the sessions acquire power to order a discharge, they may, by *the express terms of that section*, [*297 make such an order not only where security has been given, but where the party has been committed to gaol. But their power is confined to those two cases. The authority by section 6, "to inquire into the circumstances of the case," is given to "the court of general or quarter sessions before whom any person *so committed to gaol or bound to appear shall be brought.*" The words "committed to gaol" refer to persons taken into custody under section 2, and the words "bound to appear" refer to the security mentioned in section 5. The plaintiff in this case was not brought out of gaol, or in pursuance of security for his appearance; his case, consequently, was not within the contemplation of the statute, and the sessions had no authority to interfere.

Cur. adv. vult.

BAYLEY, J. It appears in this case that the recognizances were forfeited, that process issued, and that the plaintiff paid the money to the sheriff. The sessions afterwards, upon the application of the plaintiff, made an order to mitigate the forfeited recognizances to 13s. 4d., and also made an order on the sheriff to discharge the two sums of 39l. 6s. 8d. from the estreat roll, in consequence of which he omitted those sums in his accounts delivered into the exchequer, and promised the plaintiff to repay him. It has been insisted that the plaintiff was entitled to recover, first, on the statute 3 G. 4, c. 46, secondly, on the ground of the under-sheriff's promise, and, thirdly, on the ground that the sheriff took credit with the exchequer for those sums. As to the latter ground, it appears to us that if the sessions had not authority to make the order in question, that order is wholly void, and the sheriff's omission to insert *these sums in* [*298 his accounts delivered into the exchequer does not alter the case, for he is still accountable there. And if that be so, there was no consideration for his promise to pay the plaintiff, and it becomes nudum pactum. The question depends upon this, whether the 3 G. 4, c. 46, s. 6, authorizes the sessions to discharge the recognizance in all cases, or in those cases only where the party has been committed to gaol or become bound in sureties to appear at the sessions. If a general jurisdiction be given to the sessions, then the plaintiff is right, otherwise he is wrong. It was admitted by the plaintiff's counsel that the sessions had no other jurisdiction than that given by the 3 G. 4, c. 46. By section 2 of that act it is enacted, that all fines, forfeited recognizances, sum or sums of money paid or to be paid in lieu or satisfaction of them, shall be certified by the justices of the peace by or before whom such fines, forfeited recognizances, &c. shall be imposed or forfeited, to the clerk of the peace of the county, &c., and that such clerk of the peace shall copy on a roll such fines, forfeited recognizances, &c., and send a copy of such roll, with a writ of distringas and capias, ~ fieri facias and capias, to the sheriff, which shall be the authority to such

sheriff for proceeding to the immediate levying of such fines, forfeited recognizances, sum or sums of money paid or to be paid in lieu or satisfaction of them, on the goods and chattels of such several persons, or for taking into custody the bodies of such persons in case sufficient goods and chattels shall not be found whereon distress can be made for recovery thereof. Then section 5, which is very inaccurately worded, provides, that if any person on whose goods and chattels such sheriff shall be authorized to levy any such forfeited recognizance *299] or sum of money to be *paid in lieu or satisfaction thereof, shall give security to the sheriff for his appearance at the next general or quarter sessions, there to abide the decision of the court, and also to pay such forfeited recognizance or sum of money, &c. together with all expenses as shall be ordered and adjudged by the Court, it shall be lawful for such sheriff *to discharge such person, so giving such security, out of custody*; provided also, that in case such party so giving such security shall not appear in pursuance of his undertaking, it shall be lawful to the Court to issue a writ of distringas and capias, or fieri facias and capias, against the surety or sureties of the person so bound as aforesaid. I think that clause does not extend to cases where the party pays the money, or where the sheriff levies on the goods, but is confined to cases where the sheriff has taken the body. Then comes section 6, under which alone the plaintiff had power to apply to the sessions, and they had jurisdiction: that section enacts, that the court of quarter sessions, before whom any person *committed to gaol or bound to appear shall be brought*, is authorized and required to enquire into the circumstances of the case, and shall, at its discretion, be empowered to order the discharge of the whole of the forfeited recognizance or sum of money paid, or to be paid in lieu or satisfaction thereof. or any part thereof, which order shall be a discharge to the sheriff, &c. on the passing of his accounts at the exchequer. The power given to the sessions to order the discharge of a forfeited recognizance is, therefore, confined to cases in which a party brought before the sessions has been committed to gaol or been bound to appear. If it had been intended to give the sessions a general discretion in all cases, it is impossible to *suppose that this language would *300] have been used. By the second section the plaintiff might be committed to gaol. By the fifth section he might be bound to appear at the next quarter sessions; but in this case the party was neither committed to gaol nor bound to appear at the next sessions. He paid the money. Therefore, it seems to us, that as the authority of the sessions was limited to those cases only, they had no power to make the order in question. The statute 4 G. 4, c. 37, s. 3, is a legislative exposition of the former statute. It enacts, "that where a party subject to any fine, forfeited recognizance, &c. shall reside or shall have removed from or out of the jurisdiction of the sheriff in which such fine, &c. shall have been incurred, &c. it shall be lawful for such sheriff to issue his warrant, together with a copy of the writ, directed to the sheriff acting for the county or place in which such person shall then reside or be, or in which any goods or chattels shall be found, requiring such sheriff to execute such writ; and the said sheriff, &c., within thirty days after the receipt of the warrant, is required to return to the sheriff, from whom he shall have received the same, what he shall have done in the execution of such process, *and whether the party shall have given good and sufficient security to appear at the ensuing general or quarter sessions* to be held for the county from which the writ issued, and in case a levy shall have been made, to pay over all monies received in pursuance of the warrant to the sheriff from whom he shall have received the same." If the sheriff is to make that return, it shows that the party had no power to go to the sessions unless such security were given; and as the sessions have power to award costs *301] under the fifth section of the 3 G. 4, c. 46, that power would be *nugatory unless the security were given. Upon the whole we are of opinion, that the sessions had no power over the recognizance. The rule for a new trial must therefore be made absolute.

Rule absolute.

WOODWARD v. BOOTH.

Where, in case the declaration stated that plaintiff delivered a trunk to the defendant, to be put into a coach at *Chester*, in the county of *Chester*, to wit, at, &c., and safely carried to *Shrewsbury*, and that through defendant's negligence it was lost; and it appeared in evidence that the trunk was delivered to the defendant at the city of *Chester*, which is a county of itself, separate from the county of *Chester* at large, but within its ambit: Held, that this was not a material variance, but that the declaration was supported by the evidence, as no evidence was given of the existence of any other place called *Chester*.

CASE. The first count of the declaration was upon the custom of the realm as to innkeepers, and stated that the defendant kept an inn at *Chester*, in the county of *Chester*, to wit, at *Ludlow*, in the county of *Salop*; that plaintiff put up there and delivered into defendant's care a trunk, which, through his negligence, was lost; second count stated, that defendant was proprietor of a coach for the conveyance of passengers and their luggage for hire from *Chester* aforesaid to *Shrewsbury*, that plaintiff became a passenger, and that by the carelessness of the defendant his luggage was lost; third count similar in substance; fourth count, that plaintiff delivered to defendant a trunk to be put into or upon a coach at *Chester* aforesaid, to wit, at *Ludlow* aforesaid, to be carried to *Shrewsbury*; that by defendant's carelessness it was lost. Plea, not guilty. At the trial before *Vaughan*, B., at the last *Shrewsbury* assizes, it appeared that the plaintiff never went into the defendant's inn, the first count was therefore abandoned; as to the others, it was proved that the trunk was delivered at *Chester*, in the county of the city of *Chester*, and it was thereupon said that the terminus from which the trunk was to be carried was misdescribed. The learned Judge thought the variance was fatal, and *nonsuited the plaintiff. In *Easter* term a rule to set aside the nonsuit was obtained; [*302 against which

Campbell and *R. V. Richards* showed cause. Although the declaration is framed in case, yet it is founded upon a contract, and the action was substantially for non-performance of a contract. Then was the contract proved as alleged. The first count was abandoned at the trial, that described the defendant as an innkeeper at *Chester*, in the county of *Chester*, and all the subsequent counts describe the terminus a quo as *Chester* aforesaid, which must mean "*Chester*, in the county of *Chester*." But the only *Chester* to which the evidence applied was the city of *Chester*, in the county of the city of *Chester*; the contract, therefore, was not proved as laid; and this is precisely within the authority of *Tucker v. Cracklin* (a), where *Abbott*, C. J., held, that both ends of the line upon which goods are to be carried must be accurately described. [*Holroyd*, J. Is not the present case very like that of *Frith v. Gray* (b), where the declaration was upon a contract to procure a booth "on *Barnet Common*, in the county of *Middlesex*," and it appeared that *Barnet Common* was in the county of *Hertford*, but the Court held the variance immaterial?] There the place was immaterial, here it is the very foundation of the action, and, therefore, the variance is fatal, *Pool v. Court* (c), 3 *Stark. on Ev.* 1574, where several cases to the same effect are collected.

Tuunton contra. This was not an action of contract, but was founded on a common-law duty imposed upon *carriers, and according to the cases of [*303 *Frith v. Gray*, and *The Mersey and Irwell Navigation v. Douglas* (d), the variance in this case was immaterial. The gist of the action was the not carrying safely to *Shrewsbury* a trunk delivered to the defendant for that purpose; the place where it was delivered was immaterial. But it does not appear that there was any variance; for in the absence of any proof of two places being called *Chester*, "*Chester*, in the county of *Chester*," may fairly be con-

(a) 2 *Stark. N. P. C.* 385.(b) 4 *T. R.* 561, note to *Dresory v. Twiss*.(c) 4 *Taunt.* 700.(d) 2 *East*, 497.

sidered as a description of *Chester*, in the county of the city of *Chester*. [*Bayley, J.* The case of *Doe v. Salter (a)* comes very near that; for it was there held that *Farnham* was a sufficient description of *Farnham Royal*, there being no evidence of any other place being called *Farnham*.] In *Cracklin v. Tucker*, evidence was given of two places of the same name, one in the city of *London*, the other in *Middlesex*. Again, the city of *Chester*, although a county of itself, is within the ambit of the county at large, and, therefore, taking the declaration literally, there is no variance.

BAYLEY, J. The substance of the bargain in this case was to put the trunk upon the coach and carry it to *Shrewsbury*; the place whence it was to be carried was immaterial. If the trunk had been placed on the coach after it left *Chester*, and whilst on the road to *Shrewsbury*, that would have been a compliance with the duty cast upon the defendant. But as to the question of variance, I think that the county mentioned may be considered to be the county of *304] the city of *Chester*, inasmuch as in common parlance when *Chester* is *mentioned, the city of *Chester*, in the county of the city, is understood to be meant; and no evidence was given of the existence of any other place called *Chester*, in the county at large. If the objection could not have been thus answered, I should have been disposed to go further, and hold that *Chester* might be described as in the county at large. There are several cases in which a trifling variance as to the name of a corporation or of a parish has been held immaterial, where it was not calculated to mislead. For these reasons, I am of opinion, that the nonsuit must be set aside, and a new trial granted.

HOLROYD and LITLEDALE, Js., concurred.

Rule absolute.

(a) 13 East, 9.

DOE on the Demises of JAMES PRING and JOHN ROBERTS v. PEARSEY.

The presumption is, that waste land, which adjoins to a road, belongs to the owner of the adjoining inclosed land, whether he be a freeholder, leaseholder, or copyholder, and not to the lord of the manor.

THIS was an ejectment brought to recover possession of a cottage and garden in the parish of *Taunton, St. Mary Magdalen*, in the county of *Somerset*. Plea, not guilty. At the trial before *Burrough, J.*, at the Spring assizes for the county of *Somerset*, 1827, it appeared that the cottage in question had been built by the defendant's father in 1804, on a slip of waste land (by the side of the turnpike road), adjoining to inclosed land, which was copyhold, belonging to *John Roberts*, one of the lessors of the plaintiff, and which at the time of serving the ejectment was in the occupation of his tenant *James Pring*. It appeared by the court rolls, *305] that *Roberts* had been admitted to six acres of land lying in one close, called *Fullands*, and also to four acres in *Fullands*. There was no evidence to show what number of acres the inclosed land contained. It was contended, that, as the adjoining land belonged to *Roberts*, the *prima facie* presumption was that the waste between his land and the high road belonged also to him. On the other hand it was insisted, that that presumption only took effect where the owner of the adjoining lands was a freeholder. The learned Judge directed the jury to find for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained for that purpose,

F. Pollock and *C. F. Williams* now showed cause. It is a presumption of law, that uninclosed land on the side of a highway belongs to the owner of the inclosed land next adjoining. This presumption is founded on a supposition, that at some former period the owners of the land on each side of the road granted to the public a right of passage not only over the land on which the road is formed, but over the uninclosed waste whenever the road happened to be out of repair, *Steel v. Prickett* (a); and this presumption applies to a case where a copyholder is the owner of the adjoining land. For a copyhold of inheritance must have existed from time immemorial, and if the road was made after the copyhold was granted, as it must be presumed to have been, it must have been taken out of the lands of the copyholder.

**Erskine* and *Carter* contra. The declaration does not state a demise by the lord of the manor, and, therefore, if the title be in him, the plaintiff is not entitled to recover. The plaintiff, therefore, ought to have made out a title either in *Roberts* or *Pring*. *Pring* was *Roberts's* tenant. But then the plaintiff proved that *Roberts* was customary tenant of a close called *Fullands*, adjoining the waste in question; and it was insisted, that he being owner of the adjoining inclosed land the presumption was, that he was also owner of the waste adjoining the highway. That is true where the owner of the adjoining land is a freeholder, but where he is a copyholder the presumption is, that the waste belongs to the lord, and not to the copyhold tenant. For the lord must be presumed to have retained in his own hands all that he did not grant to his tenant. Here the plaintiff only showed a grant from the lord of *Fullands*, comprising a specified number of acres. [*306]

BAYLEY, J. It is very desirable that there should be one certain and definite rule applicable to all cases of this description. Now it is a *prima facie* presumption, that waste land on the sides, and the soil to the middle, of a highway belongs to the owner of the adjoining freehold land. The rule is founded on a supposition, that the proprietor of the adjoining land at some former period gave up to the public for passage all the land between his inclosure and the middle of the road. I think that rule applies not only to freehold but to copyhold lands also. There was no evidence to show when the road was first made, but it was a turnpike road. If the road existed at the time when the copyhold was first granted, viz. from time *immemorial, the right of property in the road and the waste adjoining might in that case have remained in the lord. But if the road were taken out of the land after the copyhold was granted, then the presumption would be, that the property in the road and the waste adjoining was in the copyholder. Now I think we ought not to presume that the road in question was made before the time of legal memory. The probability is, that it was made long since. And if the road was made within the time of legal memory, then the *prima facie* presumption is, that the waste land adjoining the road belonged to *Roberts*, the copyhold tenant of the land next adjoining, and not to the lord. The rule for entering a nonsuit must, therefore, be discharged. [*307]

HOLROYD, J. I am also of opinion that the verdict is right. I see no reason for confining the rule to cases where the person in possession of the adjoining land is a freeholder. It applies equally whether the party occupying the adjoining land be a freeholder, leaseholder, or copyholder. As to the property granted, a copyholder stands in the place of the lord, the leaseholder in the place of the lessor. It is very improbable that when a lease or grant is made of land near the high road, and there is between the highway and the land inclosed a small quantity of uninclosed land, of little or no use to the lord or lessor, that he should separate it from the rest, or reserve to himself such land. When a grant of land near to a road is made (even where it is inclosed and separated from the land adjoining), it appears to me that the *prima facie* presumption is,

that the land, on that side of the fence on which the road is, passes likewise with it. Generally speaking, where an inclosure is made, the party making it erects his bank and digs *his ditch on his own ground, on the outside of *308] the bank. The land which constitutes the ditch in point of law is a part of the close, though it be on the outside of the bank. And if something further is done for his own convenience when that which constitutes the fence is dug out from his land, as, for instance, if a small portion of uninclosed land near a public or private way is left out of the inclosure to protect and secure the occupation of that part of the land which is inclosed, that in point of law is a part of the close on which the inclosure is made. If any grant of such land, being copyhold, had been made before the inclosure, the subsequent grants would probably continue to be made in the same way, notwithstanding the inclosure, and all the land, both within and without the inclosure, would, therefore, pass by those grants. It seems to me, therefore, that the rule that waste land near a highway is to be presumed *prima facie* to belong to the owner of the inclosed land next adjoining, is not confined to a case where the owner of that land is a freeholder, but extends equally to cases where the owner is a leaseholder or a copyholder. In either case evidence may be given to rebut the *prima facie* presumption. But it is of considerable importance that the *prima facie* presumption should be constant and uniform, and not left to depend on a variety of particular circumstances, some of which may be beyond the time of actual memory, although not beyond the time of legal memory.

LITTLEDALE, J. I am entirely of the same opinion. If any act of ownership by the lord of the manor be proved, then there will be an end of any presumption; but where no such act of ownership is proved, I think the presumption does arise that the waste belongs to the *owner of the adjoining land. *309] It is not very likely that the lord should exercise any acts of ownership on these small strips of land where there is little herbage for cattle to depasture upon, and where there are no trees growing. It is admitted that the presumption is in favour of the owner of the adjoining land where he is a freeholder, and I think very reasonably so. We do not know the origin of these rights. In all probability the rule that the presumption is to be in favour of the owner of the adjoining land has arisen from its being a matter of convenience to the owners of adjoining land, and to prevent disputes as to the precise boundaries of property. If the rule of presumption as to the right of ownership applies to every freeholder, I see no reason why it should not apply to a copyholder. Suppose the road were made through ancient copyhold land, the copyholder would have a right to have his copyhold renewed (if he was tenant in fee-simple) to the same extent as he had it before. If before the road was made his copyhold extended to the line which afterwards was the middle of the road, he would have a right to have his copyhold renewed in the same way as before. There is no reason, therefore, why the same presumption should not be made in his case as well as in that of a freeholder. The same rule will apply if the road be made through the waste of a manor. In that case, if the lord of the manor intends to reserve his right to the uninclosed land near the road, he must take care to do it by exercising acts of ownership upon it. And if the lord of the manor make a conveyance in fee, and grant his freehold, the same rule will apply as in other cases. It would be extremely inconvenient if a different rule of presumption were to *310] prevail according as the *adjoining land is freehold, copyhold, or leasehold. If, according to the argument urged in this case, the presumption does not apply to copyholders,—for the same reason it will not apply to a leaseholder. For a copyholder stands in the same relation to the lord of the manor as a leaseholder does to a freeholder. I think it is convenient and reasonable that the presumption should be the same in the case of a copyholder as it is in that of a freeholder. This rule must, therefore, be discharged.

Rule discharged

BREWER and GREGORY, Assignees of PITTER, v. SPARROW.

The assignees of a bankrupt having once affirmed the acts of a person who wrongfully sold the property of the bankrupt, cannot afterwards treat him as a wrong-doer, and maintain trover.

THIS was an action of trover, brought by the plaintiffs as assignees of one *Pitter* a bankrupt, to recover certain goods of the bankrupt alleged to have been wrongfully converted by the defendant. This cause was referred to an arbitrator, who, by his award, stated the following facts:

The commission was issued on the 21st of *October* 1825, upon the petition of the plaintiff *Brewer*. The act of bankruptcy was committed on the 2d of *October* 1825. The assignment to the plaintiffs, under the commission, was executed on the 3d of *December* 1825. The goods for which the action was brought consisted of the stock in trade, household furniture, and effects found upon the premises of the bankrupt, at *Cheltenham*, in *Gloucestershire*, where he had carried on business until the 2d of *October* 1825, on which day he absconded *and left his dwelling-house and shop. On the 4th of *October* the de- [*311] fendant, who was a creditor of the bankrupt, after consulting with the plaintiff *Brewer*, went to *Cheltenham*, when he found the house and shop of the bankrupt shut up. Upon his arrival he took possession thereof, and also of the stock in trade, household furniture, and effects, and re-opened the shop and continued the business, assisted by his son and the apprentice of the bankrupt, by selling the stock in the same manner as had been done by the bankrupt; and he continued to do so until the 13th of *November* following, when he and his son quitted the premises, leaving the apprentice in possession. On the 15th of *November* a messenger, by virtue of a warrant issued by the commissioners under the commission, at the instance of the plaintiff *Brewer*, arrived at *Cheltenham* and took possession of the premises, the household furniture, and effects, and seized the stock in trade, which consisted partly of stock which had belonged to the bankrupt, and partly of stock which the defendant had purchased during the time he continued the business, and which had been mixed up and in part sold with the bankrupt's stock for the general benefit of the trade, and to enable the defendant to sell the bankrupt's stock more beneficially than he otherwise could have done. The goods purchased by the defendant amounted to 212*l.*, which he paid for out of the monies received by him in the sale of the general stock in trade. He kept a daily account of the sale and purchase of the stock bought and sold, of all monies received and paid, and of all incidental expenses during the time he continued in possession; and such account was a just and true account; and at the time of his quitting possession, he *left with the [*312] apprentice of the bankrupt the balance of such account, amounting to 20*l.* 6*s.* 3*d.*; which sum the apprentice duly paid to the messenger, who duly paid and accounted for the same to the plaintiffs before the commencement of the action. On the 21st of *January* the defendant, being summoned before the commissioners, delivered a copy of the account so kept by him to the plaintiffs. The action was commenced on the 4th of *April* following. The defendant did not intermeddle with, or dispose of any part of the bankrupt's goods, chattels, or effects, except his stock in trade. The defendant acted in all things touching and concerning the taking possession, and selling and disposing of the stock in trade of the bankrupt, and purchasing other stock and conducting the business, and in all other matters relating to or concerning the subject-matter of the action, *bonâ fide*, and solely for the benefit of all the creditors of the bankrupt.

Hutchinson for the plaintiffs. The defendant, after the act of bankruptcy had been committed, sold the goods of the bankrupt without any authority from the plaintiffs, or either of them, after they had become assignees; he thereby was guilty of a wrongful conversion, and is liable in trover.

Brodrick, contra, was stopped by the Court.

BAYLEY, J. The defendant in the first instance was a wrong-doer, and the plaintiffs might have treated him as such, but it was competent to them in their character of assignees either to treat him as a wrong-doer and disaffirm his acts, *313] or to affirm his acts and treat him as *their agent; and if they have once affirmed his acts and treated him as their agent, they cannot afterwards treat him as a wrong-doer, nor can they affirm his acts in part, and avoid them as to the rest. I am of opinion that the plaintiffs, in their character of assignees in this case, have affirmed the acts done by the defendant with reference to the disposition of the goods of the bankrupt, for they have accepted from him the balance of the account. That balance consisted of a sum due to them after giving them credit for the produce of all the bankrupt's goods sold by the defendant. By accepting and retaining that balance without objection, after they had received a copy of the account kept by the defendant, they adopted his acts and recognized him as their agent, and having so done, they are not at liberty to treat him as a wrong-doer.

HOLROYD, J. I think the plaintiffs adopted the acts of the defendant by accepting the balance of the account. By doing so, they at all events either recognized him as their agent in the sale of the bankrupt's goods, or they must have received the amount of that balance as a satisfaction for the wrongful act done by the defendant. If they have treated him as their agent, they cannot afterwards treat him as a wrong-doer, and maintain trover. If, on the other hand, they accepted the balance of the account as a satisfaction for the wrongful act, the acceptance of that sum is an answer to the action.

LITLEDALE, J., concurred.

Judgment for defendant.

*314] **CORTIS*, Treasurer to the Commissioners appointed under and by virtue of an Act passed in the 47 Geo. 3, Sess. 2, for paving, cleansing, lighting and watching the Town and Parish of Woolwich, in the county of Kent, and removing and preventing nuisances therein; for the better Relief and Employment of the Poor; *v.* The Company of Proprietors of the Kent Water Works.

By a local act for the relief of the poor, certain commissioners were enabled to make rates upon all and every person or persons who held, occupied, or possessed land in the parish: it was held, that a corporation was liable to be rated, although by a clause, giving an appeal to the quarter sessions to any party aggrieved, such party was bound to enter into a recognizance.

The act of parliament required that, before any action should be brought to recover any rates, there should be a personal demand of the same, or a demand in writing left at the place of abode of the persons charged, or on the premises charged: Held by *Bayley, J.*, that a demand made at a meeting of the corporate body duly convened was sufficient; and by *Litldale, J.*, that a demand fixed on the premises charged under the rate was sufficient.

The act directed that the commissioners, or the major part of them assembled at any meeting, not being less than thirteen, might, by writing under their hands, appoint a treasurer: Held, that an appointment of a treasurer signed by a majority of seventeen commissioners present at a meeting, was valid, and that it need not be signed by thirteen.

The act directed all actions to be brought in the name of the treasurer. An order was made by the commissioners, that an action should be brought to recover certain rates. At the time when this order was made *A.* was treasurer, but when the action was commenced *B.* was treasurer: Held, that the latter had authority to prosecute the action in his name for the benefit of the commissioners, and was entitled to recover the rates due to the commissioners before he was appointed treasurer: Held, also, that it was not com-

petent to the defendant in such action to object to the rates on the ground that the property rated was not sufficiently described in them, that being a ground of appeal to the quarter sessions.

By an act of parliament, authorizing the levying of a gaol rate, it was enacted, that the overseer of the poor of every parish should levy such gaol rate by such ways and means as any poor rate is by law collected: Held, that, as the power to make and levy rates had been taken from the overseers and given to certain commissioners, they were to be considered as overseers of the poor for the purpose of collecting the gaol rate within the meaning of the act of parliament.

The commissioners under the first mentioned act were to settle and ascertain the sums of money respectively necessary to be raised for the relief of the poor, and paving, &c. the streets, and make and sign rate or rates not exceeding the amount of the sum so settled and ascertained. At a meeting of the commissioners duly convened, it was adjudged necessary to raise a sum not exceeding 1300*l.* for the use of the poor, and a sum not exceeding 500*l.* for paving, &c. the streets: Held, that the fair import of that resolution was, that those two sums were the smallest sum necessary to be raised for the purposes required, and, therefore, that those were the sums fixed and ascertained by the commissioners.

The commissioners ordered that the sum of 1300*l.* should be raised by a rate of 1*d.* in the pound, and the sum of 500*l.* by a rate of 3*d.* in the pound. If these rates had been collected upon the whole rental of the parish, they would have produced less than 1800*l.*, but the poor rate would have produced more than 1300*l.*: Held, that as the act of parliament did not require separate rates to be made for the poor and for the highways, and as the entire sum directed to be raised would not exceed the sum required, the rate was good.

By the act for building the gaol, the justices at sessions were authorized to assess a special county rate upon every parish, for the payment of the expenses of building such gaol, and that rate was made payable out of the monies collected in the parishes for the relief of the poor; and there was a proviso, that every tenant might deduct out of his rent one half the amount of the rate: Held, that under the local act the commissioners could not make a retrospective rate in order to reimburse themselves in one year money which they had paid in a former year on account of the gaol rate.

THIS was an action brought by the plaintiff, *Cortis*, as treasurer to the commissioners appointed under and by virtue of the above act of the 47 *G. 3, c. 111*, *against the company of proprietors of the *Kent Water-works*, to recover 1331*l. 16s. 2d.*, being the amount of thirty-five assessments [315] made by the commissioners under the above-mentioned act of parliament, upon the defendants, for the relief of the poor of the parish of *Woolwich*, in the county of *Kent*, and for paving, cleansing, lighting and watching the town and parish of *Woolwich*, and also of six assessments made by the commissioners for similar purposes, and also for defraying the expenses of erecting a new house of correction and court houses for the county of *Kent*. At the trial before *Alexander, C. B.*, at the *Lent* assizes 1826, for the county of *Kent*, the jury found a verdict for the plaintiff, damages 1331*l. 16s. 2d.*, subject to the opinion of this Court upon the following case:

By an act of parliament passed in the 47th year of *George the Third*, session 2, chap. 111, certain commissioners were appointed for carrying the act into execution; and, amongst others, the churchwardens for the time being of the parish of *Woolwich*. And by the seventh section of that act it is provided that all the powers and authorities thereby given to the commissioners should and might be executed by the major part of them assembled at any meeting held in pursuance of the act, not being less than thirteen, except where otherwise directed by the act. By the eleventh *section it was enacted that the commis- [316] sioners might, and they were thereby empowered, at any meeting at which not less than thirteen commissioners should be present, by writing under their hands to appoint a treasurer as they the said commissioners should think proper. By the thirteenth section it was enacted that wherever any action should be brought by the order of the commissioners against any person or persons, the same might be brought in the name of the treasurer. By the sixteenth and seventeenth sections it was further enacted that the commissioners should, at any of their meetings to be held in pursuance of that act, settle and ascertain the sums of money respectively necessary for the relief, &c. of the poor of the

said parish, and also for paving, cleansing, lighting, and watching the streets, &c., providing a burial ground, and the several other purposes of the act; and should, and they were thereby required to make and sign a rate or rates, not exceeding the amount of their respective sums so settled and ascertained, upon all and every the person or persons who did inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, or other building, tenement, or hereditament within the said parish. By the twenty-third section it was further enacted, that after any rate should have been so rated, assessed, and charged by the commissioners for the purposes of the act, the collector was thereby required to collect the same accordingly; and in case any person or persons who should be rated should refuse or neglect to pay such rate to any collector for twenty-one days after personal demand made by the collector thereof, or demand in writing under the hand of such collector, and left at the last or usual place

*317] of abode of the person *or persons so refusing or neglecting to pay as aforesaid, or on the premises so charged with such rate, then after summons and default of payment, the same was to be levied by distress and sale of the goods and chattels of such person or persons so refusing or neglecting to pay as aforesaid, or on the goods and chattels found on the premises; or it should be lawful for the commissioners to recover any such rate payable by virtue of that act, by action of debt or on the case, in any of his Majesty's courts of record at *Westminster*. By the 92d section it was enacted, that the then overseers of the poor of the said parish should continue to be overseers for the remainder of the year 1807, and until two other overseers should be nominated and appointed in the manner and at the time by law directed to succeed them; and in *Easter* week, or within one month of *Easter* in each and every year, two persons, being substantial householders in the parish, should be nominated and appointed, in the manner by law directed, to be overseers of the poor of the said parish; provided always that such overseer and overseers should in all cases account to and be liable to the control, orders, and directions of the commissioners, at all their meetings to be held in pursuance of that act. By section 106, it was further enacted, that if any person or persons should think himself, herself, or themselves aggrieved by any rate or rates made by virtue of the act, such person or persons might complain to the commissioners, at any meeting to be holden within two months; and such commissioners were thereby authorized and empowered, if they should think such person or persons aggrieved, to give such relief in the premises as to them should seem necessary; and if any such

*318] *person or persons should not be satisfied with the determination of the commissioners, or should neglect to complain to them at any such meeting, within the time aforesaid, then it should be lawful for such person or persons to appeal to the then next general or quarter sessions of the peace to be holden for the county of *Kent*, which should happen next after the expiration of twenty-one days from the determination of such commissioners; in every case such appellant or appellants first giving eight days' notice, at least, in writing, of his, her, or their intention to bring such appeal, and of the matter thereof, to the clerk or clerks to the commissioners, and within two days after such notice entering into a recognizance in the sum of 20*l.*, with two sureties in the sum of 10*l.* each, before some justice of the peace for the said county conditioned for prosecuting such appeal.

By an act of the 48 *G. 3*, c. 146, it was enacted, "that it should be lawful for the commissioners appointed by the 47 *G. 3*, c. 111, or any seven or more of them, to raise and convey water from a field in the parish of *Charlton*, in the county of *Kent*, therein mentioned, along the high road leading from *Greenwich* into the said town of *Woolwich*, and along another high road therein mentioned, into certain reservoirs therein mentioned, and to convey and distribute water from every such reservoir in pipes through the said town and parish to the houses of the inhabitants thereof agreeing with the commissioners thereof to be supplied with such water, and to purchase all ground necessary for making

such reservoir or reservoirs, and to erect engines," &c. &c. By the 6th section the commissioners were enabled to borrow at interest a sum not exceeding 14,000*l.* *upon the credit of the rates. By the 12th section it was [*310 enacted, "that in case any surplus should any time arise of the rates after paying the interest of the money borrowed and the expenses of carrying the act into execution, the same should be applied towards the relief of the poor of the parish of *Woolwich*, in such manner as the commissioners, or any seven or more of them, should think proper."

By an act passed in the 49 *G. 3, c. 189*, certain persons therein named, and others their successors, were incorporated by the name of the company of proprietors of the *Kent Water Works*, and such corporation exists at the present time.

By an act passed in the 51 *G. 3, c. 145*, the defendants were empowered to supply with water, amongst other parishes, that of *St. Mary, Woolwich*; and it was by the third section enacted, that it should be lawful for the company of proprietors, and they were thereby authorized and required to contract and agree with the commissioners acting under the acts of the 47 *G. 3, c. 111*, and the 45 *G. 3, c. 146* (already set out), for the absolute purchase of, and the commissioners or any three or more of them, were thereby authorized and empowered to sell, convey, assign, and assure to the company of proprietors, a certain piece or parcel of land belonging to the said commissioners, and purchased by them of Mr. *J. Long*, situate in the parish of *Woolwich*; and also the interest of the commissioners of and in certain springs of water arising or flowing in certain fields therein described, situate in the parish of *Charlton*, any thing in the last-mentioned acts to the contrary notwithstanding; and that upon such purchase it should be lawful for the company of proprietors to use the said piece or [*320 parcel of land, and the springs of water, for the purposes of the act of the 49 *G. 3, c. 189*, and of the act now in recital, or any of them, in such and the like manner as the commissioners could or might have used or enjoyed the same prior to the making of any such conveyance or assignment.

This action was commenced on the 17th of *October 1825*, in the name of *G. Cortis*, as the treasurer to the commissioners, against the company of proprietors of the *Kent Water Works*, under the following circumstances:

At a general meeting of the commissioners, duly held on the 7th of *October 1823*, it was resolved that the company of proprietors of the *Kent Water Works* should be proceeded against for the recovery of the parochial rates in arrear; if Mr. *Nokes* (who was the solicitor to the commissioners), with the advice of counsel, should be of opinion that the parish could maintain an action. The opinion of counsel was obtained, and the solicitor to the commissioners afterwards brought the present action by their advice.

At the time when the resolution was made, Mr. *Thomas Rideout* was the treasurer to the commissioners; but before the action was commenced, Mr. *Cortis* had been appointed the treasurer, and was so at the time of its commencement, before which period (viz. on the 17th of *May 1825*), the solicitor to the commissioners having reported that a certain advance of money would be necessary for obtaining an original writ in order to commence the action and for other expenses, the commissioners advanced him a sum of 50*l.* for those purposes. Mr. *Cortis* acted as treasurer from the 2d day of *May 1825*, under a resolution of *the commissioners for that purpose, and the appointment [*321 of Mr. *Cortis* as treasurer took place on the 14th of *June 1825*, at a meeting at which seventeen of the commissioners were present, but of them, twelve only signed this appointment.

The first assessment sought to be recovered in this action was made on the 1st of *August 1815*, and in the following manner: At a general meeting of the commissioners acting under the provisions of the 47 *G. 3, c. 111*, duly holden in pursuance thereof on the 27th of *June 1825*, it was resolved and deemed necessary to raise a sum not exceeding 1300*l.* for the use of the poor, and *

sum not exceeding 500*l.* for the highways, by a rate of 11*d.* in the pound for the poor, and 3*d.* in the pound for the highways. In pursuance of this resolution a rate was prepared, and the assessment made at 11*d.* in the pound for the poor, and 3*d.* in the pound for the highways; and at a subsequent meeting of the commissioners, duly assembled on the 1st of *August* 1815, the rate thus prepared was read over and signed by them, in compliance with a resolution then entered into for the purpose. The title of the rate was as follows: "A rate or assessment made the 1st day of *August* in the year 1815, and by virtue of an act of parliament passed in the forty-seventh year of the reign of his present Majesty, intituled 'An Act,' &c." (the title of the act was set out); such rate or assessment being at 11*d.* in the pound for the relief of the poor, and the further sum of 3*d.* in the pound for paving, cleansing, lighting, and watching the streets, making in the whole the sum of 1*s.* 2*d.* in the pound, and being for three months to *Midsummer-day* 1815. The assessment on the company of proprietors of the *Kent Water Works* amounted to 24*l.* 7*s.* 8*d.*

*322] And after *apportioning the different assessments, the rate is thus concluded: "We, whose names are hereunto subscribed, commissioners, amongst others, for carrying into execution the act of parliament mentioned in the introductory part of this rate, having previously adjudged, settled, and ascertained it to be necessary to raise a sum not exceeding 1300*l.* for the relief of the poor of the said town and parish, and a sum not exceeding 500*l.* for paving, cleansing, lighting, and watching the streets, lanes, &c. within the said town and parish, have rated and assessed upon all and every person and persons in such rate and assessment named for the purposes, and in the proportions expressed and set forth in the introductory part of this rate, the several sums of money set opposite to his or their respective names. As witness our hands, the said 1st of *August* 1815."

All the subsequent rates for the use of the poor, and for the streets, to *July* 1825 inclusive, were made in a similar manner, and with similar formality, and had similar titles and conclusions. The aggregate amount of these several rates, being thirty-five in number, upon the defendants, was 1120*l.* 2*s.* 2*d.*

The assessment of 11*d.* in the pound on the actual rental of the parish of *Woolwich* amounted to 1371*l.* 14*s.*, and the assessment of 3*d.* in the pound for the highways amounted to 374*l.* 2*s.*, making together 1745*l.* 16*s.*, the sum which would have been raised if the whole had been collected; but the sums actually collected under the two assessments, and which were jointly collected, amounted to 1450*l.* only. And the subsequent assessments and rates were open to the same observation.

In addition to the thirty-five rates, there were six other rates for the use of the poor and for the highways, each of which included a gaol rate. The portions of *these six rates charged upon the defendants applicable to the *323] poor and the highways amounted to the sum of 144*l.* 6*s.*; the portions applicable to the gaol amounted to 57*l.* 18*s.*

The gaol rates were made under the 54 *G.* 3, section 15, which enacted "that the justices of the peace assembled for the county of *Kent* at the general session to be holden for the county in pursuance of that act, should yearly, until all the charges and expenses of building and completing the new gaol and court-houses, incurred and to be incurred since the then last *Easter* quarter sessions, should be paid and satisfied, assess and tax a special county rate for the payment of such charges and expenses, on all and every parish, township, &c. in the county, within their respective divisions, now contributing or liable to contribute to the ordinary county rate, at a sum not exceeding the sum of 6*d.* in the pound over and above the ordinary county rate, by one or more rates in each year, on the rental at which each parish, township, liberty, &c., and extra-parochial or other place should be rated, taxed, and assessed to the ordinary county rate; and the said special rate should be collected, levied, and recovered in like manner, and by such ways and means, and under such penalties, as any

county rate might be collected and recovered in the county of *Kent*; and the *overseers and overseer* of every parish, township, or place maintaining its own poor, within the county of *Kent*, should and might, and was and were thereby authorized and empowered to levy and raise such rate in like manner, and by such ways and means, and under such penalties, as any poor rate then was by law collected; provided always, that every tenant or occupier paying such rate might deduct and retain out of the rent payable to his *landlord or landlords for the premises in respect of which such rate was payable, one [*324 half part of the full amount of such rate, it being the intent and meaning of the act that the half of such rate, except as thereafter excepted, should be borne by the landlord; and every landlord should and was thereby required to allow and make such respective deductions accordingly; and every such tenant paying or having levied upon him such rate, should be acquitted and discharged of and from so much money as such half part should amount to, as fully and effectually as if the same had been actually rent paid to any such landlord or landlords in part of the rent due from such tenant."

The justices of the peace being duly assembled at a general session in pursuance of the provisions of this statute, did, on the 5th of *July* 1814, tax and assess a special county rate upon every parish and other place in the county within their respective divisions, at the rate of 3*d.* per pound upon the rental of each parish and place; and an entry was made in the county books in the following form:—"This court for making a general rate or assessment towards payment of the charges and expenses of building and completing the new gaol-house of correction and court-houses for the town of *Maidstone*, incurred and to be incurred since the last *Easter* quarter sessions, doth, in pursuance of an act of parliament passed in the present session of parliament, entitled, &c. assess upon all and every the parish, township, liberty, &c. in the said county," the sums following, viz. "the sum of 276*l.* 13*s.* 6*d.* upon *Woolwich*, being at the rate of 3*d.* in the pound upon the estimated rental of that parish." Then followed the assessment upon other places, and then the entry was thus continued:—"This Court doth order that the said several sum *and sums of money so assessed on the said several and respective towns, parishes, and places, shall be paid out of the money collected, [*325 or to be collected for the relief of the poor of such parish or place, by the *churchwardens and overseers* for the time being, of each and every the parishes and places aforesaid, to the high constable of the respective hundreds and divisions wherein such parishes or places shall be, within thirty days after demand thereof shall be made in writing." On the 26th *January* 1815, a similar assessment of 276*l.* 13*s.* 6*d.* was made on the parish of *Woolwich*, at the rate of 3*d.* in the pound on their estimated rental, according to the provisions of the statute. On the 23d *October* 1815 a similar assessment of 184*l.* 9*s.* was made on the parish of *Woolwich*, being at the rate of 2*d.* on the pound on their estimated rental, according to the provisions of the statute. Each of these several sums of 276*l.* 13*s.* 6*d.*, 276*l.* 13*s.* 6*d.*, and 184*l.* 9*s.*, was paid out of the monies raised for the relief of the poor under the 47 *G.* 3, sess. 2, c. 111, by the treasurer to the commissioners acting under that statute, to the high constable of the hundred, and by him paid to the county treasurer at the quarter sessions next after the times of the respective assessments. At a general meeting of the commissioners acting under the provisions of the 47 *G.* 3, duly holden in pursuance thereof on the 5th of *January* 1816, it was resolved and adjudged and deemed necessary to raise a sum not exceeding 800*l.* for the use of the poor, a sum not exceeding 400*l.* for the highways, and a sum not exceeding 800*l.* for defraying the expenses of the gaol and court-houses; and that a rate be immediately made for those purposes, at 6*d.* in the pound for the poor, 6*d.* in the pound for the new gaol, and 3*d.* in the pound for paving, &c. In pursuance of this resolution *a rate was prepared, and an assessment made at 6*d.* in the pound for the poor, and 3*d.* in the pound for the highways, and [*326

6*d.* in the pound for the expenses of the gaol and court-houses; and at a subsequent meeting of the commissioners duly assembled on the 9th of *January* 1816, the rate thus prepared was read over and signed by them, in compliance with a resolution entered into for the purpose. The title of the rate was, "A rate or assessment made the 9th day of *January* 1816, by virtue of an act of parliament passed in the 47 *G. 3*; and also by virtue of several acts passed in the 43*d.*, 47*th.*, 49*th.*, and 54*th.* years of *G. 3*, for erecting a gaol and court-house at *Maidstone*, in the said county, upon all and every person and persons holding, &c. occupying lands, &c. within the parish, as well for the relief of the poor as also for paving the streets, lanes, &c. in the parish; and also towards defraying the expenses of erecting such gaol and court-houses, such rate or assessment being at 6*d.* in the pound for the relief of the poor, and 3*d.* in the pound for such paving, &c., and 6*d.* in the pound for such gaol and court-house, making in the whole the sum of 1*s.* 3*d.* in the pound, and being for three months to *Christmas* day 1815. The assessment, which was joint for the poor, the highways, the gaol and the court-houses, on the company of proprietors of the *Kent* Water Works, amounted to 26*l.* 2*s.* 6*d.* That part of the assessment which was made for defraying the expenses of the gaol and court-houses was to repay the several sums of 276*l.* 13*s.* 6*d.*, 276*l.* 13*s.* 6*d.*, and 184*l.* 9*s.*, amounting together to 737*l.* 16*s.*, which had been paid over, as before mentioned, to the treasurer of the county of *Kent*. An assessment of 6*d.* in the pound upon the actual rent of the parish of *Woolwich*, in *January* 1816, *327] would, if the proceeds had all been collected, have *produced 761*l.* 2*s.* 8*d.*, but the amount of the sums collected was only 679*l.* 5*s.* And it was impossible in the parish to collect the whole amount of any assessment.

On the 29th *April* 1816, the justices of the peace, at a general session holden in pursuance of the 54 *G. 3*, c. 104, made a similar assessment for the gaol and court-houses on the parish of *Woolwich*, of 276*l.* 13*s.* 6*d.*, being at the rate of 3*d.* in the pound on the estimated rental, and an entry similar to that before set forth was made in the county books. On the 5th of *August* 1816, a similar assessment of 276*l.* 13*s.* 6*d.* was made on the parish of *Woolwich*, at the rate of 3*d.* in the pound on their estimated rental, and a similar entry was made in the county books. Each of these last-mentioned sums of 276*l.* 13*s.* 6*d.* and 276*l.* 13*s.* 6*d.* was paid out of the monies raised for the relief of the poor under the 47 *G. 3*, sess. 2, c. 111, by the treasurer to the commissioners acting under the statute, to the high constable of *Woolwich*, and by him paid to the treasurer of the county of *Kent*, at the quarter sessions next after the time of the respective assessments. And on the 14th of *January* an assessment for the use of the poor, for the highways, and for defraying the expenses of the gaol and court-houses, the latter at 6*d.* in the pound, was made by the commissioners acting under the 47 *G. 3*, c. 111, in a similar manner, and according to the same forms as those observed in the assessment of the 9th of *January* 1816, above set forth. The assessment on the company of proprietors of the *Kent* Water Works amounted to 36*l.* 11*s.* 6*d.* That part of the last-mentioned assessment, which was made for defraying the expenses of the gaol and court-houses, was to repay the two last-mentioned several sums of 276*l.* 13*s.* 6*d.* and 276*l.* 13*s.* 6*d.*, which had been paid over as above mentioned to the *treasurer for *328] the county of *Kent*; and also to cover the deficiency in the sum actually collected by virtue of the rate made on the 9th *January* 1816. The aggregate amount of the two several sums of 276*l.* 13*s.* 6*d.* and 276*l.* 13*s.* 6*d.*, and of the deficiency, is 611*l.* 18*s.* An assessment of 6*d.* in the pound on the actual rental of the parish of *Woolwich*, in *January* 1817, would, if the proceeds had all been collected, have produced 755*l.* 13*s.*; but the amount of the monies actually collected was only 666*l.* 6*s.* 6*d.*, which left a surplus, beyond what was required for the specific purposes for which the money was collected, of 54*l.* 8*s.* 6*d.*

The case then stated several other assessments made by the county justices

on *Woolwich* between the years 1816 and 1825, the payment of the sums so assessed on *Woolwich* by the commissioners out of the poor rates of *Woolwich*, and subsequent assessments made by them on the parish, for the use of the poor, for the highways, and for defraying the expenses of the gaol and court-houses. That part of the respective assessments made to defray the expenses of the gaol and court-houses respectively being to repay the sums last paid over by the *Woolwich* commissioners to the treasurer of the county of *Kent*, for the county assessments. The commissioners in all these assessments raised a larger sum than that required by the county assessments; and ultimately there remained in their hands a balance of 589*l.* 0*s.* 9*d.* on account of the gaol rate, which balance was afterwards applied to the use of the poor of the parish of *Woolwich*. The rental of the parish of *Woolwich* was variable between the 9th of *April* 1816 and the 3d *November* 1818: it fluctuated between the sums of 30,563*l.* and 23,746*l.*

The company of proprietors of the *Kent Water Works* *were in the occupation and enjoyment of valuable property of sufficient value, situated [329 within the parish of *Woolwich* at the time the first assessment was made upon them, and have been ever since.

At a general assembly of the company duly convened, the collector appointed by the *Woolwich* commissioners personally served upon the chairman of the assembly, publicly at the meeting, a paper writing, purporting to be a demand on the company of the proprietors of the *Kent Water Works*, of the several rates with which they had been charged, contained in a schedule thereto annexed. And a similar demand in writing, under the hand of such collector, was pasted on a board which was fixed upon the premises of the company at *Woolwich*, and also fixed upon the pipes belonging to the company. In the several rates made on the 1st *August* 1815, and subsequently until the 30th *March* 1824 inclusive, the assessment was in the following form: "The Company of Proprietors of the *Kent Water Works*,"—the amount of their assessment was then placed opposite. But in the latter rates the company were rated for and in respect of their land and reservoir, and their pipes. They did not appeal against any of the forty-one assessments under the provisions of the 106th section of the 47 *G.* 3, sess. 2, c. 111.

This case was argued at the sittings after last *Easter* term by *Broderick* for the plaintiff, and *Bolland* for the defendants. The question turned entirely upon the construction of the several clauses of the acts of parliament set out in the case, and the arguments urged are commented on in the judgment delivered by the Court, so that it is unnecessary to state them here.

*BAYLEY, J. Upon several of the points which have been made in this case we entertain no doubt whatever. The first objection to the [330 plaintiff's right of action was, that a body corporate does not come within the meaning of the sixteenth section of the 47 *G.* 3, c. 111. The title of the act shows, that the better relief and employment of the poor was one of the purposes which the legislature had in view. It does not appear that there was any intention to exonerate any person who before that time was liable to contribute to the poor rate. But if, by reason of the provisions of this act, corporations be not liable to contribute, then all property belonging to a corporation, which before was liable to contribute to the poor rate, will be exempt; and that without any express words in the act to show that such was the intention of the legislature. The clauses which relate to the raising of the poor rate are the 16th, 17th, and 23d. By the 16th section, the commissioners are to make rates upon all and every the *person or persons* who do or shall hold, occupy, possess, &c. any land within the parish. The words *person or persons* may be confined to individuals in their natural capacity, or they may extend to bodies politic. By the statute of the 43d *Elizabeth*, which is a statute in *pari materia*, "every inhabitant, parson, vicar, and occupier of any land or tenement," is liable to contribute to the relief of the poor. Now those words do not of necessity

extend to a corporation. But they have been construed to include a corporation. *Rez v. Gardiner* (a). That statute also gives the right of appeal to any *person or persons* aggrieved by any rate. It is said, however, in this case, that it must be collected from the *appeal clause of this act that *331] corporations were not intended to be included, inasmuch as the person or persons appealing against a rate are required to enter into a recognizance, and that a corporation cannot do so. If it were necessary to decide that point, I should pause before I said that a corporation is not competent to enter into a recognizance. I am aware that there is a dictum (b) to show that they cannot do so; but as they may appoint an attorney for a variety of purposes, I am not satisfied that they may not do so for the purpose of entering into a recognizance. But assuming that they cannot enter into a recognizance, yet if they are *persons* capable of being aggrieved by and appealing against a rate, I should say that that part of the clause which gives the appeal applies to all persons capable of appealing, and that the other part of the clause which requires a recognizance to be entered into applies only to those persons who are capable of entering into a recognizance, but is inapplicable to those who are not. But it has been said, that when the legislature intended that corporations should be included, they are specially named; as, for example, in the stat. 47 G. 3, c. 111, s. 66, which enables bodies politic and all corporations, feoffees in trust, husbands, guardians, committees of lunatics, or other trustees, on behalf of themselves and their successors, and their respective cestui que trusts, &c., to sell and convey to the commissioners any property which they are entitled to purchase under the act. The object of that clause is to enable a class of persons, who by law are otherwise incapable of selling their property, to sell such property to the commissioners for the purposes of this act. It required an express enactment to enable *332] such persons *to sell their property. Corporations, therefore, would not be included in such a clause, unless they were expressly named.

The second objection was, that no personal demand of the rate has been made upon any single individual, but there was a corporate meeting held under the provisions of the act of parliament, with a chairman duly authorized to preside over it, and the collector made a demand at that meeting which appears to me to be sufficient.

The third objection was, that the party suing was not duly appointed treasurer. The 11th section of the act says, "that the commissioners may and are hereby empowered, at any meeting at which not less than thirteen commissioners shall be present, by writing under their hands, to appoint a treasurer." It is said, that it is not only necessary the thirteen commissioners should be present at the meeting, but that thirteen must sign the appointment of the treasurer. It appears to me, that the words of that section do not require that the appointment should be signed by the thirteen. The general rule is, that where a power of a public nature is committed to several, who all meet for the purpose of executing it, the act of the majority will bind the minority, *Grindley v. Barker* (c); and in this case the fourth section of the act contains an enactment to that effect. And when the eleventh section authorizes thirteen commissioners present at a meeting to do an act, if seven of the thirteen concur in doing that act, it is a sufficient compliance with the act of parliament; because the act of seven, being a majority of the number present, will bind all. And, therefore, if thirteen only were *333] present, and seven of them concurred in affixing their signature to *the appointment, that would be an appointment under the hands of the majority of the persons present. In this case seventeen commissioners were present, and the instrument was signed by twelve, who constituted the majority of that meeting.

The fourth objection was, that the plaintiff was not duly authorized to bring the action. It is quite clear, however, that the order of the 7th October 1822

contained a sufficient authority to the treasurer to commence the action. But it is said, that Mr. *Rideout* was the treasurer at the time when that order was made, and that although Mr. *Cortis* was treasurer when the action was commenced, there ought to have been a new order. The order, however, does not purport to be an authority to any particular individual to bring the action in his own name, but it merely directs that the action should be brought. It is a consequence of law resulting from that order, that the action must be brought by the person who, at the time of bringing the action, shall be treasurer to the commissioners.

Then the fifth objection was, that the present plaintiff could only be entitled to recover for that part of the rates which became due after he was appointed treasurer; but I think that is not a valid objection, for the plaintiff is not suing for any thing due to himself, but he is a mere nominal party suing for those commissioners for whose benefit the action is to be brought. Whether the rates became due before the plaintiff was treasurer, or afterwards, they must still be sued for in his name, and in his name only.

The sixth objection was, that the amount of the rates was not legally ascertained. Upon that point the Court will take time to consider their judgment.

The seventh objection was, that there is too much *uncertainty in the specification of the property rated. That was a ground of appeal, and [*334 it is not competent to these parties to make it a ground of objection in this action. *Hutchins v. Chambers* (a) is an express authority to show that that objection could only be made by way of appeal.

The eighth objection, that the rates directed to be levied, if calculated upon the rental of the parish, would produce more than the sums ascertained to be necessary, also turns upon the construction of the sixteenth section, which we shall reserve for future consideration.

The ninth objection, which applies to the gaol rate, depends upon the construction of the 54 G. 3, s. 15. That section enacts "that the justices, &c. assembled at sessions shall yearly, until all the expenses of building and completing the new gaol-house and court-houses shall be paid and satisfied, assess and tax a special county rate for the payment of such expenses, in all and every parish, &c.; and the said special rate shall be collected, levied, and recovered, in like manner, and by such ways and means, and under such penalties, as any county rate may be collected, levied, and recovered in the said county of *Kent*; and the *overseers and overseer* of every parish, township, or place, maintaining its own poor, within the said county, shall and may, and is and are hereby authorized and empowered to levy and raise such rate, in like manner, and by such ways and means, and under such penalties, as any poor rate is now by law collected." The words in this clause are "*overseers and overseer*;" and the objection is, that in *Woolwich* there are persons who exercise the ordinary duties of overseers, and that they and not the commissioners should levy this rate. But this act of *parliament was intended to apply to the county at large, and not [*335 to a particular parish; and if in any particular parish power to make and levy rates is taken from the ordinary overseers and given to other persons, those persons are fairly within the meaning of the words overseers and overseer, as used in this act of parliament, for they are overseers for the purpose of levying and making this rate. I think that the commissioners are overseers, within the meaning of this act of parliament, and that the rate was properly levied by them.

HOLROYD, J. I entirely concur in the opinion of my Brother *Bayley* as to the points on which he has pronounced his opinion, and as to the propriety of further considering the other points. As to the appointment of treasurer, I am of opinion that, according to the true construction of the seventh and thirteenth sections of the 47 G. 3, c. 111, it is sufficient that the appointment of treasurer

should be signed by a majority of the commissioners present at the meeting at which the election takes place. The election is an act done by that majority, and although it is necessary that thirteen commissioners should be present at a meeting at which a treasurer is elected, it is not necessary that the formal appointment should be signed by all the commissioners present, but only by that majority who elect him. If that were not so, it would be in the power of a minority to impede, if not prevent, the completion of the appointment. It seems to me that the election, which was an act done by the majority, was sufficiently convinced by the signature of the majority; for although some of the members present at the meeting may disapprove of the act of the majority, they cannot dispute the act of the whole body. The act of the majority is to be *considered, in point of legal effect, the act of the whole body. The election in this case being an act of the majority, I think it was not necessary that the whole body, nor even that all the commissioners present at the election, should subscribe the formal appointment. The number thirteen required by the legislature to be present at the election includes those who assent to the appointment, as well as those who dissent from it. I entertained great doubts during the argument upon the objection raised as to the gaol rate, but I am now satisfied upon that point. The ninety-fourth section of the 47 G. 3, invests the commissioners named in that act with all the powers for the relief of the poor which churchwardens and overseers had. I think the meaning of the fifteenth section of the 54 G. 3 (which statute is applicable to the county at large) is, that the rate shall be collected by the persons by whom the poor rate was to be collected, viz. by those who virtually exercise the office of overseers of the poor. In this case these commissioners under the *Woolwich* act virtually execute the office of overseers of the poor, and more particularly with regard to the collection of rates and receiving the money raised by the collectors. They are, in fact, the overseers for that purpose, and it is their duty to attend to the poor rate. I think, therefore, that they were entitled to levy the gaol rate.

LITLEDALE, J. I am of the same opinion. I think that a corporation is liable to be rated by the sixteenth section of the *Woolwich* act. It has been said, that as the 106th section gives an appeal to any person or persons aggrieved by any rate, upon such appellants giving the notice therein mentioned *337] and entering into a recognizance with two sureties, and that as a *corporation cannot enter into a recognizance, this provision shows clearly that a corporation was not intended to be included by the legislature in the act of parliament, because it could not be intended to compel a corporation to do an act which is impossible. But where an act of parliament directs a thing to be done which it is impossible for a corporation to do, but which other persons may do, and another act which a corporation as well as others can do, then the corporation will be excused from doing the thing which it cannot do, and will be compelled to do the act which it is capable of doing. Assuming, therefore, that a corporation cannot of itself enter into a recognizance, still its sureties may, and I think, therefore, that a corporation might satisfy this clause, by procuring sureties to enter into such recognizance.

I also think there was a legal demand of the rate. It is said, that inasmuch as the act required a personal demand, and as such a demand could not be made upon a corporation, that shows that the legislature did not intend to include a corporation. The same answer may be given to that as to the former objection; viz. if an act of parliament direct two or three modes of doing a thing, and it be found that one cannot be adopted but another can, it is sufficient that that other be adopted. Here a notice was left on the premises, as well as a demand made at a corporate meeting.

Then as to the appointment of treasurer, the seventh section of the *Woolwich* act provides, that all powers and authorities given to the commissioners may be executed by a majority of them assembled at any meeting, not less than thirteen being present. The eleventh section enables the said commissioners at any

meeting *(at which not less than thirteen shall be present), by writing under their hands to appoint a treasurer. Construing those two sections together, I think that a majority of the commissioners (not being less than thirteen) present at any meeting can do all the acts which the entire body can do. I am, therefore, of opinion, that there having been seventeen commissioners present at this meeting, and twelve, constituting a majority of those, having concurred in the appointment of the plaintiff as treasurer, that appointment is valid. I also think that the plaintiff had authority to bring the present action. The act authorizes the commissioners to bring actions in the name of the treasurer. But the action, when brought, is their action, and although the treasurer is the nominal plaintiff, the commissioners are the real plaintiffs.

Then it has been said that the rates are void for uncertainty. If the defendants intended to object to the rates on that ground, they ought to have appealed. It was contended that the defendants were not bound to appeal, because they were not in this case liable to be rated at all. The same argument was urged *Hutchins v. Chambers* (a) and *Durrant v. Boys* (b). But it was decided, that even assuming the rate to be bad, the property of the defendants was liable to be distrained for the rate, and, consequently, that they were liable to pay it. And if, therefore, the defendant, whose goods were distrained, could not, in an action of trespass, say that the distress was unlawful because the rates were bad, neither can he object to pay the sums for which he is rated in this case, on the ground that the rates are bad. *As to the gaol rate, I have entertained great doubts during the course of the argument; but upon the whole, I think that when the legislature, by the act of the 54 G. 3, enacted that the overseers were to levy the county rate, they must be taken to have intended by *overseers* those persons who usually levied the poor rate in each parish respectively; and considering, that although there are overseers in the parish of *Woolwich*, they have no power to levy the poor rate, but that such power has been taken from them and vested in the commissioners, I am of opinion, that the commissioners are overseers within the meaning of the 54 G. 3.

I also think that the other points should be further considered before we pronounce our judgment.

Cur. adv. vult.

BAYLEY, J., now delivered the judgment of the Court. There were three points in this case reserved for our consideration. The first (which applied to the whole demand) was, whether the commissioners had properly ascertained the sums to be levied pursuant to the statute 47 G. 3, c. 111? secondly, whether they had not exceeded their authority in some instances? and, thirdly, whether certain gaol rates could be supported?

The first question is, whether the resolution of the commissioners, that they deemed it necessary to raise a sum not exceeding 1300*l.* for the poor, and a sum not exceeding 500*l.* for the highways, was a settlement and ascertainment, within the meaning of the act of parliament, that those sums were necessary to be raised? This objection applies to all the rates. A sum not *exceeding a given sum is undoubtedly a loose mode of expression, and the amount that was actually raised shows how careless the commissioners were in their calculation; for if 11*d.* in the pound would raise only 1300*l.*, 3*d.* in the pound would raise very little more than 354*l.*: it would have required 4*d.* in the pound to raise 500*l.* The words, *not exceeding a given amount*, taken in one sense, fix that amount as the maximum, and then they signify that sum, or any sum below it; and if that be the sense in which those words are used in this resolution, it is impossible to say that the amount to be raised was settled or ascertained. But may not the words, *not exceeding the sum of 1300*l.**, be used to express the smallest sum which the commissioners in their judgment deemed it necessary to raise; and is not that the only sensible meaning of the words (giving due weight

to the whole of the sentence in which they are used)? When it is said to be necessary to raise a certain sum not exceeding a given sum, if the words be understood as denoting the maximum, they have no definite meaning whatever, for in that sense they will be satisfied if it be necessary to raise only a single shilling. But if the words be construed in the other sense, as denoting the smallest sum which the commissioners in the exercise of their judgment, deem necessary to be raised, then their meaning is plain and precise. Suppose, for instance, 500*l.* only, were in fact the sum necessary to be raised for the purposes of the parish, that sum does not exceed 1300*l.* But an assertion, that a sum not exceeding 1300*l.* would be necessary to be raised, would in that case be an untrue assertion, as applied to every sum between 500*l.* and 1300*l.*; for *341] 600*l.* would be a sum not exceeding 1300*l.*; yet, according to this hypothesis, 600*l.* would not be necessary to be raised, but 500*l.* only. When, therefore, it is said that it is necessary to raise a sum not exceeding 1300*l.*, the sense in which those words must be understood, in order to give them any rational or definite meaning, must be, that it is necessary to raise 1300*l.*

But assuming that the commissioners have not in a formal mode proceeded to settle and ascertain the sum necessary to be raised for the purposes required, still it may be a question, whether they have not done that which is tantamount to it? for they have directed 11*d.* in the pound to be raised for the poor, and 3*d.* in the pound for the highways. That is an ascertainment of the sum which the collectors are to receive, and the persons who are to pay cannot, therefore, complain that it is left to the discretion of the collectors to determine what is to be raised. The money being in the hands of the treasurer, may it not be said, that there cannot be any other meaning given to the resolution of the commissioners, than that the whole 1300*l.* and 500*l.* shall be applied as directed? In their judgment a rate of 11*d.* and 3*d.* in the pound was necessary to attain the objects of their resolutions. They could not ascertain the precise sum necessary to be raised, as there might be some defaulters and some necessary expenses incurred in levying the rate; but they must have intended that the whole of the sum raised by the two specific rates of 11*d.* and 3*d.* in the pound was to be applied to the objects of those rates, in case it should not exceed the sum mentioned; and if it did exceed that sum, then the surplus would be to be returned; and if it fell short of that sum, then a new rate would be necessary to be raised *342] to make up the deficiency. *The resolution, that it was necessary to raise a sum not exceeding 1300*l.*, seems to me to mean, that it was necessary to raise money to that extent; and that being so, the first of the three objections which I have now mentioned must be overruled.

The next objection is, that the commissioners have exceeded their power, in fixing the amount of certain rates. The power of the commissioners, after settling and ascertaining the sums necessary to be raised, is to sign one or more rate or rates, not exceeding the amount of the respective sums so settled and ascertained. The sum settled and ascertained to be necessary was 1300*l.* for the poor, and 500*l.* for the highways; and the same commissioners directed that the first sum should be raised by a rate of 11*d.* in the pound, and the other by a rate of 3*d.* in the pound. Now it appears, that if the whole of the rates were collected, then 11*d.* in the pound would raise 1371*l.* 14*s.* for the poor, and that 3*d.* in the pound would raise 374*l.* for the highways; so that if these sums were considered as levied under one rate, that rate would raise less than the two sums which the commissioners resolved to be necessary. The words of the act do not seem to require that the sums raised for the relief of the poor and for the highways should be raised by separate rates, because it merely says that the sum settled and ascertained shall be raised by a rate or rates. That implies that one rate might be made, including the sums to be raised for the poor, and for paving the streets, &c. It is true that the whole amount, when raised, must be applied in certain proportions, viz. eleven-fourteenths to the poor, and three-fourteenths to the purpose of paving the streets, &c., but

still the whole may be included in one rate, *and one collection. It seems to me, therefore, that considering this as one entire rate, and that the entire sum raised would be less in the whole than that which the commissioners resolved to be necessary for both purposes, this objection also fails. Another answer to this might be, that although the 11*d.* in the rate might make the rate exceed 1300*l.*, if the whole had been collected, yet there was no chance that the whole, or so much as 1300*l.*, would, in fact, be raised upon it. [*343]

The last question is as to the gaol rate imposed by the 54 G. 3, c. 104, s. 15, which enacts, that the justices of the county, at sessions, shall assess and tax a special county rate, for the payment of the expenses of building and completing the gaol, on all parishes and places contributing to the ordinary county rate, by one or more rate or rates. There is a proviso that every tenant or occupier paying such rate may deduct out of the rent payable to his landlord one-half of the amount of the rate. The sessions fixed a specific rate from time to time upon the parish of *Woolwich*, and described it to be so much in the pound upon the estimated rental of the parish, and directed the parish officers to pay these specific sums to the high constable. The commissioners under the *Woolwich* act paid those sums accordingly, but they did not collect from the parishioners any of the sums necessary to pay such special county rates, until a considerable period after they had made such payments; and although all the sums raised by the commissioners for this purpose, except the first, were more than the specific sum fixed by the sessions, the commissioners made no allowance for such excess in future rates, and they in the whole raised 589*l.* more than the various sums fixed by the sessions for the contribution of **Woolwich*, on account of the gaol, would amount to. That sum was afterwards appropriated by the commissioners to the relief of the poor; but if the rates raised by them were radically bad, this appropriation will not cure the objection, and will not enable the commissioners to compel the defendants to pay their proportion of these rates. [*344]

There are two objections to these rates. The first (which applies to them all) is, that they are retrospective, and have the effect of casting upon the tenants at one period burdens which ought to have fallen on those who were the tenants at a preceding period. The second objection applies to all the rates except the first: they direct a levy to the full extent of the pound rate named by the sessions, when it appeared from the preceding levies that a rate to that extent could not be necessary. The first assessment, for instance, by the sessions, was made in *July* 1814, and the amount fixed for *Woolwich* was 276*l.* 13*s.* 6*d.*, being at the rate of 3*d.* in the pound on the estimated rental of the parish, which was to be paid to the county treasurer in *August*. There were similar assessments in *August* and *October* 1815, and the sums were paid out of the monies collected for the relief of the poor. But no distinct poor rate was made on the parish for any of these assessments until *January* 1816. The persons, therefore, who at that time were landlords and tenants, were called upon to bear a burden which ought to have been borne by the landlords and tenants in *July* 1814, and *January* and *October* 1815. In *April* and *August* 1816 similar assessments were made by the sessions. Every one of the gaol rates made by the commissioners under the *Woolwich* act was made to pay sums previously paid by *them; and the effect of that was to throw the burden of the rate not upon those occupiers who ought to bear it, but upon some other persons who by law were not liable to bear it. And as to the sum of 589*l.* 0*s.* 9*d.*, which the commissioners ought not to have levied on account of the gaol, the effect of their being allowed to enforce payment of that sum would be to throw on the landlords a burden to which by law they are not liable, for the tenant and not the landlord is liable to contribute to the poor rate. These objections to the gaol rates appear to us to be fatal, and we are, therefore, of opinion, that the commissioners cannot recover the sum charged on the defendants in respect of these rates. There must, therefore, be a proportionate deduction from the amount of

the verdict in respect of the gaol rates. But as to all the other parts of the demand, we are of opinion that the plaintiffs are entitled to recover.

Judgment for the plaintiffs.

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*ARLETT v. ELLIS, SHEFFORD et al.

Trespass for breaking and entering the plaintiff's close, and treading down the grass, &c. and breaking and destroying the hedges and fences of the plaintiff, &c. The defendant, as to all the trespasses, pleaded that the plaintiff's close was parcel of the manor of C., and that a certain messuage and four acres of land was parcel, and a customary tenement of that manor, and that there is, and from time whereof, &c. there hath been a custom within the manor, that the customary tenant of that tenement shall have common of pasture upon the plaintiff's close. That J. S., being seised of the said customary tenement, having occasion to use his common of pasture, entered the close in which, &c. and put his cattle in, and because the hedges and fences had been improperly erected, defendant threw them down. The plaintiff, in his replication, took issue upon the custom, and new assigned that the defendant entered for other purposes than those mentioned in the plea: Held, first, that upon the issue joined upon the replication, the plaintiff was at liberty to prove a custom for the lord of the manor to inclose parcels of the waste, and a grant to him of the locus in quo under such custom, and that it was not necessary that that custom should be specially replied.

Held, secondly, that a custom for the lord of a manor to inclose the waste without limit or restriction, being inconsistent with the rights of the commoners, was bad in point of law, but that a custom to inclose (even as against common of turbary) parcels of the waste, leaving a sufficiency of common, was good, and that it lay on the lord, or his grantee, to show that a sufficiency of common was left.

When the lord or his grantee erects fences upon the common, the commoner may by law destroy the fences, and, therefore, the fact of the defendant's having entered upon the plaintiff's close, and thrown down the whole of the fences which he had erected, when they might have entered upon the close without throwing down any part of the fences, was held not to be evidence that they entered for other purposes than those mentioned in the plea, and did not warrant the jury in finding a verdict for the plaintiff on the new assignment.

DECLARATION stated, that on, &c. the defendants broke and entered a certain close of the plaintiff, at the parish of *Yately*, in the county of *Southampton*, and forced and broke open, and broke to pieces the plaintiff's gates, standing and being in and upon the close; and with feet in walking trod down, &c. the grass of the plaintiff there growing and being; and broke down, prostrated, and destroyed the hedges and fences of the plaintiff there standing and being; and also cast and threw divers large quantities of earth, stones, and rubbish, into and upon the close of the plaintiff; and by means of the premises prevented the plaintiff from having the use, benefit, and enjoyment of his close and his hedges and fences, in so large and ample a manner as he might and would otherwise have done, to wit, at, &c. Plea, as to all the trespasses, that the close in which
 *347] &c. before and at the said several times when, &c. was and is *within and parcel of the manor and hundred of *Cron dall*; and that a certain messuage and four acres of land with the appurtenances, at the said several times when, &c. were, and from time immemorial have been within and parcel of the said manor and hundred of *Cron dall*, and a customary tenement of that manor demised and demisable by copy of the court rolls; that within the manor *there is*, and from time whereof, &c. hath been an ancient custom there used and approved of, that every customary tenant of the said customary tenement, from time whereof, &c. have, and each of them hath had, used, and been accustomed to have, *and still of right ought to have*, for himself and his farmers, occupiers of such customary tenements, common of pasture in, upon, and throughout *the said close in which, &c.* for all their commonable cattle levant

and couchant. The plea stated a grant of the customary tenement by the lord of the manor of the said customary tenement, to *J. Shefford*; that *J. Shefford* entered and became seised thereof in his demesne, as of fee, at the will of the lord of the said manor and hundred, according to the custom of the manor and hundred, and at the several times when, &c. was in the actual occupation thereof, and entitled to such common of pasture as aforesaid, wherefore the defendant *J. Shefford* at the said several times when, &c. having occasion to use his common of pasture in his own right, and the other defendants as his servants and by his command, at the said several times when, &c. entered the said close in which, &c. in order to put, and did then and there put into and upon the same his cattle, being his *J. Shefford's* commonable cattle, &c. and to use the said common of pasture of him *J. Shefford* there, and in so doing they the said *defendants with their feet in walking, trod down a little of the grass, and because the said hedges and fences had been wrongfully [*348 erected, and were wrongfully standing and being in and upon the said close, in which, &c. (so that without pulling down and destroying the hedges and fences, the defendant *J. Shefford* could not use or enjoy his said common of pasture, in and throughout the said close in which, &c. in so ample and beneficial a manner as he otherwise might and would and ought to have done), he *J. Shefford*, in his own right, and the other defendants, as his servants, pulled down, and a little destroyed the said hedges and fences, and in so doing unavoidably cast and threw the said earth, stones, and rubbish into and upon the said close, doing no unnecessary damage to the plaintiff or the said hedges or fences on the occasions aforesaid. The third plea claimed a right of common of turbary upon the close, to cut, dig, and take turf. The replication took issue upon the custom, and new assigned, that the defendants, on other and different occasions and for other purposes than those in the said pleas respectively mentioned, or any or either of them, and in a greater degree and to a greater extent, and with more force and violence than was necessary for abating and removing the said supposed stoppages and obstructions in the said pleas respectively mentioned, committed the several trespasses. The defendants joined issue on the replication, and pleaded not guilty to the new assignment. At the trial before *Park, J.*, at the Spring assizes for the county of *Hants* 1827, the plaintiff proved, by the deputy steward of the manor of *Crondall*, a grant by the rod, of the 31st of October 1825, made to him by the Dean and Chapter of *Winchester*, lords of *that manor, of two acres of land, bounded on the north by the park pales [*349 of the plaintiff; on the south, by the western road; on the east, by the tithing of *Hawley*, and a house and garden belonging to one *Curley*; and on the west by a road leading to *Yately*, part of the waste of the manor; to hold to the plaintiff, his heirs and assigns for ever, according to the custom of the manor, at the yearly rent of 2s. 6d., and all other burdens and services, and the plaintiff paid a fine of 8*l.* and was admitted tenant. It was proved that the plaintiff, in February 1826, began to inclose the piece of ground, and made an embankment; and that before the inclosure was completed, the defendants on the 7th of March entered upon the land and threw down the embankment. There was neither turf fit for fuel nor pasture on the land in question; and the defendants had no cattle with them; nor any instrument to cut turves. They might have entered upon the common and upon the piece of land in question, and turned on their cattle, without throwing down the embankment. The defendants then gave evidence in support of the right of common of pasture and of turbary claimed in the pleas. The plaintiff in reply, in order to prove a custom by the lord to inclose parcels of the waste, produced in evidence the court rolls, containing entries of various grants of parcels of the waste made by the lords of the manor, from the year 1650 to the time of the trial. It did not appear on the face of the grants that they were made with the consent of the homage, or that a sufficiency of common remained for the commoners. It was contended by the defendant's counsel, that this evidence was not admissible upon

*350] the issue joined in this case, that issue being, whether the custom stated *in the plea existed; and assuming that the evidence was admissible, the custom itself being without limit or restriction was void. The plaintiff's counsel then urged, that the plaintiff, at all events, was entitled to a verdict upon the new assignment, because it appeared clearly upon the evidence, that the defendants, by pulling down the bank, had done more than was necessary to assert the right of common. The learned Judge left three questions to the jury; first, whether the defendants had established the right of common, of pasture, and of turbary stated in the pleas; the jury found that they had. Secondly, whether there was within the manor a custom for the lord to make grants of parcels of the waste without limit or restriction; the jury found that there was such a custom. Thirdly, whether the defendants had done more than was necessary for asserting the right of common, of pasture, and of turbary. The learned Judge, in his address to the jury upon this latter point, observed that it appeared upon the evidence that there was neither turf nor pasture upon the land in question, and that the defendants pulled down the mound, which it was not necessary for them to do in order to assert the right of common. The jury found that the defendants did more than was necessary for the purpose of asserting their right of common. The learned Judge then directed a verdict to be entered for the plaintiff for 1s. damages, but reserved liberty to the defendants to move to enter a nonsuit if the Court should be of opinion that the evidence of the custom to inclose ought not to have been received, or if that custom was void; and it was agreed that the Court should (as they thought fit) order a verdict to be finally entered for the plaintiff or the defendants on all or *351] any *of the issues. *Selwyn* in *Easter* term last obtained a rule nisi for a new trial, and cited *Proud v. Hollis* (a) to show that the defendant had not done more than he was entitled to do in the exercise of his right of common, and, consequently, that the verdict for the plaintiff on the new assignment ought to be set aside. Secondly, assuming that the lord might inclose, the right to inclose, whether considered as a reserved right of the lord at the time of the grant, or a right founded on immemorial usage, ought to have been replied specially, and it ought to have been averred that a sufficiency of common was left. This course was adopted in *Duberley v. Page* (b), *Clarkson v. Woodhouse* (c), *Shakespear v. Peppin* (d), and *Grant v. Gunner* (e). But, thirdly, the lord cannot establish such a reserved right, *Badger v. Ford* (f). It is true, that in *Follard v. Hammett* (g) Lord Chief Justice *De Grey* alludes to such a right as existing in the manor of *Hampstead*; but there it was the custom for the homage to survey the spot before the inclosure, and to make their report. But considering it as a custom, it is unlimited in its nature, and undefined in its terms, and goes to the destruction of the whole common, and, however ancient, is bad in this view of it, *Wilson v. Wilkes*. (h)

P. Williams and *Follett* for the plaintiff. The evidence of the right of the lord to make grants of the waste was admissible upon the issue joined on the replication. The plea is, that *at the time when the trespasses complained of* *352] *were committed*, the defendant in *respect of his copyhold tenement had a right of common *over the close of the plaintiff*. The replication applies to the time mentioned in the plea. The answer of the plaintiff in substance therefore is, that at the time when the trespasses were committed, the defendant had no such right of common on the plaintiff's close. Evidence showing that the right of common was then at an end supported the issue, and the evidence of the custom for the lord to inclose was, therefore, properly received. But in fact no other issue could be raised by the replication by which the point in dispute between the parties, viz. the existence of the custom to inclose

(a) 1 B. & C. 8.

(b) 2 T. R. 391.

(c) 5 T. R. 412, n.

(d) 6 T. R. 742.

(e) 1 Taunt. 435.

(f) 3 B. & A. 153.

(g) 5 T. R. 417.

(h) 7 East, 127.

could be tried. For it is a clear and elementary principle of pleading, that the matter constituting the ground of defence in the defendant's plea must in the replication be either confessed and avoided or traversed. Here the custom upon which the defendant says his right is founded is traversed. The plaintiff's answer to the defendant's plea in fact is, that the defendant's right of common over the plaintiff's close had, at the time *when the trespasses were committed*, been put an end to. But that could not, according to the rules of pleading, have been replied, for the mere assertion of a fact inconsistent with the matters pleaded is not sufficient. There must be a positive denial or confession of the plea; *Com. Dig. Pleader* (G 2,) *Covert's* (a). And therefore a replication setting out the custom under which the plaintiff claimed would have been bad unless it had concluded with a traverse of the custom set out in the plea. Such a replication could have been framed, but then the issue must have been the same; because an inducement to a traverse is not traversable. And, although in some cases it may be advisable to use a *special traverse in order to avoid an estoppel, or to take the opinion of the Court in an early stage [353] of the proceedings, on the legality of the answer to the plea, it is not in any case necessary. There may be a traverse at once concluding to the country, which is the shortest and best; or there may be a special traverse with an inducement. If a party by his plea makes title by custom or prescription, the other party cannot reply another custom or prescription inconsistent with it, without a traverse. He must deny the prescription stated in the plea, and his custom or prescription will be sufficient evidence to show that the custom or prescription stated in the plea does not exist, *Durrant v. Child* (b); *Kenchin v. Knight* (c). In *Spooner v. Day* (d) the plaintiff in the declaration prescribed for a right of common, the defendant pleaded a custom to inclose, and the plea was held bad, on the ground that the defendant did not traverse the prescription in the declaration, and that he could not plead a prescription against a prescription, but ought to answer the prescription alleged in the count. In *Murgatroid v. Law* (e), the action was for diverting a watercourse; the plaintiff set out his title in the ordinary way, and a prescription that the water should flow to his close, and that defendant diverted it. The defendant pleaded in bar that he was seised in fee of his close, and that all those whose estate he had therein had been accustomed to take the water for the convenient watering of their cattle in the close. Upon general demurrer, the plea was adjudged ill, because the defendant had neither confessed and avoided, nor *traversed the matter alleged [354] in the declaration; but it was said that if he had pleaded the general issue, the facts stated in the special plea would have been a good answer to the action. It is therefore quite clear, that in this case the replication must have contained a denial of the right of common set out in the plea, and that if the custom to inclose alone had been replied, the replication would have been bad. In *Grant v. Gunner* (f), the defendant pleaded a common of turbary, and from the abstract of the pleadings in the printed report, the replication does not appear to have contained any traverse of the prescription; in that case, however, the right of common was claimed over the wastes of the manor, and not over the close of the plaintiff, as it is here. In *Weeks v. Sparke* (g), to trespass, *quare clausum fregit*, the defendant pleaded a prescriptive right of common over the locus in quo at all times for his cattle, levant and couchant. The plaintiff in his replication prescribed in right of his messuage to use the locus in quo for tillage with corn, and until the taking in of the corn, to hold and enjoy the same in every year, and *traversed the defendant's prescription*. And, therefore, where prescriptive rights are pleaded, but have been put an end to, the proper replication is not that the right has been put an end to, and for this reason, that it does not deny the plea, but the replication takes issue upon the

(a) *Cro. Eliz.* 754.(d) *Cro. Car.* 432.(b) *Yelv.* 217.(e) *Carth.* 116.(g) 1 *M. & S.* 679.(c) 1 *Wils.* 253.(f) 1 *Taunt.* 435.

prescription; and if there has been such a prescriptive right, and such right has been put an end to *before the trespasses were committed*, that issue must be found for the plaintiff, because the replication puts in issue the existence of the prescriptive right *at the time when the trespasses were committed*. Thus, in

*355] *Rotherham v. *Green (a)*, to trespass, *quare clausum fregit*, the defendant pleaded that *W. G.* was seised in fee of a tenement in *L.*; and that he and his ancestors, and all those, &c. in the said tenement from time whereof, &c. have used to have common in the place where, &c. for all their beasts levant and couchant upon the tenement; and that it descended to him, &c. Issue was taken upon the prescription, and upon the issue the plaintiff proved that *E. G.*, the grandfather of the defendant, being seised of the tenement, released to the plaintiff's ancestor all his right, and his common in part of the land where he had the common, and died, and the tenement descended to *W. G.*, and from him to the defendant; and it was adjudged for the plaintiff on the ground that the release, though only partial, was a release in law of all the right; or in other words, that the right of common had been put an end to. So where a public footway has been stopped up by an order of justices, and the owner of the soil brings trespass, and the defendant pleads the public footway, the proper form of the replication is not to reply specially the order for stopping up, but to deny that there is any such footway as that mentioned in the plea, *Divison v. Gill (b)*.

Assuming that the evidence of the custom to inclose was admissible upon this issue, then the next and principal question is, Whether that be or be not a legal custom? First, a custom for the lord to inclose without restriction is good; for such a custom is evidence that the lord, at the time of granting the right of common, expressly reserved to himself the right to inclose. It is true, that by inclosing, the lord excludes the commoner from a portion of the common; *356] *but so he does, if he plants trees upon the common, or if he makes clay pits, or turns in rabbits, which make coney burrows. *Bateson v. Green (c)* and *Cooper v. Marshal (d)*, and *Kirby v. Sadgrove (e)*, show that the lord may do all those acts. During the time the trees are growing, or the clay pits or coney burrows are open, the commoner is deprived of the use of a portion of the surface of the land. *Lord Northwick v. Stanway (f)*, *Clarkson v. Woodhouse (g)*, and *Folkard v. Hemmett (h)*, are authorities to show that a right for the lord to inclose may exist. But assuming that the lord can only be entitled by custom to inclose parcels of the waste, provided he leave a sufficiency of common for the commoners, there was in this case *prima facie* evidence to show that a sufficiency of common was left; or at least the onus of proving the contrary lay on the defendant. It was proved that there were 2000 acres of waste land still left, and that the grant made in this instance was in the same form as that which had been used for 200 years. It ought not, therefore, to be presumed that the lord acted illegally; and if that be so, then there was *prima facie* evidence to show that a sufficiency of common was left. It lay upon the defendants, who impeached the grant, to show by evidence that it is void, because a sufficiency of common was not left. *Grant v. Gunner (i)*, will be relied upon to show that there can be no approvement in derogation of a right of common of turbary. That case only shows there can be no approvement under the statute of *Merton*. But there was not any evidence of a custom, or of any right having *357] *been reserved to the lord at the time when he granted the common, of making inclosures, &c. or doing other acts for his own benefit on his wastes. The replications stated that the plaintiff became seised by force of the statute. The objection that a reservation of this kind by the lord is inconsistent with the grant of the right of common, will

(a) *Cro. Eliz.* 593.(d) 1 *Burr.* 259.(g) 5 *T. R.* 411.(b) 1 *East*, 6.(e) 6 *T. R.* 483.(h) 5 *T. R.* 417.(c) 2 *T. R.* 411.(f) 3 *Bos. & Pw.* 346.(i) 1 *Taunt.* 435.

apply equally whether the common be common of pasture or turbary. In *Badger v. Ford* (a), it was common of pasture. In approvements made under the statute of *Merton*, the party to whom the grant is made holds as a freeholder; but where the grant is by custom, the grantee takes as a copyholder. All the cases, therefore, which recognize as a valid custom the right of the lord to grant parcels of the waste as copyholds, recognize the validity of this custom, which has been treated as a valid one in *Rez v. Warblington* (b). *Doe v. Davidson* (c), *Rez v. The Inhabitants of Wilby* (d), *Rez v. Inhabitants of Hornchurch* (e). *Badger v. Ford* is the only authority against the plaintiff. That case was decided upon a motion for a new trial. The point now before the Court was not at all argued. Two points arose, and the Court refused the rule upon both grounds. And what the Lord Chief Justice there says does not apply to a case where the lord does not claim the right of annihilating the right of common altogether, but merely a right to grant, leaving a sufficiency of common to the commoner.

Assuming that the evidence of the custom to inclose was not admissible upon this issue, or that such *custom itself was bad, the plaintiff, at all events, [†358] is entitled to retain his verdict on the new assignment. The lord is the absolute owner of the waste, and may convey or lease any part of it, subject to the right of common. The locus in quo, therefore, is clearly the close of the plaintiff. The declaration charges the defendants with breaking and entering the plaintiff's close, and destroying the herbage, and prostrating the fences. The defendants in their plea say, that having occasion to use their right of common, they broke and entered the close, and destroyed the herbage, and threw down and destroyed the fences while in the exercise of that right. Then the plaintiff by his new assignment says, that the defendants, *on other occasions* and for *different purposes* than those mentioned in the pleas, and to a greater extent, and with more force and violence than was necessary for abating and removing the supposed stoppages and obstructions in the pleas mentioned, committed the trespasses in those pleas mentioned. Now, admitting that the defendants were justified in throwing down the fences *to abate the nuisance*, they have not in their plea alleged that they did it for that purpose, and they were not justified in destroying the grass and herbage in the close, except for the purpose of exercising the right of common. They say they did it for that purpose, but the new assignment charges that they did not. The question upon the plea of not guilty is, Did they or did they not? It was clear upon the evidence, that they did not do it in the exercise of their right of common; because there was neither pasture nor turf on the place, and they had no cattle with them, nor any instrument to cut or carry away turves if there had been any; they did, therefore, commit trespasses for other purposes *than those mentioned in the pleas. [†359] Assuming, therefore, that they were justified in throwing down these fences because they were a nuisance to their commonable rights, they have not so pleaded it in those pleas; and, therefore, upon this part of the new assignment, there must, at all events, be a verdict for the plaintiff. Moreover, the defendants were not justified in throwing down and totally destroying the fences, although the fences might be an injury to their rights of common. Their proper remedy was an action upon the case against the lord. In *Sadgrove v. Kirby* (f), it was held that a commoner could not justify cutting down trees planted by the lord on the waste, although there was not a sufficiency of common left, but that his remedy was by action on the case or by assize.

Serjt. *E. Lawes* and *Selwyn*, contra, were desired by the Court to confine their argument to the point on the new assignment. The true meaning of the new assignment is, that the defendant committed trespasses unconnected with the right of common claimed in the pleas. If, therefore, the pulling

(a) 3 B. & A. 155.
(a) 2 M. & S. 504.

(b) 1 T. R. 242.
(c) 2 B. & A. 189.

(c) 2 M. & S. 184.
(f) 6 T. R. 483.

down the fence by the defendant was an act which he was authorized to do in assertion of that right of common, then it was not done for other purposes than those mentioned in the pleas, and the plaintiff ought not to have any verdict upon the new assignment. Now here the erecting the fences upon the common was not only an injury to the commoner, but an act illegal in its own nature, and consequently a nuisance of that description which the commoner was entitled to abate. *Bracton*, liber 4, chap. 37, takes a distinction between *360] what he calls *nocumentum justum* and *nocumentum injuriosum*; and he defines *nocumentum injuriosum* to be, where a person does something in itself unjustly against law; and *nocumentum justum* to be where the act is just in itself, but causes damage to another. This distinguishes the present case from those where the lord has either planted trees on the common, or stocked it with rabbits. An act of this kind, the lord, as owner of the soil, has a right to do; and though it may prove injurious to the commoners, yet it is what the law deems *nocumentum justum*, and only becomes *nocumentum injuriosum* by excess. In the case of the *nocumentum injuriosum*, the commoner may abate the nuisance; but where it is *nocumentum justum*, and becomes *injurious* by the excess, he must bring his action. The authorities show that the defendants had a right to destroy the whole of the fence, in the exercise of the right of common. In *Bro. Abr. tit. Common*, pl. 9, this is laid down, "Where I have common in another's land, and the owner makes a hedge on the land where the common is, I may break down the *whole* hedge; but if he incloses the whole land in which the common is, by making a hedge on other land which surrounds the land in which the common is, I may not break down the whole hedge, but only part, so as to have a way to the land where the common is; and this is the diversity;" and the Year Book 15 H. 7, 10 b, is cited. On reference to the Year Book, it appears to have been held per Curiam, "If I have common appendant, &c. and he who hath the land makes a hedge on the land whence the common issues, I may break down the *whole* hedge; although the common be appendant, yet the lord may approve a parcel." The other part *361] of the report in the *Year Book is literally the same as in *Brooke*. In *Bro. tit. Common*, pl. 9, it is laid down, "that where the common is appendant, the owner may approve certain parcel, et hoc videtur esse relinquat al comminners suff. comon." In 2 *Inst.* 88, it is said, "If the lord doth inclose any part, and leave not sufficient common in the residue, the commoner may break down the whole inclosure, because it standeth upon the ground which is his common." In *Mason v. Cesar (a)*, which was trespass for breaking down hedges, the issue was, Whether the defendant could enjoy the common tam amplo modo? and there was a verdict for the defendant. The Court were of opinion, "that the defendant might abate the hedges, for thereby he did not meddle with the soil, but only pulled down the erection." In this case it is admitted on the pleadings, that the defendant did not enjoy tam amplo modo, and he has only levelled the banks. In *Cooper v. Marshal (b)*, the distinction between surcharging the common, and a total obstruction of it, is noticed by the Court. Lord *Mansfield* there lays it down, that in the one case the commoner is driven to his action, in the other he may abate; and *Foster, J.*, there says, that an abatement of a nuisance occasioned by a lord's inclosing, is only a restoring that right which the lord had before granted, and is, therefore, justifiable; but in the case of an excess (by surcharging a common with rabbits), the law is to judge of the measure of it.

BAYLEY, J. I think that the rule for a new trial ought to be made absolute. The question upon which I have entertained the greatest difficulty during the *362] argument is, whether the plaintiff is entitled to retain his *verdict upon the new assignment? and upon the whole I think that he is not. The authorities cited from *Brooke's Abridgment* and the Year Book satisfy my mind,

that where a fence has been erected upon a common, inclosing and separating parts of that common from the residue, and thereby interfering with the rights of the commoners, the latter are not by law restrained, in the exercise of those rights, to pulling down so much of that fence as it may be necessary for them to remove for the purpose of enabling their cattle to enter and feed upon the residue of the common, but that they are entitled to consider the whole of that fence so erected upon the common as a nuisance, and to remove it accordingly. Those authorities show that there is an essential distinction between this case and that of *Sadgrove v. Kirby* (a). The fences placed upon the common in this case were, *primâ facie*, as against the commoners, wrongfully and illegally placed there, and a nuisance which they might abate; but the trees growing upon the common, in *Sadgrove v. Kirby*, were not, *primâ facie*, illegally growing there; for the lord, as owner of the soil, had, *primâ facie*, a right to plant and to have those trees there; and the trees would not become wrongful as against the commoners, unless it were by their injuring their easement, and not leaving them a sufficiency of common for their cattle. The lord, by granting rights of common upon his waste, does not thereby exclude himself or his tenants from all use of the waste on which the right of common is to be exercised, but merely grants to others, in common with himself and his tenants, certain rights upon that waste. All that the lord has not granted remains in him. He may therefore apply the waste to any purposes [*363] not inconsistent with the rights which he has previously granted to the commoners. One mode by which he may make his waste beneficial to himself is, by planting trees on it. They may also be beneficial to the commoners, by affording shade to the cattle at particular periods of the year. He may also exercise his right by turning in rabbits, provided he leave a sufficiency of common for the commoners. The turning rabbits on the common is an act not *primâ facie injuriosum*. It is *primâ facie* in the exercise of his legal rights, as owner of the soil. It was therefore properly decided, in *Sadgrove v. Kirby* (b), and *Cooper v. Marshal* (c), that a commoner in such a case is not to take upon himself to decide that the trees or rabbits on a common are a nuisance, and to cut the trees down or destroy the rabbits, but that he is bound in the first instance to bring his action, and to establish to the satisfaction of a jury they are a nuisance. If that be a sound distinction between those cases and the present, what was the principle upon which the verdict was given for the plaintiff on the new assignment? The jury seem to have been of opinion, that the defendant had done more than was necessary for the purpose of asserting the right of common; and if the decision in *Sadgrove v. Kirby* were to govern the present case, and the erection of the fence were an act which the lord and his grantee *primâ facie* had a right to do, the defendants would have done more than was necessary for the purpose of using the right of common, if they had pulled down any part of the bank or fence, because there was an opening by which they might have entered upon the plaintiff's close; but if the whole of that bank or fence were a *nocumentum injuriosum*, which the defendants, in the exercise of [*364] their rights of common, were justified in removing, the verdict of the jury, that they had done more than was necessary for the purpose of asserting their rights, could not be well founded. It seems to me, that the verdict upon the new assignment was founded upon the notion, that the defendants, in pulling down the fence, had done something more than they had a right to do in asserting their rights of common. But the authorities show, that they had not done more than by law they were entitled to do. I think, therefore, that the jury were not warranted in coming to the conclusion, that the defendant entered the close for other purposes than those mentioned in the pleas, and that the verdict for the plaintiff upon the new assignment is not warranted by the evidence.

The next question is, Whether the plaintiff be entitled to recover, on the

(a) 6 T. R. 483.

(b) *Ibid.*

(c) 1 Burr. 259.

ground that he has proved a custom for the lord to inclose parcels of the waste? and that raises the great question in this case, Whether the lord had any such right? The lord had granted to the plaintiff a particular spot, parcel of a large waste. The defendants had a right of common on the waste, including the space of land granted to the plaintiff, unless that spot had been legally separated from the residue of the manor by the lord. I have no difficulty in saying, that if it were legally separated, the plaintiff had a sufficient possession to entitle him to maintain trespass. The possession of the whole waste, notwithstanding the right of common, remains in the lord; and if he, in the manner warranted by the custom, transfers the possession to the plaintiff, and the latter enters, then he *365] becomes possessed, and acquires a lawful possession, as against the lord; and the right of the commoners to turn their cattle over that land, as well as the residue of the waste, is perfectly consistent with the right of possession being vested and perfected in him.

Then, as to the right of the lord to inclose the land in question, and to grant a perfect title to the plaintiff, it was insisted, first, that the lord had an unlimited and unrestricted right (founded upon a custom in this particular manor) to abridge the rights of the commoners, and to confer in severalty, upon any person from time to time, such portions of the waste as he in his discretion should think fit; it seems to me, that such a right is utterly inconsistent with an existing right of common; for the lord might by degrees inclose the whole of the waste, and so annihilate the right of the commoners. *Badger v. Ford* (a) is an authority upon that point; but had there been no authority, I should have thought, that wherever it is once established that a right of common has existed from time immemorial, such a privilege or custom in the lord cannot by law be supported, because it would be in destruction of that right of common. All the authorities which have been cited in support of such a right are distinguishable from the present case. The right claimed is to sever and take away permanently from the common a beneficial part of it, so as to deprive the commoner of any power or right over that part. In *Bateson v. Green* (b) there had been from time immemorial an usage for the lord to dig clay upon the waste; and that was held to be evidence to show, that when he granted out the right *366] of common to the commoners he reserved to himself the right of digging clay. The extent to which it had been carried in that case did not appear to be unreasonable. Lord *Kenyon*, in delivering judgment, intimated that there was no evidence to show that the right had been more exercised of late years than formerly. Now the lord, by digging for clay, takes from the land a product of a particular species, but the land afterwards remains capable of yielding food fit for the feeding of cattle. Indeed it frequently happens, that land, besides the support which it yields for the food of man or of cattle, has within it some valuable product, as marl or limestone, which it is desirable for the owner of the waste to obtain; and it is not unreasonable that the lord of a manor, when he grants rights on that land, should reserve to himself the right of taking such marl or limestone. But when he takes them, he does not permanently deprive the commoners of that benefit which they are entitled to derive from the surface of that part of the land from which the marl or limestone is so taken. A case of that sort is distinguishable from the present, because the lord still leaves for the benefit of the commoner something capable of yielding food for his cattle. The user of the privilege by the lord from time to time is evidence to show that he reserved that right to himself; and the nature of the substance which is taken from the earth shows that such reservation was not unreasonable. The exercise of such a right will no doubt interfere with the privilege of the commoners during the time the produce is taken from the earth, and until the surface reproduces pasturage. But the distinction between that case and the present is, that here the commoner is wholly and permanently

deprived of the benefit of a quantity of land, whereas in that *case the land was only taken away for a certain period. The case of *Clarkson* [*367 v. *Woodhouse* is distinguishable from the present. The question in that case was on the record, and came on for argument on motion in arrest of judgment. That was an action of trespass for breaking and entering the plaintiff's close in *Stalmine*, in the county of *Lancaster*. The defendant by his pleas claimed, in right of an ancient messuage in *Stalmine*, common of pasture and of turbary. The plaintiff relied on a grant of parcel of the waste. The right claimed by the defendant would be exercised on those portions of the waste which yielded pasture and turbary respectively. When the grants of common were first made, it is probable that pasturage would be confined to those places which yielded pasture, and that that quantity was deemed sufficient for the cattle of all the commoners. The right stated in the replication was, not to withdraw from the commoners any portion of the pasture or turf land, but that the owner should assign to particular individuals a particular portion of moss land, and that they should work upon that, and not elsewhere, until all the turbary should be exhausted, and then that the owner might inclose. The words are, "So long as any turbary remained or should remain in such respective moss-ales; and when and so often as the turbary of such moss-ales so assigned, &c. had been got and cleared therefrom by such digging and getting of turves for the purposes aforesaid, the owners of the said waste for the time being, for all the time whereof, &c. had inclosed and approved, &c. to themselves all such moss-ales or parts of the said waste called *Stalmine Moss* as had been or should be cleared, to hold the same so inclosed at their pleasure in severalty for ever afterwards, freed and *discharged from all common of pasture and turbary thereon." The fair meaning of the custom to inclose [*368 stated upon that record seems to me to be that when the land was exhausted and incapable of producing any more turf, the owner of the same might inclose; for until it was so rendered incapable of yielding more turf, it could not be truly said that the turbary was all got and cleared therefrom; and if that be the true meaning of the custom there stated, then it only amounts to this, that when particular portions of the land which have been destined for turbary ceased to have the power of producing turbary, the owner should be at liberty to take that portion to himself. That case, therefore, is distinguishable from the present, because the owner of the waste there did not take away from the commoners any thing which had been originally appropriated to them for the purposes of pasture or turbary. In *Folkard v. Hemmett* (a), the grant of the soil was made by the lord with the consent of the homage. Now the homage are persons associated together at the lord's court (at which all the tenants of the manor may attend) to act as between the lord and his tenants. Being tenants themselves, it is not very likely that they will lean unfairly towards the lord, and if the homage say, therefore, that a grant shall be made (assuming that the lord has a right to grant wherever there is more land than is necessary for the purpose of the commoners), it may be reasonably presumed, that the homage have given their consent to the grant only when it is clear that the land granted may be taken by the grantor, without interfering with the rights of the commoners; and, on the other hand, it may be fairly presumed that the homage would never consent *to any part of the common being taken [*369 away from the tenants, unless they were satisfied that sufficient remained for the commoners. That case, therefore, is distinguishable from the present: there, the grant was made with the consent of the homage; here, it is done by the act of the lord himself.

I have no difficulty in saying that, in my judgment, the lord has rights of his own reserved upon the waste; I do not say subservient to, but concurrent with, the rights of the commoners. He has a right to stock the common, and to

every benefit to be derived from the soil, not inconsistent with the rights of commoners. And when it is ascertained that there is more common than is necessary for the cattle of the commoners, the lord, as it seems to me, is entitled to take that for his own purposes. That is the principle upon which the statute of *Merton* is founded. The lord has a right to approve, not as lord, but as owner of the soil. *Glover v. Lane* (a) shows that the owner of the soil, whether lord or not, may make such an approvement. It seems to me that the lord's right is this: he may approve provided he leave sufficiency of common of pasturage for all the cattle which are entitled to feed upon it. The common may originally have been destined for a definite number of cattle, or for all cattle levant and couchant upon certain lands. Many of those rights may be extinguished, or the common itself may produce so much more herbage, that a smaller portion of that common may be sufficient for depasturing the cattle of the persons entitled, than when it was originally destined *to that purpose. Now, whenever that is

*370] the case, I think that the lord has a right to inclose; but in order to justify making the inclosure, it is incumbent upon him or his grantee, when the right to inclose is questioned, to show that there is sufficiency of common left (b). In all the cases in which the right of the lord to inclose has been stated on the record, there has been an allegation that he left sufficient common for the commoners. That was so in *Glover v. Lane* and in *Grant v. Gunner* (c). The commoner has a certain right over the whole of the waste; and when the lord abridges that right, he ought to show that he has done that which the law requires him to do before he abridges the right of the commoner. And, therefore, I am of opinion, that in this case, it ought to have been submitted to the jury whether there was or was not, at the time when the lord made the grant of the locus in quo, a sufficiency of common left for all the persons having rights of common upon the waste in question. The right of the lord to inclose must depend on the finding of the jury on that question. It is impossible for this Court, without knowing what the fact is, to say, whether the verdict ought to be entered for the plaintiff or defendants.

It is not necessary to give an opinion upon the question, whether there can be any approvement against a right of common of turbary. There are, undoubtedly, authorities to show that the owner of the soil, generally speaking, cannot approve against such a right. In this manor, however, numerous instances of an exercise of the right have been shown, and in all those instances, *per-

*371] sons having the right of common of turbary must have been excluded from the parts inclosed. These inclosures having been always submitted to, may establish that, at least in this manor, the right to approve does exist; and I think that such right may reasonably exist. Common of turbary must be enjoyed in respect of ancient messuages. Many of those ancient messuages may be destroyed and others not substituted, and it would be unreasonable that the whole of a waste should remain uninclosed so long as a single commoner in respect of an ancient messuage should continue to have a right to cut turves on the common. Without giving any distinct opinion on that point, it seems to me, that in this case, there was sufficient evidence, of a custom for the lord to inclose, to take this out of the general rule which is laid down with respect to common of turbary; and that, as against the common of turbary in this case, the lord may have a right to inclose. But, inasmuch as the question, whether a sufficiency of common of turbary or pasture was left for the commoner, and whether the turbary left was sufficiently near and convenient to that messuage in respect of which the right is claimed, has not been submitted to the jury, I think that there ought to be a new trial.

HOLROYD, J. I am of the same opinion. The cases of *Sadgrove v. Kirby* (d) and *Cooper v. Marshal* (e) induced me to think for a considerable period that

(a) 3 T. R. 445.

(b) *Smith v. Feverell*, 2 Mod. 6.

(c) 1 Taunt. 435.

(d) 6 T. R. 483.

(e) 1 Burr. 259.

the defendants had done more than they were justified in doing in order to use the right of common, because as the inclosure was not completed, they might have entered *upon the locus in quo to exercise their right of common [*372 without throwing down the embankment; or even if the whole space had been inclosed, I thought that they would have been justified only in making an opening to enable them to enter and exercise the right of common upon the locus in quo. But the authorities cited have satisfied my mind that where fences are wrongfully erected upon land, subject to a right of common, the commoner in exercising his right is not restricted to pulling down so much of the fence as it may be necessary for him to remove in order to enter upon the locus in quo, but that he may remove the nocumentum injuriosum. I think, therefore, that the commoner in this case had a right to remove the whole of the fences, so as to restore to himself that right of common which might be injured by their continuance. If that point had not been so established by the authorities, I think that the commoner would have had a right to do no more than restore himself to the situation of exercising his right of common, and that he might have done so without pulling down the fences.

With respect to the right of the lord, I cannot accede to the doctrine that he can have an unlimited right by custom to inclose common. I think that such a custom would be void, because it would go to the destruction of the right of the commoners altogether. It would be inconsistent with that right, and with the grant, which from the usage and custom must be presumed to have been made to the tenants or persons entitled to the right of common. The cases of *Bateson v. Green* (a), *Clarkson v. Woodhouse* (b), and *Folkard v. Hemmett* (c), *are distinguishable from the present, for the reasons given by my [*373 Brother Bayley. In *Bateson v. Green* the lord was exercising, not, strictly speaking, a right of common (because the act done was upon his own soil), but a right of getting the soil for his own benefit, and thereby enjoying that fair share of the land with the other persons having the right of common. In that case it appeared in evidence that the lord had been accustomed for seventy years to dig clay-pits, which were of great size, and were not filled up again, and that if no pits had been dug, there was not sufficient common for the number of commoners. The question considered by the Court was, whether the right of the lord to dig for clay was subservient to that of the commoners or not, and the Court decided that the custom showed the right of the commoner to be subservient to that of the lord; and that the latter, therefore, had a right to dig clay to the extent to which he had been used to do it, although the right of the commoner was thereby abridged. That is a very different thing from taking the land from the commoners for all purposes, and depriving them of any benefit of it. The case of *Clarkson v. Woodhouse* (d) is distinguishable from this upon the same principle; and the case of *Folkard v. Hemmett* (e) upon the ground that the right of inclosure could not be exercised without the consent of those persons whose rights would be affected by such inclosure, and, therefore, if there was a consent by them, it would be conclusive, not only against them, but against those whom they represented at the time when they consented to the grant. The exercise of the right *to build may have been injurious to the commoners, but [*374 they may have received compensation for any injury which they thereby sustained. That does not apply to a case where the lord claims by custom the right to inclose and take from the common any part of the waste, whether it be injurious to the commoners or not. I incline to think that the lord may by custom be entitled to grant parcel of the waste, even as against common of turbary; but this, his right, must be subservient to, and not injurious to the rights of the commoners. If it be not injurious to the rights of the commoners, the lord from whom their interest is derived may reasonably make use of a part of the waste, and his so doing ought not to be *primâ facie* considered an

(a) 5 T. R. 411.

(b) 5 T. R. 412, n.

(c) 5 T. R. 417.

(d) 5 T. R. 411.

(e) 5 T. R. 417.

injury to them, but if he goes beyond that, and grants so much of the waste as to be injurious to the rights of common, I think that that is inconsistent with the grant of common, and, therefore, a custom for the lord to make a grant of the waste to that extent, would be bad. But a right by the lord to grant parcels of the waste, leaving a sufficiency of common for the commoner, may exist upon the grounds stated by my Brother *Bayley*, both as against common of pasture and common of turbary. The cases seem to show, that without a custom there cannot be an approvement against a common of turbary; but I think that they do not establish that such a power of approvement may not exist by custom. Upon these grounds I think that there should be a new trial.

LITTLEDALE, J. It seems to me that the form of the plaintiff's replication is correct, and that it was not necessary for him to set out a custom to inclose generally, *or leaving a sufficiency of common, but that on the issue *375] joined upon the custom, the plaintiff was entitled to give evidence to show that the right of common no longer existed. The defendant in his plea alleges, that from time immemorial there hath been *and still is* a custom to have common upon the locus in quo. It lies upon him to prove the whole of that allegation. The plaintiff may, therefore, show that at the present day, by lawful inclosure or otherwise, the custom to have common upon the locus in quo no longer exists. I am, therefore, of opinion, that the evidence of the custom for the lord to inclose was admissible to negative the allegation in the plea that there still is a custom to have common upon the locus in quo.

It seems to me, that a general custom for the lord of the manor to take in parts of the waste, cannot be supported, for the reasons already given by my Brother *Bayley*. If such a custom were valid, the lord might by degrees take away the whole of the rights of the commoners; but I see no objection to a custom for the lord to make inclosures from time to time, leaving a sufficiency of common. Such an inclosure could not be made in the present case under the statute of *Merton*, because, by that statute, the approvements which take place must be of freeholds. Here the custom alleged is, to inclose copyholds to be granted according to the custom of the manor. The right claimed by the plaintiff cannot therefore be maintained, except by special custom. The statute of *Merton* authorizes the lord to inclose, leaving a sufficiency of common of pasture; and where there is a custom to inclose copyhold lands, I think that custom ought reasonably to be subject to the restriction imposed by the statute *376] of *Merton* as to freehold *lands. There should, therefore, be left a sufficiency of common, and if there be a right to inclose against common of turbary (upon which I pronounce no opinion), there ought also to be sufficient for common of turbary left. Assuming that there can be no right to inclose without leaving a sufficiency of common, I think the onus of proving that a sufficiency of common has been left lies on the plaintiff. It has been contended, that as he has put in several grants of parcels of the waste on which inclosures have been made, it ought to be presumed that the lord has a right to inclose, until the contrary be shown. But it seems to me, that it lies on the lord, or the persons claiming under him, to show, that a sufficiency of common is left. Where the lord approves under the statute of *Merton*, he shows a sufficiency of common left. In the present case it is said that as the right does not depend upon any statute, a different consideration may be applied to it; but I think not. For when the lord is apparently abridging the right of the commoner by making an inclosure, it lies upon him to show, that although that right is apparently injured, it is not really injured. I think, therefore, that the onus probandi lay upon the plaintiff who represented the lord. That question has not been submitted to the jury, and the plaintiff has not proved that there was a sufficiency of common left. As far, indeed, as relates to the common of turbary, there was one witness who stated that there was plenty of turf left upon the waste; but the plaintiff ought to have shown, not merely that there was a sufficient quantity left upon the waste, but that the turbary left was such that

persons who have the right may conveniently get at it; for it makes a great difference to a commoner, *whether he has to go only a quarter of a mile for his turves, or two or three miles. And, therefore, I think the lord, when he incloses against common of turbary, ought to show, not only that there is a sufficient quantity of turves, but that they are in a convenient situation. It has not even been proved that there is a sufficiency of common of pasture left; for although it was proved that there were 2000 acres uninclosed, yet it appeared that there were a great number of tenants; and it was not shown that the common left was sufficient for them all. [*377]

Then, as to the question, Whether the plaintiff is entitled to retain the verdict upon the new assignment, it has been contended, that when the defendant justifies the breaking and entering and throwing down the inclosure, he alleges that it was done for the purpose of putting in his cattle; but in point of fact no cattle were turned in while the defendants were on the ground, and they entered merely for the purpose of throwing down the inclosure. But the case was not presented to the jury in that way. The only question submitted to their consideration was, Whether there was an excess? and they thought that there was. The question is, whether the commoner was justified in throwing down the inclosure. There can be no doubt that a commoner is authorized to throw down part of the inclosure; and that he need not bring an action for disturbing his right of common. Then remains the question, whether he was authorized to pull down the whole. The cases which have been cited in support of the rule show that he was authorized to pull down the whole, and those cases are not contravened by any subsequent decisions. *Sadgrove v. Kirby* (a) and *Cooper v. *Mar-shal* (b) are quite different. There, the lord did what was necessary for the enjoyment of the waste, by having trees and rabbits there. In *Sadgrove v. Kirby* (reported in 1 *Bos. & Pul.* 13), Mr. Justice Buller observes that *Mason v. Cesar* (c) was decided on the point, that the hedge was no part of the soil, and, therefore, he at that time recognized the right to pull down part. None of these cases, therefore, affect the authority of the more ancient cases cited from *Brooke's Abridgment* and the Year Book, and there does not appear to be any reason why the commoner should not pull down the whole. It might be a great injury to the commoner to have fences set up on a common in different places, and although he might bring an action for the obstruction, yet he is in this, as in other analogous cases, entitled to abate the nuisance, and that is much more convenient than that he should bring an action for every obstruction; because, when the fences are thrown down, the question of right may be decided in one action. For these reasons I am of opinion, that the defendant was justified in what he did, and that the verdict of the jury upon the new assignment cannot be sustained. There must, therefore, be a new trial. [*378]

Rule absolute for a new trial.

(a) 6 T. R. 483.

(b) 1 Burr. 259, and 2 Wils. 51.

(c) 3 Mod. 65.

•BERNASCONI et al. v. FAIRBROTHER and WINCHESTER, Sheriff of Middlesex, and HENRY WILTON.

The sheriff having, under a *feri facias*, issued at the suit of a judgment-creditor, seized the goods of a bankrupt, which the assignees claimed, the Court stayed the return of the *feri facias* until the sheriff should be indemnified. The assignees of the bankrupt, in their own name, and not in their character of assignees, brought trespass against the sheriff and execution-creditor for seizing the goods, which consisted of the stock on a farm, which had belonged to the bankrupt. On the issuing of the commission, the assignees took possession of the farm, managed it for the benefit of the creditors, and purchased additional stock and farming utensils, and they had continued in possession several months before the goods were seized by the sheriff under the *feri facias*. The Court refused to stay the proceedings in the action of trespass.

A RULE had been obtained in a former term, for staying the return to a writ of *feri facias* issued at the suit of *Wilton* (one of the defendants in this case) against the goods of one *Chambers*, a bankrupt, until the sheriff should be indemnified, the assignees of *Chambers* and *Wilton* having refused such indemnity. The plaintiffs, who were the assignees of *Chambers*, brought, in their own names, and not as assignees, the present action of trespass against the sheriff and *Wilton*, for seizing those goods under the judgment and execution issued against *Chambers*. The property upon which the defendants had levied, was part of a farming stock at *Enfield*, formerly belonging to the bankrupt, against whom a commission had issued in November 1825, and under which *Bernasconi* and others had been chosen assignees in 1826. The assignees took possession of the farm and stock, and managed it for the benefit of the creditors, and they had purchased some additional stock and farming utensils. After they had been in possession some months, *Wilton* issued the execution above mentioned, when the rule before stated was made by the Court. A motion was made for staying the proceedings in this action also; and it appeared by the affidavits that
 *380] *Chambers* was disputing his commission *with the assignees, and had petitioned the Chancellor to supersede it. A rule nisi was obtained; first on the ground that the sheriff ought not to have been made a party to the action, as he acted in obedience to the writ delivered to him; and, secondly, that the prosecution of this action was in violation of the rule to stay the return of the *feri facias* until the sheriff should be indemnified.

F. Pollock now showed cause. Generally speaking, the sheriff is entitled to an indemnity where the property is claimed by adverse parties, such as a judgment-creditor and assignees of a bankrupt. But when, as in the present case, the assignees, by the consent of the creditors, have taken possession of the bankrupt's stock, have renewed part of the stock, and have added property of their own, the assignees have a right to maintain their possession and to bring trespass against any person disturbing it. The action now brought is in their own names, and upon their own title, and has nothing to do with the antecedent possession and property of *Chambers*. It was lawful for the assignees, with the consent of the creditors, to carry on the business of the bankrupt. There was a notorious change of possession, and the sheriff should not have been induced by the representation of the judgment-creditor to levy on the goods. A motion like the present is of the first impression, and the effect of it, if successful, will be to deprive a party of a remedy to which he is entitled by law.

Holt contra. In granting these indemnities the Court always acts upon the principle of saving the sheriff and the parties the expense of a bill of interpleader
 *381] in a court of equity. It regards the sheriff as a mere *ministerial officer, having to perform an onerous and responsible function without any personal interest in the matter. *Chambers* is disputing his commission with the assignees. He has petitioned the Lord Chancellor for relief, and the bankruptcy has never been established in a court of law by legal trial and verdict. On the one hand, the judgment-creditor calls upon the sheriff to execute the

writ, and points out property in possession of the bankrupt previous to the commission. He threatens the sheriff with an action if he does not levy; and the assignees, on the other hand, bring the present action on the ground that *he has levied*. This is a case, therefore, in which the sheriff ought to be indemnified, otherwise he will be made the instrument of the parties, and will have to try at his own expense, in the present action, the validity of the commission against *Chambers*. He cited *Cooper v. Chitty* (a), *Raines v. Nelson* (b), *James v. Terry* (c), *M'George and others, Assignees, v. Birch* (d), *Ledbury v. Smith* (e).

LORD TENTERDEN, C. J. The Court will give the sheriff all the protection due to a public officer when he acts *bonâ fide* within the scope of his duty; and, as between the sheriff, a judgment-creditor, and the assignees of a bankrupt, it will always take care that the sheriff shall not be made an instrument of trying at his own expense the validity of a commission. In such cases the course has been always to interfere when the sheriff has come promptly, and has acted in the straight course of his duty, indifferently and equally between the *parties, and to administer to the sheriff all the equity which a court of [*382 equity could give him upon a bill of interpleader, and this has been uniformly done upon motion. But the present is a very different case. If we were to stay this action of trespass, we should take from the plaintiffs that ordinary protection to which they are by law entitled. In the first place, the plaintiffs do not bring this action in their character of assignees, but upon their own possession. If they had sued as assignees affirming the commission, it would have opened another consideration. They claim the property legally as their own, though they act as trustees for the general creditors. *Chambers* became a bankrupt in 1825, and the plaintiffs were chosen assignees immediately afterwards. They have been in possession of the farm and stock ever since; they have renewed part of the stock, and have brought in fresh stock of their own. After such a possession the sheriff is to be deemed, *primâ facie*, a trespasser if he levies upon it. He may, perhaps, be able to defend himself in the present action, by showing that the commission against *Chambers* is invalid, but even such a case would only protect him as to the seizure of stock which had previously belonged to *Chambers*. This rule must therefore be discharged.

Rule discharged.

(a) 1 Burr. 20. 1 Bl. 65.

(c) Tidd's Pr. 8th edit. 1057.

(e) 1 Chit. Rep. 294.

(b) 2 Bl. Rep. 1181.

(d) 4 Taunt. 585.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN MICHAELMAS TERM,

IN THE EIGHTH YEAR OF THE REIGN OF GEORGE IV.

MEMORANDA.

In the course of the vacation Sir ANTHONY HART, Vice-Chancellor, ~~was~~ promoted to the office of Lord Chancellor of *Ireland*, upon the resignation of Lord MANNERS, and was succeeded by LANCELOT SHADWELL, of *Lincoln's-Inn*, Esq.

On the first day of this term, *Charles Frederick Williams*, Esq., *William Selwyn*, Esq., and the Honourable *Thomas Erskine*, all of *Lincoln's-Inn*, having been, in the course of the vacation, appointed His Majesty's Counsel learned in the law were called within the bar, and took their rank accordingly.

*384] *DOE on the demise of LUCY NEWTON *v.* TAYLOR. *Nov.* 6.

A. B. seized of a moiety of several estates, the whole of which had been her father's (but of which she took one part as heir of her father, and the remainder as heir of a niece, her father's granddaughter), devised "all her moiety of and in all her late father's messuages," &c. : Held, that the devisee took, as well the estates which descended from the niece, as those which descended immediately from the testatrix's father.

EJECTMENT for lands in the parish of *Glossop*, in the county of *Derby*. Plea, not guilty. At the trial before Lord *Tenterden*, C. J., at the last Summer assizes for *Derby*, it appeared that the lands in question were formerly the property of one *Buckley Bower*, who in the year 1797, upon the intended marriage of his son *George Buckley Bower*, settled them to the use of himself until the marriage, then to the use of *G. B. Bower* for life, subject to an annuity to the wife, remainder to the use of *G. B. Bower*, his heirs and assigns for ever. The marriage took place, and in 1800 the wife died, leaving her husband and one daughter, *Frances Bower*, her surviving. In the same year *G. B. Bower* died intestate, as to his real estates, leaving his daughter *Frances* him surviving. In 1803 *Buckley Bower* died, having, by his will made in 1801, devised as follows;—An estate in *Ollersett*, in the parish of *Glossop*, in trust for his daughter *Lucy* (the lessor of the plaintiff), the wife of *Robert Newton*, and her children ;

then, "as for and concerning all other his messuages, tenements, closes, lands, and hereditaments situate, &c. in *Edale*, in the parish of *Castleton*, in the county of *Derby*, and in the hamlets of *Thornsett*, *Phoside*, and *Whittle*, in the parish of *Glossop* aforesaid, he gave and devised to his daughter, *F. C. Bower*, *C. Prescott* and *T. Wright*, their heirs and assigns for ever, upon certain trusts, and subject to them, in trust, to accumulate and lay up the *rents, issues, and profits thereof, until his granddaughter, *Frances Bower*, should attain the age of twenty-one years, or die before that period. And in case she should attain that age, then, in trust, to convey the fee-simple to her, her heirs, and assigns for ever. And in case his granddaughter should die under age, without lawful issue, in trust for his own right heirs." The testator, *Buckley Bower*, had other real estates besides those settled on the marriage of his son, and the estate in *Ollersett*, given to trustees for the use of *Mrs. Newton*. The granddaughter, *F. Bower*, died in 1815, intestate and without issue, leaving the lessor of the plaintiff and her sister, *F. C. Bower*, (daughters of *Buckley Bower*, the testator) her co-heiresses at law. By indentures of lease and release of 1820, *F. C. Bower* conveyed all her real estates to a trustee, habendum to him and his heirs, to the use of him and his heirs, in trust for her, *F. C. Bower*, her heirs and assigns for ever. In 1824 *F. C. Bower* made her will, duly executed and attested, to pass real estates, and thereby devised "all that her undivided moiety or equal half part (the whole into two equal parts to be divided) of and in all and every of her late father's messuages, tenements, closes, lands, real estate, hereditaments, and premises, situate, &c. in *Edale*, in the parish of *Castleton*, in the county of *Derby*, in the several hamlets or places called *Thornsett*, *Phoside*, and *Whittle*, all in the parish of *Glossop* aforesaid, to certain persons to the use of the defendant for life." *F. C. Bower* died on the 17th of *January* 1826, leaving the lessor of the plaintiff her heiress at law. For the plaintiff it was contended, that the estate settled on the marriage of *G. B. Bower* could not be considered as the property of the father at the time when *his will was made, and that the testatrix *F. C. Bower* took the moiety of them, not as heir of her father, but as heir of her niece, and, therefore, they did not come within the description of the lands devised by her will, and, consequently, the lessor of the plaintiff was entitled to recover those lands as her heir at law. Lord *Tenterden*, C. J., thought the description in the will applied to those lands, and that they passed under the will to the defendant, and he directed a nonsuit, giving the lessor of the plaintiff leave to move to enter a verdict in her favour.

Denman, C. S., now moved accordingly, and contended, that the right of *Mrs. Newton*, as heir at law, was not to be defeated, except by express words or necessary intendment; that the power of the father over the property in question ceased upon the execution of the settlement, *Doe dem. Ryall v. Bell* (a); and that it could no longer be described with propriety as the estate of the father, and consequently would not pass by the will devising "all her late father's messuages," &c. That the very fact of a description of the lands devised being introduced into the will raised a supposition that the testatrix did not mean it to apply to the whole of her real estate, *Doe v. Parkin* (b).

Lord *TENTERDEN*, C. J. In that case the testator described the property devised as "then in his occupation." That clearly pointed out certain specific lands as the subject-matter of the devise. But there is nothing to restrict the meaning of the words in question. The *whole of the testatrix's real property had been her late father's, although part she inherited as heir of her niece and part as heir or devisee of her father. The description in the will applies to the whole, and we cannot say that she intended to die intestate as to any part of it. The lessor of the plaintiff has not, therefore, any right to recover.

Rule refused.

HARPER v. LUFFKIN. Nov. 7.

Where a married woman separated from her husband, lived with her father, and acted as his servant: Held, that he might maintain an action against a person by whom she was debauched and had a child.

TRESPASS for debauching the plaintiff's daughter and servant. Plea, not guilty. At the trial before *Gaselee, J.*, at the last Summer assizes for *Essex*, it appeared that the plaintiff's daughter was married eight years ago, had two children, and was five years ago separated from her husband, who never during that period had any access to her. After this separation she returned to her father's house, and lived with him, acting as his servant. During such residence with her father she became acquainted with the defendant, and had a child by him. For the defendant it was contended, that the relation of master and servant could not under such circumstances, exist between the plaintiff and his daughter. The learned Judge overruled the objection, and the plaintiff had a verdict for 10*l*.

Jessopp now moved to enter a nonsuit upon the objection taken at the trial. This action is founded on the loss of the child's service; but if the relation of master and servant could not exist between the plaintiff and his daughter, the *388] very foundation of the action *failed. Now the husband had not consented to his wife becoming the servant of her father, and might at any time have reclaimed her.

Lord TENTERDEN, C. J. This motion depends upon the question, Whether the plaintiff's daughter could under the circumstances which appeared in evidence, be considered as his servant. It was not disputed that she performed various acts of service, but it is said that a married woman living apart from her husband, could not make a contract of service. In many instances, married women are in fact hired as servants. Such contracts are no doubt liable to be defeated at the will of the husband. He may put an end to that relation of master and servant; but, unless he interferes, it by no means follows that such a relation may not exist, especially as against third persons who are wrongdoers. It appears to me that such a relation might, and did, in fact, exist in this case; and that, in the absence of any interference by the husband, it is not competent to the defendant to set up his rights as an answer to the action.

Rule refused.

COATES and another, Assignees of COX, v. Lord HAWARDEN. Nov. 7.

An Irish peer cannot be arrested for a debt.

THE defendant in this case had been arrested by the sheriff of *Sussex*, and given a bail bond. It appeared by the affidavit, that the defendant was a viscount *389] of that part of the United Kingdom called *Ireland*; that his right to vote in the election of representative peers had been allowed by the House of Lords, and exercised by him. A rule was now obtained for setting aside the *pluries capias* issued in the case, and delivering up the bail bond to be cancelled, on the ground that the defendant as a *peer of Ireland*, was privileged from arrest, the Act of Union 40 G. 3, c. 67, art. 4, providing that the peers of *Ireland* shall, as peers of the United Kingdom, be sued and tried as peers, and shall enjoy all privileges of peers as fully as the peers of *Great Britain* the

right of sitting in the House of Lords, and the privileges depending thereon (a), and the right of sitting on the trial of the peers, only excepted. The Court, on granting the rule, said they entertained no doubt as to the defendant's privilege. On a subsequent day *Gurney*, who was instructed to have shown cause against the rule, said that he would not oppose the rule, provided the defendant would undertake to bring no action; and this being acceded to, the rule was made absolute.

Rule absolute. (b)

(a) Freedom from arrest in a civil suit seems, in the case of a peer, to be a privilege incident to the peerage itself, and not to depend on the right to sit in the House of Peers; for peeresses, by birth or marriage, are privileged on account of their dignity, and because they are supposed to have sufficient property by which they may be compelled to appear. *Countess of Rutland's case*, 6 Coks, 53.

(b) The under-sheriff of *Sussex* was, on complaint of the defendant, committed by the House of Lords to the custody of the serjeant-at-arms, and afterwards discharged on payment of the fees.

*ATTWOOD v. SMALL and others. Nov. 8.

[*390]

Where an agreement referred to a clause in a former agreement, and provided that it should extend to the new agreement as if it had been repeated therein: Held, that the clause referred to could not be considered as "annexed to" the new agreement so as to make an additional stamp necessary, on the ground of the agreement, with the clause, containing more than 1080 words.

ASSUMPSIT for interest payable according to three agreements set out in the declaration for the sale of certain real property by the plaintiff to the defendants. Plea, the general issue. At the trial before *Littledale*, J., at the last assizes for *Stafford*, the plaintiff produced in evidence these three agreements, by the first of which the plaintiff agreed to sell certain real property to the defendants, and the price was to be paid by instalments, with interest upon each from the time appointed for payment. By the second some alterations were made in the terms of the former agreement, and it contained a clause that all disputes between the parties should be submitted to arbitration. These two agreements were properly stamped. The third, which was indorsed on the second, made some further alterations, and it was thereby agreed "that the provision for arbitration contained in the second agreement, and the agreement therein also contained for carrying the same provision into effect, &c., should extend to that (the third) agreement, and to every clause therein contained, in like manner as if the same had been therein repeated." This instrument had a 1*l*. stamp, and, taken by itself, did not contain 1080 words; but if the clause of reference in the former agreement were taken as part of it, the number of words exceeded 1080. For the defendants it was objected that the clause of reference must be considered as actually embodied in the third agreement, and that therefore it had not a sufficient *stamp, and could not be read in evidence. The learned Judge [*391] overruled the objection; and the plaintiff having obtained a verdict,

Campbell now renewed his objection, and contended that the third instrument could not be read in evidence without the other to which it referred; that the words of reference had the same effect as if the former agreement had been actually annexed to the last, and that consequently the 1*l*. stamp was insufficient; and he relied upon *Lake v. Ashwell* (a).

Lord TENTERDEN, C. J. The duty is imposed by the 55 G. 3, c. 184, upon

the words contained in the instrument itself, together with every "schedule, receipt, or other matter put or indorsed thereon, or annexed thereto." In *Lake v. Ashwell* the schedule was *annexed to* the deed, in the very words of the act of parliament. In the present case, the words of the clause of reference were not in the instrument, nor in any schedule, receipt, or other matter put or indorsed thereon or annexed thereto. I am, therefore, of opinion, that the stamp was sufficient, and the instrument properly received in evidence.

Rule refused.

*392] *DOE on the demise of Lord SUFFIELD v. PRESTON. Nov. 8.

Where an inclosure act gave the commissioners power to award lands in exchange for others in an adjoining parish, and also to award lands to those who bought them of persons entitled to allotments: Held, that they might award lands given in exchange partly for other lands and partly for money, and that the award need not have an ad valorem stamp upon the money consideration.

EJECTMENT for lands in the parish of *Felmingham*, in the county of *Suffolk*. Plea, the general issue. At the trial before *Alexander*, C. B., at the last Summer assizes for *Suffolk*, it appeared that the lands in question, and certain lands in the adjoining parish of *Suffield*, originally belonged to the defendant. The lessor of the plaintiff had lands in the parish of *Felmingham*. An act of parliament was passed for inclosing lands in *North Walsham* and *Felmingham*, by which it was (amongst other things) enacted, "that it should be lawful for the commissioners to set out, allot, and award any lands, tenements, or hereditaments whatsoever within the parishes of *North Walsham* and *Felmingham*, or either of them, in lieu of or in exchange for any other lands, tenements, or hereditaments whatsoever within the said respective parishes, or within any adjoining parish, provided that all such exchanges were ascertained and specified in the award of the commissioners, and were made with the consent of the owner or owners, proprietor or proprietors of the lands, tenements, or hereditaments which would be so exchanged, whether such owner or owners, proprietor or proprietors, should be a body or bodies politic, corporate, &c., or tenants in fee-simple, &c., such consent to be testified in writing under the common seal of the body or bodies politic, &c. and under the hands of the other consenting parties respectively." By another clause in the inclosure act, it was *393] provided, "that in cases where persons had sold or agreed to sell or should at any time before the execution of the award of the commissioners, sell or agree to sell their interest in the lands directed to be inclosed, the commissioners were authorized to make an allotment of the land to the purchaser, and every such purchaser should, after the execution of the said award, hold and enjoy the land so allotted to him, in the same manner as the vendor could have done in case such sale had not been made." It was agreed between the lessor of the plaintiff and the defendant, that the former should have the lands in question, and the defendant's lands in the parish of *Suffield*, and that the defendant should receive in exchange the lessor's lands in the parish of *Felmingham*, and the sum of 2000*l.*, which was duly paid to him. The award being produced, it appeared that the land in dispute was, together with some other, awarded to the lessor of the plaintiff in exchange for his land in *Felmingham*, and the sum of 2000*l.* It was thereupon objected for the defendant, that the commissioners had no power to award lands in exchange for others unless they were of equal value, and that an exchange partly for land and partly for money was beyond their authority; and, secondly, that if this were to be treated as a sale of the land in question, the

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Rule refused.

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*393] provided, "that in cases where persons had sold or agreed to sell or should at any time before the execution of the award of the commissioners, sell or agree to sell their interest in the lands directed to be inclosed, the commissioners were authorized to make an allotment of the land to the purchaser, and every such purchaser should, after the execution of the said award, hold and enjoy the land so allotted to him, in the same manner as the vendor could have done in case such sale had not been made." It was agreed between the lessor of the plaintiff and the defendant, that the former should have the lands in question, and the defendant's lands in the parish of *Suffield*, and that the defendant should receive in exchange the lessor's lands in the parish of *Felmingham*, and the sum of 2000*l.*, which was duly paid to him. The award being produced, it appeared that the land in dispute was, together with some other, awarded to the lessor of the plaintiff in exchange for his land in *Felmingham*, and the sum of 2000*l.* It was thereupon objected for the defendant, that the commissioners had no power to award lands in exchange for others unless they were of equal value, and that an exchange partly for land and partly for money was beyond their authority; and, secondly, that if this were to be treated as a sale of the land in question, the

award should have been upon an ad valorem stamp, whereas it had merely an award stamp. The Lord Chief Baron overruled the objections; and the plaintiff having obtained a verdict,

The *Solicitor-General* moved for a new trial, and renewed the objections taken at the trial. He contended, that as persons having an estate less than an *estate in fee, were enabled to exchange lands, the commissioners could [*394 not properly carry agreements for exchange into effect unless the lands were of equal value, and if they did, the award must be considered as an ordinary conveyance, and be subject to an ad valorem stamp.

Lord TENTERDEN, C. J. I think that there is not any weight in either objection. The commissioners had power to award land in exchange for other land, or for money paid. Here they have awarded land partly in exchange for land and partly for money. They have not, therefore, exceeded their jurisdiction. Their award appears to have the stamp imposed on such instruments by the act of parliament, and that is sufficient.

Rule refused.

FAWCETT v. FOWLIS, Baronet, and another. Nov. 8.

Where, in trespass against two magistrates for breaking and entering the plaintiff's close in the parish of A. and seizing his sheep, it appeared that the defendants, upon the complaint of the surveyor of the highways appointed for the whole parish, convicted the plaintiff of neglecting to do statute duty, and issued a warrant to levy the penalty under which the act complained of was done: Held, that the conviction being good upon the face of it, was a sufficient defence, and that the plaintiff could not, in this action, try the question, whether the land which he occupied was exempt from the burthen of repairing the roads in other parts of the parish.

The surveyor called upon the plaintiff to do certain statute duty, or compound for it. The conviction stated that he was an occupier of land in the parish, and had neglected to do the work, but did not notice the composition: Held, that it was unnecessary to do so, or to state that the plaintiff kept a team; for that, if he did not keep a team, or had compounded for the statute duty, that was a matter of defence, which ought to have been urged by him in answer to the complaint.

TRESPASS for breaking and entering the plaintiff's close and taking away his sheep. Plea, the general issue. At the trial before *Bayley, J.*, at the last Summer assizes for the county of York, it appeared that the plaintiff occupied lands in the township of *Arncliffe* in the parish of *Arncliffe*, and having been served with notice to do *statute duty on the roads in the township of *Ingleby* [*395 in the same parish, refused to do so, whereupon he was summoned before the defendants, two justices of the peace, and convicted as follows: "Be it remembered, that on, &c. *Thomas Peacock*, of the parish of *Arncliffe*, surveyor of the highways for the said parish, came before us, &c. and informed us that *John Fawcett* (the plaintiff) was on, &c. served with a notice under the hand of him, *T. P.*, whereby he was required to send one wain or cart furnished with no less than two able horses and one able man, *with proper tools*, to be at, &c. on, &c. and do certain statute duty specified in the conviction, or compound for the same two days before the time appointed for doing the work; and that the said *J. F.* (although liable to the same by reason of his occupation of a certain farm and lands within the same parish) neglected to attend and perform such statute duty, contrary to the statute, &c. Whereupon the said *J. F.* being duly summoned to answer the said charge, appeared before us, on, &c. and having heard the charge, declared that he was not guilty thereof. But the same being fully proved upon the oaths of *T. P.* and *T. B.*, credible witnesses, it manifestly appears to us (defendants) that *J. F.* is guilty of the offences charged. It is

therefore considered and adjudged by us that he be convicted, and we do hereby convict him of the same." The conviction then proceeded to declare a certain sum forfeited according to the form of the statute. Upon this conviction a distress warrant was granted, and the sheep of the plaintiff were seized, which was the alleged trespass for which the action was brought. Upon this conviction being put in, it was objected for the defendants, that as it remained unappealed against *396] and unreversed, the action could not be maintained. The learned Judge was of that opinion, and directed a nonsuit, giving the plaintiff leave to move to enter a verdict in his favour for nominal damages, if the Court should be of opinion that the conviction was bad, or his direction wrong.

Brougham now moved pursuant to the leave reserved. The conviction in this case was in respect of the plaintiff's disobedience of an order to perform statute duty. Now that order directed the plaintiff to send a cart and horses with a man and proper tools; but the highway act does not compel the party doing statute duty to find tools. The order was, therefore, unwarranted by the statute, and the plaintiff was not bound to obey it. Secondly, the order was to perform the statute work or compound for it; the conviction is, for not performing the work, and does not mention the composition. It is therefore consistent with all that appears upon the conviction, that the plaintiff might have compounded for the statute work, and therefore would not be liable to the conviction. Neither is it alleged in the conviction that statute duty in kind was necessary. [Lord *Tenterden*, C. J. That must have been ascertained before the surveyor's requisition, and must, therefore, be presumed.] At all events, it should have been shown that the plaintiff kept a team, for he could not otherwise be called upon to do statute work with a team. Supposing, however, the conviction to be correct in form, still it was not a sufficient answer to this action, unless the justices acted within their jurisdiction. Now, that could not be ascertained without hearing the evidence in the cause, for if the plaintiff was not, by reason of his occupation of land in *Arncliffe*, bound to repair the roads in *Ingleby*, the surveyor had no right to order him to do statute *work in that township, *397] nor had the justices any authority to convict him for disobeying that order. And this was the real question intended to be tried. All the proceedings by the surveyor, the magistrates, and the plaintiff, were taken with the view to raise the question of such liability, and have it solemnly decided by this Court.

Lord *TENTERDEN*, C. J. I am of opinion that the nonsuit in this case was right, and ought not to be disturbed. The conviction was clearly good in substance, and being in full force was a sufficient answer to the action. By the highway act certain statute duty is required to be performed by all persons occupying land and keeping a team. There is also a provision, that parties may relieve themselves from the performance of this duty by paying certain sums to be appointed by the justices, who may, however, refuse to allow this relief, and insist upon having the statute work performed. That power was not acted upon in this instance; the surveyor gave notice to the plaintiff to do the work or compound for it. If he had paid the composition, that would have been a good defence to the charge of neglecting to perform the work; but it was matter of defence only, and the proceeding for non-performance of the work was correct. As to the objection, that the plaintiff was ordered to provide tools, it is sufficient to say, that he was not convicted for neglecting to do so, and, therefore, the objection falls to the ground. In the next place, it was objected that the conviction does not allege that the plaintiff kept a team; that is true, but he is described as the occupier of land, which *primâ facie* rendered him *398] liable; and if he kept no team, that was matter to be urged in his *defence before the justices. Then it was urged that the whole of these proceedings were taken in order to try the question of liability. If, however, the inhabitants of the township of *Arncliffe* meant to contend that they were not liable

to contribute to the repair of the roads in *Ingleby*, their proper course was to appeal against the appointment of one surveyor for the whole parish. *Prima facie* all persons occupying lands within the parish were liable to repair all the roads in the parish. The surveyor appointed for the whole parish gave notice to the plaintiff to do certain statute duty; having neglected to do it, he was summoned, and it does not appear that even before the justices the question of liability was raised. Then a conviction ensued, followed up by a warrant and distress; and it appears to me that it is not competent to the plaintiff in this late stage of the proceedings to raise and try the question of the liability of the occupier of lands in *Arncliffe* to contribute to these repairs. For some time I was disposed to think this case analogous to some that have arisen on the poor laws, in which it has been held, that if a person not an occupier or resident within a given parish be there rated to the relief of the poor, and his goods are distrained for the rate, he may maintain an action against the party levying (a). But in those cases there was an entire want of jurisdiction. Here the justice had jurisdiction to hear and decide upon the complaint of the surveyor, and the present plaintiff, as an occupier of lands within the parish, was *prima facie* liable to the burden imposed. If in this late stage the question of liability could be raised, it might be equally raised after an appeal to the sessions against the appointment of one surveyor for the whole parish, although they might [399] have decided that the appointment was proper, and one highway rate for the whole parish also proper. The impropriety of rendering magistrates liable to be sued for acting upon such a decision of the sessions is an additional reason for holding that the nonsuit in this case was proper.

HOLROYD, J. If there had been separate surveyors for the townships of *Arncliffe* and *Ingleby*, and the surveyor of the latter had directed work to be done in *Arncliffe* as if it were in *Ingleby*, then upon a complaint made of the neglect to do it, the magistrate would have had no jurisdiction; and if he had convicted the party and issued a warrant to levy the penalty, he would have been liable to an action, in the same manner as for enforcing the payment of a poor-rate under the circumstances mentioned by my Lord *Tenterden*.

LITTTLEDALE, J., concurred.

Rule refused. (b)

(a) See *Nichols v. Walker*, Cro. Car. 394. *Milward v. Caste*, 2 Black. 1331. *Lord Amherst v. Lord Somers*, 3 T. R. 372.

(b) See *Strickland v. Ward*, 7 T. R. 633.

GEORGE BUTCHER v. JOHN BUTCHER. Nov. 8.

A party having the legal title to land having entered, may maintain trespass against a person wrongfully in possession at the time of entry, and continuing in such possession afterwards.

TRESPASS for breaking and entering the plaintiff's close, mowing, and cutting down the grass, corn, and crops; and taking and carrying away the hay, corn, and crops of the plaintiff. Plea, first, not guilty. Secondly, *liberum tenementum*. At the trial before *Garrow*, B., at the Summer assizes for the county of *Bucks*, 1827, it appeared that the plaintiff and defendant were the sons [400] of *George Butcher*, who in 1761 was admitted a copyhold tenant to the close in question, to hold to him the said *G. Butcher*, the elder, *W. S. Butcher*, his second son, and *G. Butcher*, the younger, his eldest son (the plaintiff), for

the term of their lives, and the lives and life of the survivors and survivor. *George Butcher*, the father, died in 1807. *W. S. Butcher* remained in possession of the close in question, from that time to *January* 1827, when he died, and by his will devised the close to *John Butcher*, the defendant, in fee, and appointed him sole executor of his will. The defendant entered into possession of the close as devisee. On the 10th of *March* 1827, the plaintiff and his servants cut the chain which fastened the gate of the close, and entered the same and began to plough the land; the defendant then ordered the plaintiff's men to leave the close. On the 21st of *June* the defendant mowed the grass growing in the close, made it into hay, and afterwards carried it away. Upon this evidence, it was contended by the defendant's counsel, that the plaintiff had not a sufficient possession of the close in question to entitle him to maintain trespass; because a party who has the freehold in law, but not the actual possession, cannot maintain trespass, *Com. Dig. Trespass* (B 3), and 2 *Roll's Abr.* 553, *Trespass*, pl. 45. Here the defendant continued in actual possession. Assuming that the plaintiff by entering acquired a concurrent possession with the plaintiff, that is not sufficient; he ought to have the exclusive possession; *Stacks v. Booth* (a). On the other hand, it was insisted, that the plaintiff by *401] entry had acquired the freehold in deed, and a possession quite sufficient to maintain trespass. The defendant, having no right to the land, entered upon the death of the tenant for life, before any entry of him in remainder; he was, therefore, an intruder, and in the case of intrusion, entry by the legal owner is the summary remedy; and in 3 *Blackst. Com.* 175, it is said, "such an entry gives a man seisin, or puts into immediate possession him that hath immediate right of possession on the estate, and thereby makes him complete owner, and capable of conveying it from himself either by descent or purchase," and accordingly it is laid down in 2 *Roll's Abr.* 554, pl. 5, that if a man be disseised after his re-entry, he may maintain trespass against the disseisor for any trespass done by him since the disseisin, for by his re-entry his possession is restored from the beginning. The learned Judge was of opinion that the plaintiff had, by entering upon the land, acquired possession sufficient to entitle him to maintain trespass, and a verdict was found for the plaintiff, with 5*l.* damages, with liberty to the defendant to move to set it aside, and enter a nonsuit.

Robinson now moved accordingly. Although the legal title to the premises was in the plaintiff, and he had a right to enter, and by entry acquired a possession, the defendant had, at least, a concurrent possession with the plaintiff. Besides, in order to vest the possession in the plaintiff by entry, that entry ought to have been formal, and accompanied with a declaration that he entered to assert his title (b).

*402] Lord TENTERDEN, C. J. If he who has the right to land, enters and takes possession, he may maintain trespass. It is not necessary that the party who makes the entry should declare that he enters to take possession; it is sufficient, if he does any act to show his intention. Here his servants ploughed the land. It is manifest, therefore, that he intended to take possession.

BAYLEY, J. *Taunton v. Costar* (c) is an authority to show that a party wrongfully holding possession of land cannot treat the rightful owner, who enters on the land, as a trespasser. I think that a party having a right to the land, acquires by entry the lawful possession of it, and may maintain trespass against any person who being in possession at the time of his entry, wrongfully continues upon the land.

Rule refused.

(a) 1 T. E. 428.

(b) 3 Bl. Com. 174.

(c) 7 T. E. 431.

*MOUNSEY v. STEPHENSON. Nov. 9.

Articles of agreement, whereby one party agreed to pay the other a fixed salary, and the other agreed not to set up a chemist's shop within a certain distance, and the parties were mutually bound in a penalty of 600*l.* to perform the agreement: Held, to require a stamp of 1*l.* 15*s.*

COVENANT on articles of agreement, whereby the plaintiff agreed to pay the defendant a salary of 35*l.* per annum, and the defendant covenanted not to set up a chemist's shop within one mile of the plaintiff's, and whereby the plaintiff and defendant were mutually bound in a penalty of 600*l.* to perform the agreement. Breach, that defendant had opened a chemist's shop within one mile of the plaintiff's. Plea, that he had not opened such shop. At the trial before *Park, J.*, at the last assizes for *Surrey*, the articles of agreement were produced, impressed with a stamp of 1*l.* 15*s.* For the defendant it was objected, that the instrument was to be considered as a bond to secure the payment of an annual sum of money, or as a bond with a penalty to secure the performance of an agreement, and in either case the stamp was insufficient. The learned Judge reserved the point; and the plaintiff having obtained a verdict,

Marryat now moved to enter a nonsuit, and renewed his former objection upon the authority of *Attree v. Anscomb* (a), where it was held, that a bond conditioned to pay rent, was a bond conditioned to pay the sum to which the rent would amount, and required an ad valorem stamp.

Lord TENTERDEN, C. J. If you take this instrument as a bond, it is not for the payment of an annuity, nor *for the payment of any certain sum [404 of money. It is not a bond of any of the kinds specified in the stamp act, and was therefore liable to a stamp duty of 1*l.* 15*s.*, as a bond "not otherwise charged." If you treat it as a bond conditioned for the performance of agreements contained in the same instrument, the statute expressly states that it shall not be subject to a separate duty. Taking the instrument as a common deed, the stamp was sufficient; there is not, therefore, any ground for disturbing the verdict.

Rule refused.

(a) 2 M. & S. 88.

NOWELL v. ROAKE. Nov. 10.

In an action for mesne profits, the plaintiff may recover by way of damages, costs incurred by him in a court of error in reversing a judgment in ejectment obtained by the defendant.

TRESPASS for mesne profits of one undivided moiety of two water corn-mills. Plea, not guilty. At the trial before *Park, J.*, at the Summer assizes for the county of *Surrey* 1827, it appeared that the plaintiff in the first instance had brought his ejectment in the Common Pleas, and that judgment was there given for the defendant, and that that judgment had been afterwards reversed in the King's Bench. The plaintiff claimed to recover, by way of damages, the costs in error, and he proved the amount of those costs to be 200*l.*, considering them as costs between attorney and client. The learned Judge was of opinion, that the costs in the court of error were part of the damages sustained by the plaintiff in consequence of his having been wrongfully kept out of possession;

and the jury under his direction found a verdict for the plaintiff for 510*l.*, which included these costs; but liberty was reserved to the defendant to move
 *405] to reduce the damages to 310*l.*, if the Court should be of opinion that the plaintiff was not entitled to recover the costs in error.

Gurney now moved accordingly, and contended that the plaintiff could not recover costs in error even by way of damages; and he cited *Bell v. Potts (a)*, *Wyril v. Stapleton (b)*, to show that where a judgment is reversed, the court of error cannot give costs.

Lord TENTERDEN, C. J. There can be no doubt that the court of error could not award costs to the plaintiff. But the expenses incurred in the court of error were part of the damages sustained by the plaintiff, by reason of his having been wrongfully kept out of possession by the act of the defendant; and I think that the jury might reasonably consider the costs between attorney and client as the measure of the damages which he had sustained.

Rule refused.

(a) 5 *East*, 49.

(b) *Strange*, 615.

*406] *WOOLDRIDGE, Administratrix of GEORGE WOOLDRIDGE, v. BISHOP. Nov. 10.

By the special memorandum of a declaration, it was stated, that the plaintiff, administratrix, on the 20th of *January*, brought her bill into the office of the clerk of the declarations of K. B., according to the course and practice of the court, and filed the same as of *Michaelmas* term. Plea, that at the time of exhibiting the bill, the plaintiff was not administratrix, upon which issue was joined. It appeared that the defendant was neither an attorney, nor a prisoner in the custody of the marshal. The bill was delivered on the 20th of *January*. The letters of administration were granted on the 10th of *January*: Held, that, upon the issue joined, the verdict was properly found for the plaintiff, the latter having been administratrix at the time when the bill was exhibited.

THE declaration in this case was specially entitled as follows: "Be it remembered, that on the 20th day of *January*, 7 G. 4, *Elizabeth Wooldridge*, administratrix of all and singular, &c. the goods and chattels, &c. of *George Wooldridge*, brought her bill into the office of the clerk of the declarations of the Court of K. B., according to the course and practice of the same Court, and filed the same bill as of *Michaelmas* term, 7 G. 4, which said bill follows in these words." There then followed counts for goods sold, money paid, &c., and in the breach it was averred that administration was granted to the plaintiff on the 10th of *January* 1827. Plea, that the plaintiff at the time of exhibiting the bill was not administratrix. Upon this plea issue was joined. At the trial before *Vaughan*, B., at the *Worcester* Summer assizes 1827, it appeared that the defendant had been arrested in this cause in *Trinity* vacation 1826, upon a latitat returnable the first return of *Michaelmas* term 1826, which was the 7th of *November*, and bail was duly put in on the 7th of *November*, and justified on the 11th of *November*. The declaration was delivered on the 20th of *January* 1827. At the time of the delivery of the declaration the defendant was not a prisoner. It was contended, that as by the practice of the Court, a bill could
 *407] not be filed in vacation as of the preceding *term, against a party, unless he was a prisoner or an attorney, the bill in this case must be considered to have been filed in *Michaelmas* term, and if that were so, then the plaintiff, at the time of exhibiting her bill, was not administratrix. The learned Baron was of opinion that it was made out in evidence that the plaintiff was adminis

tratrix at the time when the bill was exhibited, and he directed the jury to find for the plaintiff on the issue, but reserved liberty to the defendant to move to enter a nonsuit.

Campbell now moved for a new trial. The bill must be taken to have been exhibited the first day of *Michaelmas* term, and not on the 20th of *January*, when it was brought into the office of the clerk of the declarations, and if that be so, then the issue ought to have been found for the defendant, for by the practice of the Court, a bill can be filed in the vacation as of the preceding term, only against a prisoner in the actual custody of the marshal, or against an attorney. Here the defendant was neither a prisoner in the custody of the marshal, nor an attorney. The bill, therefore, was not exhibited against the defendant on the 20th of *January*, but as of *Michaelmas* term. In *Best v. Wilding* (a), which was an action for use and occupation, the rent became due on the 5th of *April*, the writ was sued out on the 4th of *April*. It does not appear distinctly whether the arrest was before or after the rent became due, but probably it was not till after. There it was held that it was sufficient to prove a cause of action before the bill filed, though after the writ was sued out. In *Swancott v. Westgarth* (b), the action was for goods sold, the bill was filed on the day subsequent to the expiration of the credit, but the writ was issued before; the bill was entitled of the term of which the writ was returnable. It was held that the plaintiff was entitled to recover. But a bill, by the practice of the Court, may be specially entitled of any day in the term, of which the writ is returnable, but it cannot be entitled of any day after the term. The title of the plaintiff must be perfect in that term of which the declaration is entitled. There is a distinction between an executor and an administrator; the former derives his right from the will, and may commence an action before probate, but an administrator derives his right from the ordinary. Before administration is granted he has no right whatever, and cannot maintain any action.

LORD TENTERDEN, C. J. At *Nisi Prius* the Judge can only look at the record, and direct the jury to determine the issue joined upon that record according to the evidence. The plea in this case is, that the plaintiff, at the time of exhibiting her will, was not administratrix. It appears from the record that the bill was exhibited on the 20th of *January*. It was proved, that the plaintiff was administratrix on the 20th of *January*. The issue to be tried, therefore, was, whether on the 20th of *January* there was a good administration. It was no part of the duty of the Judge or jury at *Nisi Prius* to determine whether the bill had been so exhibited according to the regular practice of the court. If it were contrary to that practice to entitle the bill as of the preceding term, the defendant ought to have moved to set aside the special memorandum for irregularity.

BAYLEY, J. If the issue joined between these parties had been, whether at the time of commencing the suit the plaintiff was administratrix, the verdict ought, upon the evidence, to have been found for the defendant; but the issue was, Whether at the time of exhibiting the bill the plaintiff was administratrix. Now the bill in fact was exhibited on the 20th of *January*, and at that time the plaintiff was undoubtedly administratrix. I think, therefore, the verdict was properly found for the plaintiff.

HOLROYD and LITTLEDALE, Js., concurred.

Rule refused.

VICE v. Lady ANSON.

Where in an action for goods supplied for the purpose of working a mine, it appeared that the defendant had paid money for certain shares, and received a certificate that she was a proprietor of those shares; and that she had acknowledged that she was a shareholder: but no assignment of any interest in the mine had been made to her: Held, that the action could not be maintained.

ASSUMPSIT for goods sold and delivered. Plea, non assumpsit. At the trial before Lord *Tenterden*, C. J., at the *London* sittings after *Trinity* term 1827, it appeared that the action was brought against the defendant, as one of the adventurers in a mining company, to recover the price of goods sold, and work and materials furnished by the plaintiff for the working of the mine. The plaintiff himself, when he furnished the goods, had no knowledge of Lady *Anson* as a shareholder. It appeared that she had spoken and written of *herself, *410] in private letters and society, as being one; but she never signed any deed. She had paid her deposits on her shares, and had received certificates in the following form:—"Wheal Concord Tin and Copper Mine Company, No. 133. These are to certify, that the Viscountess Dowager *Anson* is the proprietor of the share or number 133, being one share of the Wheal Concord mine, situate in the parish of *St. Agnes*, in the county of *Cornwall*, and that her name is duly registered in the act-book of the said mine, subject to the rules, regulations, and orders of the said company; and that the said Viscountess Dowager *Anson*, her executors, administrators, and assigns, are entitled to the profits and advantages of such share.—By order of the directors, as witness my hand, this 14th day of *June*, in the year of our Lord 1822. *Christopher Vaux*, secretary to the said mine." The mine, at one time, before the proposal to form a company, had been in the hands of one *Thomas*; but it did not appear distinctly in what character he acted, or that any interest had been transferred from him to the company. The Attorney-General for the defendant, on these facts contended, that the defendant was not liable. He admitted that there was some evidence to show, that at one time she considered herself liable; but though that might be *prima facie* evidence against her, it could not make her so, if, on the other facts, she was not. She never became known as a partner, nor was she one in fact, for she never had any assignment made to her of the partnership property, nor did she sign any deed, so as to bring this within the case of *Lawler v. Kershaw* (a). The utmost she can have is a right in equity to call for *411] *an assignment of the partnership property; but until that is made she has no interest, for the certificate gives her none; and if she has none she is not a partner. Lord *Tenterden*, C. J., addressed the jury as follows: (b)—"It is clear, in this case, that the plaintiff did not actually give credit to Lady *Anson*, and that she never held herself out to the world as a partner. If, therefore, she is chargeable, she can only be so on the ground that she is really interested; and no mistaken supposition of her own that she was so would make her liable, unless it were communicated to the plaintiff so as to mislead him. The partnership, if any, is not strictly a trading partnership; it is one formed for the purpose of working a mine, a species of real estate, and the plaintiff's claim is for labour and goods employed in working that mine. An interest in a real estate can only pass by certain formalities; and it is clear that the certificates are not sufficient to pass it, nor would the registration in the act-book of the company, as mentioned in them, even if it were made, of which there is no proof, be so. Is there, then, any evidence from which you can conclude that Lady *Anson* ever had any interest in the mines conveyed to her? The history of the mine is not much explained; but it appears that one *Thomas* had something to do with it in 1822 before the company was thought of, and

(a) 1 *Moody & Malkin*, 93.(b) See 1 *Moody & Malkin*, 99.

we hear of no one else. It is not pretended that Lady *Anson* derived any interest from any one else, and it is not clear, even, that he had any. If he had none, he could communicate none: if he had any, Lady *Anson* would be liable or not, as he had transmitted it to her or not. His name is not on the *certificates; they do not profess to pass any thing from him, or to make him accountable for the money paid upon them, or for the profits arising [412 from the mine. Directors are mentioned, but he is not shown to be one of them, or in any way connected with them. The certificates, therefore, which clearly do not in themselves pass any interest, seem not even to furnish any evidence that an interest had passed from *Thomas*, or from any one else, to Lady *Anson* (a). The question which you have to consider is, whether it is made out to your satisfaction that Lady *Anson* had any interest in the mine? I think it is not." The plaintiff's counsel then elected to be nonsuited.

F. Pollock now moved to set aside the nonsuit. It was not necessary to show that any formal conveyance was executed in order to vest in the defendant an interest in the mine; for the parties engaged in this undertaking may have worked under a licence, and without having any legal interest in the soil, *Doe dem. Hanley v. Wood* (b). It was sufficient, therefore, to show that the defendant had agreed to participate in the profits of working the mine. Now there was evidence to show that the defendant had entered into an undertaking with others working the mine, to participate with them in the profits of the mine. She had purchased shares, and had spoken of those shares. That is evidence against her that she had an interest in the working of the mine; and if so, then the articles were supplied for her benefit.

*Lord TENTERDEN, C. J. The plaintiff, at the time when he supplied the goods, did not know that the defendant either had or thought she [413 had any interest in the mine. He did not, therefore, supply the goods on her credit. The fact of her having thought that she had such an interest, that being wholly unknown to the plaintiff at the time when he supplied the goods, will not make her liable for those goods. Her having expressed an opinion that she was so, might be *prima facie* evidence that she had an interest; but the other facts in the case show that she had not any interest. She thought she had an interest because she had paid her deposits and received the certificates, but those certificates pass no interest whatever. It did not appear who the directors were, or that they had any authority to issue such certificates. The defendant, therefore, had no interest in this mine, and is not liable in this action.

Rule refused.

(a) See this case reported in 1 *Moody & M. N. P. C.* 96.

(b) 2 *B. & A.* 724.

REX v. KNIGHT et al. Nov. 13.

Indictment charged that defendants removed a culvert in the parish of *S.* opposite to a mill there, in a highway there, leading from *S.* to *H.*: Held, on motion in arrest of judgment, that it sufficiently appeared that the culvert removed was in the parish of *S.*

INDICTMENT charged, that the defendants, with force and arms wrongfully did stock up and remove, &c. the gravel, soil, and rubbish then being upon and over a certain brick culvert, for the convenience of his majesty's liege subjects, passing therealong in the parish of *Studley*, in the county of *Warwick*, opposite to a certain mill there, called *Studley Mill*, in a certain king's common highway

there, leading from *Studley* in the said county, to *Henley in Arden*, in the same county. The defendants having been convicted,

*414] *Denman* now moved to arrest the judgment, on the ground that it did not distinctly appear upon the face of the indictment that the road obstructed was in the parish of *Studley*, and he relied upon *Rex v. Gamlingay* (a). There the indictment was against that parish for not repairing a road leading from the parish of *Hatley*, towards and unto the parish of *Gamlingay*; and it was held, that that allegation excluded *Gamlingay*, and, consequently, that the indictment was bad, and that it was not aided by a subsequent allegation, that a certain part of the said highway, situate in *Gamlingoy*, was in decay. The decision was founded upon an old authority in 2 *Roll's Abr. Indictment* (M) pl. 19, where it is said, that if *A.* is indicted for stopping up a way at *D.* leading from *D.* to *S.*, it is not good, because it does not allege the way to be *in D.*, but *from D.*, which excludes the vill; and in *Mich. 21 Car. 2.*, such an indictment was quashed. [Lord *Tenterden*, C. J. I doubt whether that ought to have been considered an authority; for the indictment may have been quashed in order to prevent any question arising.] In *Hammond v. Brewer* (b) the words *from* and *to* in a turnpike act were held to be exclusive.

Lord *TENTERDEN*, C. J. The indictment in *Rex v. Gamlingay* (c) differed essentially from that in the present case. It stated that there was and yet is a common and ancient king's highway, leading from the parish of *Hatley*, towards and unto the parish of *Gamlingay*. Here the indictment charges, "that the defendants stocked up and removed the gravel, &c. then being upon and *415] *over a certain brick culvert, for the convenience of his majesty's liege subjects passing therealong in the parish of *Studley*, opposite to a certain mill there, called *Studley Mill*, in a certain king's common highway there, leading from *Studley* to *Henley in Arden*." If we were to construe the words *to* and *from* as exclusive in this case, we should make the allegation inconsistent and insensible, which otherwise is perfectly consistent and sensible. In common parlance, the words *leading from a place*, include as well as exclude that place; and at present my mind is not satisfied with the decision of the Court in the case of *Rex v. Gamlingay*, that the words *from* and *to* are necessarily exclusive.

BAILEY, J. The objection in *Rex v. Gamlingay* was, that it did not distinctly appear on the face of the indictment that any part of the road was in the parish indicted. The indictment charged that there was and is a common highway leading from the parish of *Hatley* towards and unto the parish of *Gamlingay*. That allegation did not import that any part of the highway was in the parish of *Gamlingay*. The subsequent allegation that a certain part of the same common, highway, &c. situate in *Gamlingay*, was in decay, did not go further, for it referred to the highway mentioned in the former allegation. Lord *Kenyon* there lamented that the court was under the necessity of coming to the decision which they did in that case. Here we are relieved from that necessity, because in this case there is a distinct allegation that the nuisance was committed in the parish of *Studley*. The words *leading from Studley to Henley* would *prima facie* import that it was in a highway leading from a vill in the parish, and, *416] therefore, must be *considered as a highway leading from a vill or town situate in the parish to another place.

HOLYROD and *LITTLEDALE*, Js., concurred.

Rule refused.

(a) 3 T. R. 513.

(b) 1 Burr. 376.

(c) 3 T. R. 513.

SUTTON v. TOOMER. Nov. 13.

A customer deposited a sum of money with a banker, and received a note, by which the banker promised to pay the principal at ten days' sight, with three per cent. interest to the day of acceptance. The banker paid interest on the note, but at the same time told the customer, that he would not, in future, pay more than two and a half per cent., and in his presence altered the terms of the note by striking out *three* and inserting *two and a half*: Held, first, that the word "acceptance" meant *sight*, and that it need not be left with the maker for acceptance; secondly, that the payment of interest was evidence to show that a principal sum was due, and that the note was admissible in evidence to show the terms on which the deposit was made.

ASSUMPSIT upon a promissory note, bearing date the 13th *November* 1813, by which the defendant promised to pay ten days after sight thereof to the plaintiff or order, the sum of 250*l.* with interest, at the rate of two and a half per cent. per annum to the day of acceptance. Second count, on a similar note payable with three per cent. interest. Counts for money lent, &c. Plea, non assumpsit. At the trial before *Best*, C. J., at the Summer assizes for the county of *Hants* 1827, the following appeared to be the facts of the case. In *November* 1813 the defendant carried on business as a banker at *Southampton*, in partnership with two persons named *Trim* and *Kellow*. The plaintiff on the 23d *November* 1813 deposited 250*l.* at the bank, and at the same time received the note declared on, which purported to bear interest at the rate of three per cent. per annum to the day of acceptance. The clerk to the bankers, who received the money, proved that the deposit was made on the terms contained in the note. In 1819 the defendant retired from the firm, and was succeeded by one *Pritchard*; who *continued the business in partnership with *Trim* and *Kellow* [*417 till 1823, when *Trim* died, and then with *Kellow* alone, who afterwards died insolvent. On the 14th of *May* 1825 the plaintiff demanded payment of the interest due on the note, and the same was paid up to *November* 1824, by desire of the defendant. But *Pritchard* then told the plaintiff that no more than two and a half per cent. would be paid in future, and in the plaintiff's presence he altered the note, by striking out *three* and inserting *two and a half*, and then returned the note to the plaintiff. In *January* 1827 payment of the principal was demanded of the defendant, and interest at three per cent., and also at two and a half per cent. The defendant requested that the note should be left for a day, which he stated to be the usual course, and said that unless it was so left he would have nothing to do with it. The person who demanded payment offered to read the note to the defendant, but refused to part with the possession of it. Upon this evidence it was contended by the defendant's counsel, first, that the plaintiff could not recover the principal, because the note had not been left or presented for acceptance, nor had any acceptance been required or given, although it appeared clearly from the circumstance of the interest being made payable to the day of acceptance, that the parties contemplated that an acceptance should be given or demanded. Secondly, that the note having been altered in a substantial part with the consent of the holder, was not admissible without a new stamp. The Lord Chief Justice overruled the objections, and a verdict was found for the plaintiff.

**C. F. Williams* now moved for a new trial. He contended, first, that it was clear that the parties intended that the promissory note should be left [*418 for acceptance in the same manner as a bill of exchange was. [Lord *Tenterden*, C. J. I should be sorry to suppose that bankers, by the word *acceptance* as used in this note, meant that sort of acceptance which is required in a bill of exchange. I think the term acceptance, as used in this note, meant sight.] Secondly, the note was not admissible in evidence at all for want of a new stamp, and the terms upon which the money was deposited could only be collected from the note. The

plaintiff by consenting to the alteration made it a new instrument, and therefore it was not admissible in evidence, *Rapp v. Allnutt (a)*, and *Rex v. Gillson (b)*.

LORD TENTERDEN, C. J. I am of opinion that the plaintiff could not recover by force of the instrument itself; but, taking the whole evidence together, I think he might recover on the count for money lent. There was proof of a deposit of money and a promise to pay that money on certain terms contained in a paper in the form of a promissory note. That paper was produced. It contained the terms on which the money was deposited, and it had a stamp required for a promissory note of that amount. Some years afterwards the plaintiff consented that an alteration for the benefit of the defendant should be made in the terms of the instrument. The effect of that alteration was not to make it a security for the principal and two and a half per cent. interest, but to render it wholly *419] invalid *as a security. But although the instrument thereby became void as a security, yet the original loan was not destroyed; nor were the terms on which that loan was made rendered void. It was contended that the alteration not only made the security void, but that it extinguished the debt. I think it did not, and that it was competent to the plaintiff to give the paper in evidence to prove the terms on which the money was deposited.

BAYLEY, J. It was proved that interest was paid; that showed that there was a loan of money; the subsequent alteration in the note avoided the security, but the debt was created by the loan. In like manner, taking an usurious security for a pre-existing debt does not avoid the debt, but the security is void, *Mason v. Abdy (c)*.

Rule refused.

(a) 15 East, 601.

(b) 1 Taunt. 95.

(c) 3 Salk. 390.

MILBURN v. CODD and another. Nov. 15.

A., an attorney, and B. and C. had been members of a trading company. After the dissolution of that company, B. and C. were sued by creditors of the company, and retained A. to defend the actions, and in the course of making that defence a bill of costs was incurred: Held, that A., as a member of the company, being jointly liable to contribute to the expense of defending those actions, could not maintain any action against B. and C. for his bill of costs.

THIS was an action brought by the plaintiff as an attorney to recover the amount of his bill. At the trial before Lord Tenterden, C. J., at the *Middlesex* sittings in *Trinity* term 1827, the following appeared to be the facts of the case. The plaintiff and the defendants had been members of the *London Carriers Company*, which was dissolved on the 3d of May *1826. The defendants *420] being afterwards sued by several of the creditors of the company, employed the plaintiff to defend the actions, and the bill of costs in question was incurred. It was objected by the defendants that the action was not maintainable, inasmuch as the plaintiff and defendants, as copartners, were jointly liable for the sums for which the defendants had been sued, and one partner could not maintain an action against his copartners for work and labour performed, or money expended on account of the partnership, and *Holmes v. Higgins (a)* was cited. The Lord Chief Justice overruled the objection, and a verdict was found for the plaintiff. A rule nisi having been obtained for a new trial,

(a) 1 B. & C. 74.

Denman, C. S., now showed cause. This case is distinguishable from *Holmes v. Higgins*, because the contract between the plaintiff and defendants was made, and the retainer was given, *after* the company had been dissolved, and consequently after the plaintiff and defendants had ceased to be partners.

J. Williams and *Goulburn* contra. The plaintiff and defendants were copartners. The business was done for the defendants as partners. The plaintiff (as a partner) was liable to contribute to those expenses, and if he recovers against the defendant he may be sued for contribution.

Lord TENTERDEN, C. J. The actions which the plaintiff defended were brought against the defendants *as members of a partnership of which [421] the plaintiff himself was also a member. When the actions were commenced, it was the duty of all the partners to pay the money which the plaintiffs in those actions demanded and recovered, or to resist the actions at their joint expense. The actions were resisted. Supposing the resistance to have been proper (and it is not competent to the plaintiff to say it was not), the expenses ought to have been borne by *all* the partners. If the plaintiff were allowed to recover his demand in this action, the defendants would have a right to require him to refund part of it, as his contribution as a partner to the general fund, out of which general fund the actions ought to have been defended. For this reason, I think the present action is not maintainable. The rule for a new trial must, therefore, be made absolute.

BAYLEY, J. I am of opinion that this action is not maintainable. In this case the plaintiff and the defendants were members of a company, and jointly liable to all just demands on the company, and those demands ought to have been satisfied out of the common fund. Two individuals were selected by the creditors of the company, and were sued. All the members of the company ought to contribute to satisfy those claims, or to resist them. It was the common duty of all the members of the company, if there was any ground of defence, to make that a common cause and to defend the actions, and if there was no ground of defence, to satisfy the demand out of the funds of the company. In this case it was thought right to defend the actions. The plaintiff cannot say it was improper to defend, for he himself *concurred in that [422] defence. The expense of such defence ought to fall on the company. Every member of the company, if there are not adequate funds, ought to contribute his proportion to it; and if that be so, every member ought to contribute to satisfy the claim which the plaintiff, as one of the members of the company, has upon its funds. This is, therefore, in effect a claim of the plaintiff against his partners for contribution, and that is the proper subject of a bill in equity.

LITTTLEDALE, J. I also think this action is not maintainable. The original creditors were entitled to be paid by the whole company, viz. the two defendants, *Milburn* the plaintiff, and the other members. They did not pay, and the creditors brought actions against the two defendants. It was thought advisable to defend the actions, and if they were defended on fair and reasonable grounds, the costs of the defence ought to have been borne by the whole company, the two defendants, *Milburn* the plaintiff, and all the other members. And if that be so, *Milburn*, being a partner, cannot maintain an action against the two defendants to recover the amount of his own bill from these two individuals, for he ought to contribute his proportion. But assuming the defence to have been frivolous and improper, still *Milburn* having been employed as the attorney, must have known the nature of that defence as well as the defendants, and, therefore, he is exactly in the same situation as if the defence was fair and reasonable. If he concurred in a frivolous defence, he, being a party liable to contribute as well as the others, cannot maintain this action against either of the two defendants.

Rule absolute.

*PAYNE v. WILSON, one, &c. Nov. 15.

Assumpsit, in consideration that the plaintiff, at the request of the defendant, *would consent* to suspend proceedings against A. on a cognovit, defendant promised to pay 30*l.* on account of the debt (for which the cognovit was given) on the 1st of April then next. Averment, that the plaintiff did suspend proceedings on the cognovit. The plaintiff, at the trial, proved the following agreement in writing: "The plaintiff *having, at my request, consented* to suspend proceedings against A., I do hereby, in consideration thereof, personally promise to pay 30*l.* on account of the debt on the 1st day of April:" Held, that, as the request must have preceded the consent to suspend proceedings, the contract might be declared on as an executory contract, and consequently, that there was not any variance. Secondly, that the consideration for the promise was sufficient, because it must be taken as a consent to suspend proceedings, at least, until the 1st of April. Thirdly, that, after verdict, the averment that "plaintiff had suspended proceedings" was sufficient, without specifying for what period.

ASSUMPSIT. The declaration stated, that at the time of making the promise of the defendant thereafter mentioned, one C. Vaux was indebted to the plaintiff in 103*l.* 8*s.*, for the recovery of which the plaintiff had commenced an action against C. Vaux in K. B., and in which action C. Vaux had signed a cognovit for the payment of the said debt of 103*l.* 8*s.*, together with the costs of the said action, at certain times therein mentioned, to wit, at, &c.; that before the making of the promise of the defendant, C. Vaux having made default in payment of the whole of the sum of 103*l.* 8*s.* at the time specified in the cognovit, he, the plaintiff, was about to take proceedings on the cognovit, and thereupon, to wit, on, &c. at, &c. in consideration that the plaintiff, at the request of the defendant, *would consent* to suspend proceedings against C. Vaux, on the cognovit so signed by him, he the defendant undertook and promised the plaintiff to pay to him the plaintiff 30*l.* on account of the said debt, on the 1st of April then next, and a further sum at a subsequent day. Averment, that the plaintiff did suspend all further proceedings against the said C. Vaux on the cognovit, of which the defendant had notice. Breach, non-payment of the 30*l.* Plea, the general issue. At the trial before Lord Tenterden, C. J., at the *Middlesex* sittings after *424] Hilary term 1827, the plaintiff produced in evidence *the following paper, signed by the defendant:—"Mr. R. Payne having, at my instance and request, consented to suspend proceedings against the above named defendant on the cognovit signed by him in this cause, and given for payment of the debt this day, I do hereby, in consideration thereof, personally undertake and promise to pay to the plaintiff the sum of 30*l.* on account of the said debt, on the 1st day of April now next; and the further sum of 53*l.* 3*s.* within four months next ensuing the 1st day of April." It was objected, on the part of the defendant, that there was a variance between the contract proved and that alleged in the declaration; the consideration for the promise stated in the declaration being executory, whereas the consideration *proved* had been executed. Lord Tenterden, C. J., directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. Campbell in Easter term obtained a rule nisi, first for entering a nonsuit on the objection taken at the trial; and, secondly, for arresting the judgment, on the ground that no sufficient consideration for the promise was stated in the declaration, it not being alleged that the plaintiff had consented to forbear to sue for any definite time; and also, that it was not properly averred that the consideration was performed.

The Attorney-General and Wightman now showed cause. There was sufficient proof of the executory consideration stated in the declaration. The proof was, that in consideration of the plaintiff's having, at the request of the defendant, consented to suspend proceedings against Vaux, the defendant promised. Now that implies, that the defendant's request to suspend the proceedings pre-
ceded the consent given by the plaintiff, *and, therefore, this was evidence
of a promise made by the defendant, in consideration that the plaintiff
would suspend proceedings.

Campbell contra. The consideration proved in this case was executed, the consideration alleged was executory. There is a material distinction between considerations executory and executed. Executory considerations are traversable, and performance must be averred with time and place. It depends on the performance of the consideration, whether the promise be binding. If the consideration be executed, the promise is immediately binding; there is no condition or qualification. Here the consideration alleged in the declaration was executory, and it would depend upon the plaintiff's consent to suspend the proceedings whether the defendant's promise were binding. In the contract proved, the consideration was executed. No subsequent consent of the plaintiff was necessary to make the defendant liable. But no sufficient consideration appears in the contract itself, nor is alleged in the declaration; for a forbearance to sue is a good consideration for a promise, only where it is absolute, *Mapes v. Sidney* (a); or for a definite portion of time, *Fish v. Richardson* (b); or a reasonable time, *Johnson v. Whitchcott* (c); forbearance for a little (d) or some time (e) is not sufficient. And even supposing this could be considered as a contract to suspend proceedings for some definite period, it is not alleged that the plaintiff did suspend his proceedings absolutely, or for any definite period of time.

*Lord TENTERDEN, C. J. I think that the contract stated in the declaration was sufficiently proved by the paper produced in evidence; for [426] it must be implied, from the contents of the paper, that the defendant's promise was made in consideration that the plaintiff would suspend his proceedings against *Vaux*. It states that the plaintiff *had* consented to do so at the request of the defendant. That request, therefore, must have preceded and induced the consent given to suspend the proceedings. Then, as to the objections in arrest of judgment, it is said that it does not appear that the plaintiff consented to suspend the proceedings for any definite time. The promise made by the defendant was to pay 30*l.* on the 1st of *April*, in consideration of the plaintiff's consenting to suspend proceedings. That imports that the proceedings were, at all events, to be suspended until that period; and I think that the averment that the plaintiff did suspend the proceedings is sufficient after verdict, because it must be taken that it was proved at the trial that the plaintiff had suspended the proceedings, either for a time required by law, or for a definite or reasonable time.

BAYLEY, J. I think there was no variance in this case. The declaration states, that in consideration that the plaintiff would consent to suspend the proceedings, the defendant promised. Now I think that the fair meaning of that is, "in consideration that he would suspend proceedings, the defendant promised;" and I think that is proved by the paper produced in evidence. I think, also, that it must be taken, after verdict, that the agreement was to suspend until the 1st of *April*, and also that the allegation that he did suspend is sufficient.

*LITLEDALE, J. (f). I am of the same opinion. There is a clear [427] distinction between considerations executed and executory. In *Com. Dig. tit. Action on the Case upon Assumpsit*, B. 12, it is laid down, that "an assumpsit lies though the consideration be executed in part, as in consideration that he had done a thing at my request;" and afterwards it is laid down, "so if the consideration is continuing though the act be executed, as in consideration that the lessee now in possession had paid his rent very well, to save him harmless; for prompt payment of the rent is a continuing consideration when he remains in possession." In the present case, there was a continuing consideration, for the plaintiff not only *had* consented to suspend the proceedings, but that they *should* be suspended until the first of *April* (until the instalments became due). Therefore, this might be alleged in pleading either as an executed or executory

(a) *Cro. Jac.* 683.

(c) 1 *Roll. Abr.* 24, pl. 33.

(e) 1 *Roll. Abr.* 23, pl. 26.

(b) *Cro. Jac.* 47.

(d) 1 *Roll. Abr.* 23, pl. 5.

(f) *Holroyd, J.*, was in the Bail Court

consideration; and it was therefore properly described in the declaration. As to the objection in arrest of judgment, I think it must be taken after verdict that the defendant did suspend his proceedings absolutely, or for a reasonable time.

Rule discharged

W. FERRER and ANN ROLLASON v. OVEN. Nov. 15.

In debt on an award, the execution of the submission by all the parties must be proved.

DECLARATION in debt stated that differences having arisen between *W. Ferrer* and *Honorio* his wife and *Ann Rollason*, and the defendant and one *L. Lambe*, they, *W. Ferrer* and *Honorio* his wife and *Ann Rollason*, by a bond of arbitration, became bound *to the defendant and *L. Lambe*; and the defendant and *L. Lambe*, by a certain other bond of arbitration, became bound to the said *W. Ferrer* and *Honorio* his wife and the said *Ann*, which bonds were conditioned for the performance of an award of two persons therein named, to whom all matters in difference between the parties were referred, provided the award was made within a certain time therein mentioned; but if they did not make their award within the time aforesaid, then of the award of an umpire therein named. Then there followed a stipulation by all the parties to the bonds, that the costs of a suit in Chancery, in which *W. Ferrer* and *H.* his wife and *Ann* were plaintiffs, and the defendant and *L. Lambe* were defendants, and of the reference, and of the award of the arbitrators or umpire, should abide the event of the award; and that the arbitrators or umpire should tax and award the amount of costs to be paid by the party or parties liable. It was then averred (the arbitrators not having made their award within the time limited). that the umpire did by his award (after directing that the defendant should pay a sum of money to *W. Ferrer*, and another sum to *Ann Rollason*) award that the defendant, his heirs, &c. should pay to *W. Ferrer* and *Ann R.* on, &c. at, &c. 41*l.* 16*s.*, being the amount of costs incurred by *W. Ferrer* and *H.* his wife, and *Ann R.*, in the suit in Chancery, together with the costs of the award. Breach, non-payment of that sum. Plea, nil debet. At the trial before Lord *Tenterden*, C. J., at the *London* sittings after *Easter* term 1827, the plaintiffs proved the defendant's execution of the bond, in which he and *Lambe* were the obligors, and the execution of the award. It was objected that it was incumbent on the plaintiffs to prove that *Lambe* executed this bond, and also the execution *429] of the other bond by the two plaintiffs *and *Mrs. Ferrer*, the submission of the rest being the consideration to each party to submit to arbitration. Lord *Tenterden*, C. J., directed the jury to find a verdict for the plaintiffs, but reserved liberty to the defendants to move to enter a nonsuit. *Follett* in last *Easter* term obtained a rule nisi for that purpose.

Taunton now showed cause. It must be conceded that *Antram v. Chace* (a) establishes that where an award is declared upon and is offered in evidence, the submission by all the parties interested must be proved. But this case is distinguishable from that. For here it did not appear that *Lambe* had any interest. In *Antram v. Chace* all the parties had an interest in the subject-matter, for they were copartners in trade. The execution of the submission by one was induced by the expectation that the instrument would be executed by the others.

Follett, contra, cited *Dilley v. Polhill* (b), 2 *Williams's Saunders*, 61, n.

(a) 15 *East*, 209.

(b) 2 *Str.* 923.

2, *Biddell v. Dowse* (a), to show that where an award is sought to be enforced it is necessary to allege in pleading a binding submission by all the parties.

LORD TENTERDEN, C. J. These authorities show that it was necessary for the plaintiffs to give evidence of the execution of the bond by themselves. The rule must, therefore, be made absolute.

BAYLEY, J. I do not see how to get over the objection. It was necessary for the plaintiffs to allege a mutual submission by all the parties. There was no sufficient evidence of the execution of the bond by the plaintiffs. I think also that they should have proved the execution of the bond by *Lambe*. The defendant might not have consented to refer unless the other party had joined. It appears by the submission, that *Lambe* had an interest in the Chancery suit. I hope the decision in this case will have the effect of inducing all parties to declare on the arbitration bond. By declaring on the award, the plaintiff takes upon himself the onus of proving a mutual submission. By declaring on the bond, he transfers the burden of proof to the defendant; and he lies on the latter to discharge himself from the penalty by showing a performance of the conditions.

HOLROYD, J. *Dilley v. Polhill* (b) is an authority to show that it is necessary for the plaintiff to allege a mutual submission. That being a matter of averment, it ought to have been proved.

Rule absolute.

(a) 6 B. & C. 255.

(b) 2 Str. 923.

(c) See 2 Stark. on Ev. 137.

SOLARTE et al., Assignees of ALZEDO, a Bankrupt, v. MELVILLE et al., another. Nov. 16.

Where a broker carried bills to be discounted, and allowed to the person discounting interest at the rate of 5l. per cent. per annum, and in addition, 1l. per cent. on the amount of the bills towards the payment of a debt due from a third person, but which the broker thought himself bound in honour to pay, and the broker accounted to his principals the whole amount of the bills, minus lawful discount and commission: Held, that the action was not usurious.

ASSUMPSIT on several bills of exchange accepted by the defendants and indorsed to *Alzedo* before his bankruptcy. Plea, non assumpsit. At the trial before Lord Tenterden, C. J., at the London sittings *after Hilary term 1827, it appeared that the bills in question were drawn by *Maltby & Co.*, payable to their order, and accepted by the defendants. *Maltby & Co.* employed one *Bramley*, a bill-broker, to get them discounted. *Bramley* for some years been in the habit of getting bills discounted by the bank. In 1822, he carried to him for discount bills to a large amount, accepted by *Wagstaffe & Co.*, and these he guaranteed, and represented *Wagstaffe & Co.* to be opulent and responsible persons (which he then believed to be the case) in consequence of which *Alzedo* was induced to discount for *Wagstaffe & Co.* bills that did not come through *Bramley's* hands, and to which his guarantee did not apply. In January 1823, *Wagstaffe and Co.* failed, and at that time *Alzedo* had a claim of more than 4000l. upon bills discounted for them and guaranteed by *Bramley*, and a still larger sum upon bills taken immediately from them, and with which *Bramley* had not any connexion. After this failure of *Wagstaffe and Co.*, *Alzedo* ceased to do business with *Bramley* for several months. The latter then addressed a letter to him, stating that he could discount some perfectly good bills, and that if he was willing to discount them at

cent. he should also deduct 10 per cent. from the amount towards the dishonoured bills of *Wagstaffe* and Co. which he (*Bramley*) had guaranteed. To this *Alzedo* assented, and they continued to transact business upon these terms until the whole sum guaranteed by *Bramley* was paid off. Then *Bramley* wrote another letter to *Alzedo*, expressing his regret that he should sustain any loss through the representations that he had made of *Wagstaffe* and Co.'s solvency, and that he felt bound in honour to pay their debt if he could; that he would
 *432] bring *bills and allow *Alzedo* to deduct, besides the 5*l.* per cent. discount, 1*l.* per cent. towards the liquidation of the debt of *Wagstaffe* and Co.; and the bills in question were, amongst others, discounted upon these terms. It further appeared, that although *Alzedo* made these deductions, first of 10*l.*, and then of 1*l.* per cent. over and above the 5*l.* per cent. discount, *Bramley* always accounted to his employers for the whole amount, after deducting only lawful discount and commission. For the defendants it was contended, that the dealings between the bankrupt (*Alzedo*) and *Bramley* were usurious; and that, therefore, the assignees of the former could not be entitled to recover upon the bills which he had discounted upon such terms. The Lord Chief Justice told the jury, that in his opinion the transactions were not usurious if *Bramley* really considered himself bound in honour to pay the debt of *Wagstaffe* and Co., and the deductions over and above the lawful discount were made in order to effect that object, and not by way of contrivance to allow *Alzedo* more than 5*l.* per cent. upon the discount; and with that observation he left the case to the jury, who found a verdict for the plaintiffs. In *Easter* term a rule nisi for a new trial was granted, on the ground that the opinion expressed at the trial by the Lord Chief Justice was not correct.

The Attorney-General-Brougham, and *Pollock* showed cause. The verdict of the jury is decisive of this question, for they have, in effect, found that there was no corrupt bargain between *Bramley* and the bankrupt, that the latter should have more than 5*l.* per cent. for discounting the bills. When the bills were discounted, *Bramley* might lawfully pay out of the proceeds part of
 *433] *his debt to the person discounting. Neither had his employer any thing to do with that; he had a right to claim from the broker the whole amount of the bills, minus lawful discount and commission; and to that extent *Bramley* always, in fact, accounted with his employers. If, indeed, the alleged bargain between *Bramley* and the bankrupt had been a mere contrivance to secure to the latter more than lawful discount, the case would have been different; but that has been negatived by the jury, and the question was properly left to their decision, *Hammett v. Yea* (a), *Carstairs v. Stein* (b).

The Solicitor-General and *Gurney* contra. It has been contended that the transaction with the bankrupt could not be usurious, because he did not receive more than after the rate of 5*l.* per cent. per annum upon the bills from the party to whom they belonged, but from the broker. If that argument were valid, no bargain between the discounter of a bill and the broker could ever be usurious. But the statute 12 *Ann.* c. 16 says, that no person shall, upon any contract, take directly or indirectly, for the loan of any monies, &c. above the value of 5*l.* per cent. for the forbearance of 100*l.* for a year, &c. Nothing is said as to the person from whom the money must be taken to be within the statute: it therefore applies as strongly to payments made, or sums allowed by the broker, as to those made by his principal. The party taking more than lawful discount is equally guilty of usury, whether he takes it out of the pocket of the principal or the agent. But it is said that the excess taken by the bankrupt was by way
 *434] of payment of *a debt. Admitting that the broker might have lawfully paid his own debt out of the proceeds of the bills, this case is very different. He was under no legal obligation to pay *Wagstaffe's* debt; and if in order to induce the bankrupt to discount the bills he agreed to allow dis-

count at the rate of 5*l.* per cent. per annum, and in addition a sum of 1*l.* cent. on the amount which he was not under any legal obligation to pay, only reasonable construction of such a bargain is, that the whole was in truth as a consideration for the loan of the money advanced on the bills; and if it was usurious. There is no case to warrant the opinion expressed by the Chief Justice, that if *Bramley* thought himself bound in honour to pay *Wagstaffe's* debt, the transaction was not usurious; and the finding of the jury in consequence of the opinion so expressed ought not to bind the defendants where the facts of a case establish usury, that is not answered by the finding of a jury that the parties meant to act legally, *Marsh v. Martindale* (a), *Barnes v. Young* (b).

Cour. adv. vult.

Lord TENTERDEN, C. J. The question in this case was, whether the bills which the plaintiffs had commenced their action against the defendants as acceptors, were tainted by usury. They had been discounted through the intervention of a broker of the name of *Bramley*, who before the discounting of the bills represented to *Alzedo*, the bankrupt by whom they were discounted, that in consequence of his having recommended to the bankrupt one *Wagstaffe*, for whom *Alzedo* had discounted bills, but who failed, so that *Alzedo* had incurred great loss, he, *Bramley*, felt himself under an honorary, though not under a legal obligation, to make good that loss. The mode which he proposed in order to effect this object was, that as he could not pay the whole once (for he otherwise would have done so), he (*Alzedo*) should go on discounting for him, and should deduct from the sums to be paid to him (*Bramley*) such discounts 1*l.* per cent.; but, nevertheless, *Bramley* was not to deduct 1*l.* per cent. from the persons who employed him, but to account to them the full amount, deducting only ordinary interest. I left to the jury the question whether they were of opinion that *Bramley* thought himself under an honorary obligation, intimating to them as my opinion, that in case they thought *Bramley* acted under an idea honestly formed in his own mind, that he was under an honorary obligation to pay the money, I was inclined to think that, in point of law, it was not an usurious contract. I still incline to think that if *Bramley* felt himself under an honorary obligation, the contract was not usurious; and I believe some of my learned Brothers are of the same opinion, though on this point they differ from me. We are all, however, agreed, that notwithstanding the intimation to the jury my opinion upon the subject, yet as I left it to them to exercise their own discretion, and to draw their own conclusion from the evidence, we ought not to disturb this verdict; and that more especially as this is a case in which, if the usury be established, the penal consequences are heavy. A new rule for a new trial must, therefore, be discharged.

Rule discharged (a)

(a) 3 B. & P. 154.

(b) 17 Ves. 44.

(c) See *Staneld v. Eade*, 4 Bing. 81.

*GREENWAY and another v. FISHER. Nov. 16. [4

Where a verdict in trover was obtained in vacation against a trader, who, after the first day of the next term, but before final judgment was signed, became bankrupt: Held, that the final judgment signed afterwards during the same term, related to the first day of the term, and that the debt thereby created was barred by the bankrupt's certificate.

Scire facias on a judgment in trover. Plea, bankruptcy and certificate of discharge of the defendant, and that the cause of action in the writ of scire facias mentioned

to wit, by the recovery of the damages therein mentioned, accrued to the plaintiffs before defendant became bankrupt. Replication, that the said cause of action did not accrue to the plaintiffs by the recovery of the said damages before the defendant became bankrupt. At the trial before Lord *Tenterden*, C. J., at the *London* sittings after last *Easter* term, it appeared that the action of trover was tried on the 20th of *April* 1824. *Easter* term in that year commenced on the 5th of *May*. On the 8th of that month the defendant committed an act of bankruptcy; on the 13th a commission of bankrupt issued against him; and on the 18th he was declared a bankrupt. On the 19th, final judgment was signed in the action of trover; and on the 25th of *November* following, the defendant obtained his certificate. For the defendant it was objected, that the debt was barred by the certificate, for that it might have been proved under the commission. Lord *Tenterden* thereupon directed a verdict to be entered for the plaintiffs, and that the defendant should move to enter it for the defendant. In *Trinity* term a rule nisi for that purpose was obtained, against which

The *Attorney-General* and *Chitty* now showed cause, and contended, that *437] the rule as to the relation of *judgments was often productive of great hardship, and ought not to be extended. That hitherto it had only been applied to cases of contract; and that the judgment in this case, being an action of tort, was distinguishable from that in *Ex parte Birck* (a).

Campbell, contra, was stopped by the Court.

LORD *TENTERDEN*, C. J. I am of opinion that this rule must be made absolute. At common law all judgments related to the first day of the term in which they were entered up, in like manner as all acts of parliament related to the first day of the session in which they were passed. I take one reason for this to have been, that there was not any mode of ascertaining the precise time at which judgments were signed. By the statute of frauds this rule of law was altered for one purpose, and now the Court can, for that purpose, ascertain and notice the time when judgments are actually signed. So, if by the words of an act of parliament, the commencement of its operation is confined to a particular day, that may be noticed by the Court. But with the exception of those instances the old rule of relation still prevails. Nor does it work any injustice; for if the certificate is a bar to the action, it follows, as part of the same rule, that the creditor might have proved his claim under the commission against his debtor.

BAYLY, J. The judgment for damages in an action of trover cannot be distinguished from a judgment in an action of assumpsit brought to recover *438] unliquidated *damages. The present case is, therefore, precisely similar to *Ex parte Birck*; and the creditor having had the power to prove under the commission, is barred by the bankrupt's certificate.

Rule absolute.

(a) 4 B. & C. 890.

REX v. The Inhabitants of Fylingdales. Nov. 16.

Where a magistrate presented a road in the township of *F.*, "upon the information upon oath of *A. B.*, surveyor of the highways for the township of *C.*, which is thirty-five miles distant from the township of *F.*," &c.: Held, in arrest of judgment, that this presentment was bad; for that it did not appear that the information upon oath was given to the presenting magistrate, and the surveyor of the highways in *C.* had no authority under the 13 G. 2, c. 78, s. 21, to give information as to the road in *F.*

A ROAD in the township of *Fylingdales*, in the North Riding of the county of *York*, was presented in the following form:—"I, *W.*, one of the justices,

business done, and of a promise by the defendant to pay; and the affirmative as to the omission complained of rested with the defendant.

Pollock (and *Putteson* was with him), contra, was stopped by the Court.

Lord TENTERDEN, C. J. It is a very important part of the duty of this Court to take care that an attorney shall fairly and honestly discharge his duty to his client. Here an attorney was employed to conduct business on the part of the assignee of an insolvent debtor. It was part of the duty of the attorney to inform the assignee, that if he proceeded in an action without the consent of the creditors, he would be liable to pay the costs of such action out of his own pocket. That being the duty of the attorney, the question is, Whether, when he brings an action to recover the amount of his bill of costs incurred in a suit, it lies upon him to show affirmatively that he has done all that he ought to have done; or whether it lies upon the client to show negatively that the attorney has not done his duty? I think that the affirmative proof lies upon the attorney; and, therefore, that in order to sustain this action, he ought to have proved that he did all that the act required to be done, in order to entitle the assignee to proceed in the action.

BAYLEY, J. *Templar v. M^r Lachlan* is distinguishable from the present case, as there it was not impossible that the defendant might, at some future time, receive benefit from the work of the attorney. Here, for any thing that appears, the defendant, through the plaintiff's negligence, has lost all chance of being reimbursed the expenses incurred, as he will not be entitled to retain those expenses out of the insolvent's effects. There was indeed evidence that no such steps as are required by the statute had been taken; for there was no charge in the bill for attending a meeting of creditors, nor did the plaintiff's clerks know that any such meeting had taken place.

HOLROVN, J. It was the attorney's duty to secure his client against any loss he might sustain through a neglect of the preliminary measure required by the statute, or to apprise him that he ran the risk of incurring that loss.

Rule absolute.

CHARLES ASHBY v. ANN ASHBY and THOMAS ASHBY, Executrix and Executor of CHARLES ASHBY, deceased.

A count in assumpsit for money had and received by defendant, as executor, to the use of the plaintiff, cannot be joined with a count for money due to plaintiff from defendant, as executor, upon an account stated with him of money due from him as executor. Semble. That a count for money paid by plaintiff to the use of defendant, as executor, cannot be joined with such a count on an account stated.

ASSUMPSIT. The first count of the declaration stated that the defendants, executrix and executor, were indebted to the plaintiff in 500*l.*, for so much money by the plaintiff paid, laid out, &c. to and for the use of the defendants, as such executrix and executor, at their request. And being so indebted, the defendants, as executrix and executor, promised the plaintiff, to pay him the said sum of 500*l.* Second count stated that the defendants, as such executrix and executor, were indebted to the plaintiff in other 500*l.* for so much money by the defendants, as such executrix and executor, had and received to and for the use of the plaintiff; and being so indebted, they, the defendants, as executrix and executor, promised, &c. Third count, that the defendants, on, &c. at, &c. executrix and executor, accounted with the plaintiff of and concerning divers

other sums of money from the defendants, as such executrix and executor as aforesaid, to the plaintiff before that time due and owing. And upon that account the defendants, as such executrix and executor, were found to be indebted to the plaintiff in the further sum of 500*l*. And being so found indebted, they, the defendants, as executrix and executor as aforesaid, in consideration thereof, promised, &c. Breach, non-payment. Demurrer and joinder.

Miller in support of the demurrer. There is a misjoinder of counts, because the first and second counts charge the defendants personally, and will sustain a judgment *de bonis propriis* only; whereas the third count charges them in their representative character, and will require a judgment *de bonis testatoris*. There is no case in which it has been expressly decided, that a count for money paid to the defendant's use as executor will charge him *de bonis testatoris*, but *Rose v. Bowler* (a) and *Powell v. Graham* (b) are authorities to show, that an action against an executor for money lent to him as executor will not warrant a judgment *de bonis testatoris*. *There is no difference between the case of a
*446] loan of money to an executor, to be applied by him to the purposes of his testator's estate, and a payment of money at an executor's request for the purposes of the estate. The principle to be collected from the cases is, that an executor cannot, after the death of his testator, enter into a contract to bind his estate. Now, here, the count for money paid raises a new cause of action not existing at the time of the death of the testator, and founded on a contract made by the executrix and executor. In *Wigley v. Ashton* (c) it was held, that a count in *assumpsit* against husband and wife, who was administratrix with the will annexed, upon promises by the testator to pay rent, could not be joined with counts upon promises by the husband and wife as administratrix, for use and occupation by them after the death of the testator, the defendants in the one case being personally liable, in the other only to the extent of assets. So in *Childs v. Monins* (d), it was held that executors were liable personally on a promissory note drawn by them as executors, because it was a new contract on their part to which their testator was no party. Then as to the second count, *Rose v. Bowler* (e), *Jennings v. Newman* (f), *Brigdon v. Parkes* (g), *Powell v. Graham* (h), 2 *Wms. Saund.* 117 d, establish clearly, that that count charges the executors in their personal character, and warrants a judgment *de bonis propriis*.

Jessopp contra. The plea of *plene administravit* might be pleaded to all the
*447] counts, and they would all warrant a judgment *de bonis testatoris*. It was decided in *Ord v. Fenwick* (i), that a count on a promise to the plaintiff as executrix for money paid by her to the defendant's use, may be joined with another count on promises to the testator, and the same rule ought to apply in actions against, as well as by executors. That case, therefore, shows that the first count may charge the defendants in their representative character. The second count also may be joined with the third, for although there is an apparent contradiction in the cases upon this subject, and in some of them, where the defendant has been charged on promises made by him as executor, he has been held to be liable *de bonis propriis*, yet *Gibbs, C. J.*, in *Powell v. Graham* says, that "a count on a promise by the defendant as executor, has no force further to charge the defendant than a count on a promise of the testator;" if so, the second count in the present case will only charge the assets of the testator, and may be joined with the others.

Lord TENTERDEN, C. J. I am of opinion that the judgment in this case must be for the defendant. There is no doubt as to the count on the account stated, that a plea of *plene administravit* would be a good plea, and that the only judgment which could be given in favour of the plaintiff, would be a judgment *de*

(a) 1 *H. Bl.* 109.(d) 2 *Bro. & B.* 460.(g) 2 *B. & P.* 424.(b) 7 *Taunt.* 581.(e) 1 *H. Bl.* 108.(h) 7 *Taunt.* 580.(c) 3 *B. & A.* 101.(f) 4 *T. R.* 347.(i) 3 *East*, 104.

bonis testatoris. As to the count for money paid, there may be some doubt but it is unnecessary to pronounce any decision upon that, because the counts clearly establish that the count for money had and received cannot be joined with counts against a party in his character of executor. In those cases the count for money had and received is *treated as showing a personal charge on the executor. If the matter were quite new, I am not sure it [*4 might not be as well to hold that a plaintiff might elect to treat the receipt of the money as an act done by the defendant in his character of executor, and take his chance whether he would get paid out of the assets or not. If he elects so to treat it, then he must show that the money came into the defendant's hands because he was executor. But the count for money had and received being a personal charge on the executor, to which plene administravit cannot be pleaded, and on which the judgment must be de bonis propriis, and the count on the account stated being of a contrary character, it appears to me that there is a misjoinder, and consequently that there must be judgment for the defendant. Although there may be some doubt on the first count, the strong inclination of my opinion is that that count is good as against an executor; that the latter might plead plene administravit to it, and that the judgment should be de bonis testatoris.

BAYLEY, J. I do not know how to get over the authorities. If we had not been bound by those authorities, I should have thought that all the counts would have charged the defendants in their character of executor and executrix, and that every one of them was rightly so framed. There may be cases in which the creditor may be entitled at his option either to sue the party in his personal or his representative character. And where, as in this case, he makes his election to charge the defendants in the latter character, if the right stated in each count would be a right binding the assets of the testator, it would be very reasonable *to say that they might be joined. In the first count of the declaration [*4 before us, the money is stated to have been paid by the plaintiff to the use of the defendants, as executor and executrix of the testator. That imports that the plaintiff has paid it not on the personal account of the defendants, but that he has paid it for them, because they were executor and executrix; that is, as it seems to me, in release of something which otherwise would have been a burden on the assets of the testator. I think that the plaintiff, having paid the money to the use of the defendants, as executor and executrix, has the same rights that, before such payment, belonged to the person to whom it was made, and, consequently, that he (the plaintiff) may charge the assets of the testator. To put a plain case, suppose two persons are jointly bound as sureties, one dies, the survivor is sued and is obliged to pay the whole debt. If the deceased had been living, the survivor might have sued him for contribution in an action for money paid, and I think he is entitled to sue the executor of the deceased for money paid to his use as executor. A plaintiff in many instances may have an advantage in proceeding against the assets rather than against the executor personally. The executor, in his individual capacity, may be insolvent; in his character of executor he may have assets adequate to answer any claim; and when the money is paid to his use as executor, justice requires that the person who has made that payment should have the liberty of looking to the fund which the executor has in that character. The second count is for money had and received by the defendants as executor and executrix. That I consider as money received by them in consequence of *their being executor and executrix, and which [*4 would not otherwise have come into their hands. Such a case may [*4 occur. Suppose a bill payable to the testator were remitted from a foreign country, half the amount applicable to the personal use of the testator, and the other half to be paid over by him to some other person. Before the bill arrived the testator dies, and his executor receives the money. It is possible that he might not have received advice as to the mode in which it is to be applied, until after he has applied it in the ordinary course of administration. He may be insolvent in his individual capacity, and it would be hard that the party, under such c

cumstances, should not have his election to be paid out of the funds of the testator. If the question, therefore, were new, I should be disposed to think that an action for money had and received by the defendant in his character of executor, might, at the election of the party for whose benefit it was received, charge the assets of the testator, and might, therefore, be joined with other counts of that description. How a court of error will deal with a case of this description, I can form no judgment. But the authorities on the point are certainly so strong, that I feel myself bound by them, and, therefore, concur in the judgment of the rest of the Court, not because my reason is convinced, but because I feel myself bound by those authorities.

HOLROYD, J. It appears to me clearly established by the authorities, that the different counts in this declaration cannot be joined. The second count is framed on a cause of action arising wholly in the time of the executors; it is for money had and received by them to *the use of the plaintiff. If that *451] be the plaintiff's money, he is entitled to it, whether there be assets or not, and whether the executor and executrix have or have not applied to other purposes the money which was received to the plaintiff's use. If that count had stood alone in the declaration, charging the defendants as executor and executrix, the plaintiff might, according to the authorities, have had judgment generally against them, which would be *de bonis propriis*, and not *de bonis testatoris*. If that be so, then the only remaining question is, Whether the other counts are of a similar description? It is quite clear, that on the third count the only judgment that could be given would be *de bonis testatoris*. That count being on an account stated of money due and owing from the defendants, as executor and executrix, the only proof admissible in support of the cause of action stated in that count would be, an account stated respecting debts due from the testator himself. As to the first count, there may be some doubt. I however think, that, upon the authorities cited, the judgment on that count might be *de bonis testatoris*.

LITTLEDALE, J. There may be some doubt as to the first count of this declaration; for although, generally speaking, *plene administravit* cannot be pleaded to a charge subjecting a defendant to a personal liability, yet a case may be put where an action may be brought by a plaintiff against a defendant in his character of executor, for money paid to his use. Suppose that a plaintiff had become bound jointly with a testator, and after his death had paid the whole debt; I should think that an action against the executor for money paid *452] to *his use might be supported, and that the plaintiff would be entitled to judgment *de bonis testatoris*. As to the third count, there can be no doubt that it charges the defendants in their representative character, and that the plaintiff is entitled to have judgment *de bonis testatoris*. The question for us mainly arises on the second count, in which the defendants are charged with having received money in their character of executor and executrix. The question is, Whether that makes the defendants liable in their representative character, so as to warrant a judgment *de bonis testatoris*. All the authorities show that such a count only makes the defendant liable personally; and it appears to me, that if the case were perfectly new, that would be the correct view of the law upon the subject. Upon the death of a testator an executor is bound to pay his debts in a certain order; first, debts due to the crown, then judgment debts, then specialty debts, and, lastly, debts on simple contract. But these last must be debts of the testator. In this case there never was any simple contract debt owing from the testator. The debt stated in the declaration is a debt contracted by the defendants, in their character of executor and executrix, by their having received a sum of money to be paid over to the plaintiff. That is a debt not contemplated by the law in the rule laid down as to the order in which debts are to be paid. If the testator in his lifetime had been indebted to the plaintiff for money had and received to his use, there would not be any specific appropriation of the money so received to the plaintiff's use; but that money,

on the death of the testator, would have gone into his general funds, and debt must have been paid out of those funds in its regular order. But when an executor receives *money to the use of a particular individual, it operates as a specific appropriation of that money belonging to the party, and he, in his individual capacity, must be liable for the money so received has nothing to do with the accounts of the testator. For these reasons, I am of opinion that the second count cannot be joined with the third, and that judgment, therefore, must be for the defendants.

Judgment for the defendants.

JOSEPH BEETE v. HENRY FISHER BIDGOOD. Nov. 20.

Where a contract was made for the sale of an estate at a certain price, and it was agreed that this should be paid by instalments at certain future days, with interest, calculated at 6l. per cent. per annum; and promissory notes were given for these sums, composed of the instalments and that which was called interest: Held, that the whole must be considered as the purchase-money of the estate, and that the bargain was not usurious.

ASSUMPSIT on the following promissory note:

London, 10th March 1821

On the 1st July 1825, we promise to pay to *Joseph Beete*, Esq., his executor or administrators, at the house of Messrs. *Sandbach, Tuine, and Co., Liverpool*, the sum of 3968l. for value received, in second instalment, with interest included, as expressed and specified in agreement for the sale of his moiety of the plantation *Meten Meer Zorg*, in the colony of *Demerara*, to *John Newton*.
£3968.

John Newton
H. F. Sloane

Plea, the general issue. At the trial before Lord Tenterden, C. J., at *Guilthall* sittings before *Michaelmas* term 1826, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case:

The note in question was signed by the defendant, who then bore the name of *Sloane*, but afterwards changed it to *Bidgood*; the signature of *John Newton*, *the other maker of the promissory note, was also proved; and that he died before the commencement of the action. The note was duly presented for payment on the day it became due at the house of Messrs. *Sandbach, Tuine, and Co. of Liverpool*, mentioned in the said note, and payment was refused.

The agreement referred to in the note, and the account made out, settled, signed between the parties at the time, were as follows:

The former recited "that *Joseph Beete* hath contracted and agreed with said *John Newton* for the absolute sale to him of the undivided moiety or part of him the said *Joseph Beete*, of and in the plantation called *Meten Meer Zorg*, and the lands in *Masseronic*, and all the buildings, cultivation, slaughtering, furniture, cattle, and other appurtenances, plantation, and husbandry implements and utensils, and all coffee and other stock on hand, and everything of what denomination soever, thereunto belonging or appertaining, without any exception whatever, at or for the price or sum of 16,000l. sterling money of Great Britain (being the balance of an account already drawn and stated by the said *Joseph Beete* and *John Newton*, and intended to be signed upon the said *Joseph Beete's* signing the special power of attorney hereinafter mentioned); with said sum of 16,000l., together with interest upon the several promissory notes

added hereto for the time they have to run, and which are wrote and stated at the foot of these presents, and to be dated respectively the 10th day of this instant month of *March*, and delivered to the said *Joseph Beete* upon his signing and delivering the said special power of attorney, are to be in full of the

*455] *said purchase-money; and the said *John Newton* hath agreed to purchase of the said *Joseph Beete* his the said *Joseph Beete's* undivided moiety or half part of and in the said plantation-lands, buildings, cultivation, slaves, furniture, cattle, stock in hand, and every thing thereunto belonging and hereinbefore mentioned, the property of the said *Joseph Beete*, at or for the said price or sum of 16,000*l.*, to be paid at the times, including the said interest to be added thereto, by the instalments, and in the manner specified in the said several promissory notes stated at the foot of these presents, as agreed upon between the said *Joseph Beete* and *John Newton*." The agreement then contained a declaration that plaintiff, for the considerations therein mentioned, did sell, &c. (the premises thereinbefore specified) to *John Newton*; and he thereby agreed to execute on the 10th of *March* (the date of the note) a power of attorney to *A. B.* and *C.* to pass a legal transport of the estate, &c. to *Newton*, according to the existing laws of the colony. At the foot of the articles of agreement there was the following memorandum, signed by the plaintiff: "I, the undersigned *Joseph Beete*, do hereby acknowledge to have received of and from the said *John Newton* the seven several promissory notes hereinafter mentioned, respectively signed by the said *John Newton* and *Henry Fisher Sloane*, being the amount of the said sum of 16,000*l.*, the money agreed upon for the said purchase, and the balance of the said account stated between them, the said *Joseph Beete* and *John Newton*, as aforesaid, together with interest on the said sum of 16,000*l.* added thereto for the time the respective bills have to run, making in the whole principal and interest 20,800*l.*, that is to say," (copies of the

*456] promissory notes were then added). The account stated between *the parties debited *John Newton* with 25,000*l.*, "the sum which he agreed to pay for the plaintiff's interest in the *Meten Meer Zorg* plantation," and then gave credit for several sums of money amounting in the whole to 9,000*l.*, and the balance in favour of the plaintiff was stated at 16,000*l.* The interest mentioned in the several promissory notes set forth at the foot of the agreement (of which the note in question was the fourth) was after the rate of 6 per cent. per annum, being the legal interest for money in the colony of *Demerara*.

The question for the opinion of the Court was, Whether the transaction was or was not usurious.

Armstrong for the plaintiff. There is nothing usurious in the contract between these parties. The statute 12 *Anne*, c. 16, applies only to the loan or forbearance of money; *Barclay v. Walmsley* (a); whereas the contract in this case was for the sale of an estate at a certain price, to be paid by instalments. It is true, that the estimated value of the estate, if paid for immediately, was 16,000*l.*; but that did not make it usurious to contract for a price to be paid at a future period, which exceeded the 16,000*l.* and 5 per cent. interest. If, indeed, the transaction were colourable, the imputation of usury might be established; but there is no doubt that a real sale of the estate was intended, and the mode of calculating the price will not make the contract usurious; *Floyer v. Edwards* (b), *Doe v. Brown* (c). No question could have arisen but for the word *interest* introduced into the agreement; that, however, will not make illegal a bargain

*457] which is in substance legal. The sale was, *in fact, made for the promissory notes. The only forbearance of money would be, of the sums secured by the notes after they became due; for such forbearance no amount of interest was expressly reserved, the notes would, therefore, bear legal interest only; and this circumstance completely distinguishes the present case from that of *Dewar*

(a) 4 *East*, 55.(b) 1 *Cowp.* 112.(c) *Holt*, N. P. C. 295

v. *Span* (a), where, for the purchase-money of an estate, a bond bearing 6 per cent. interest was given.

Patteson contra. The note upon which this action is brought was given in performance of an usurious agreement. It is, upon the face of it, expressed to be "for value received in second instalment, with interest included, as expressed and specified in agreement for sale," &c. Looking at that agreement, it appears that the consideration-money to be paid for the estate was 16,000*l.*; and it was further agreed, that it should bear interest at 6 per cent., up to certain future days appointed for payment of the principal sum. A power of attorney was to be given for the immediate transfer of the estate; it must, therefore, be taken, that the sum of 16,000*l.* then became due, and that the further sums agreed to be paid were for the forbearance of the 16,000*l.* If so, the bargain was clearly usurious, for notes were given for sums greatly exceeding the principal sum due, together with lawful interest up to the time to which payment was deferred. It appears, also, by the account stated between the parties, that the value of the estate was computed at 25,000*l.*; then credit was given for certain items of cash, amounting to 9000*l.*; *the remaining 16,000*l.* must, therefore, have [*458 been considered as a cash balance then due, and the further payments could only be made for the forbearance of that sum. The case of *Floyer v. Edwards* was very different; there goods were actually sold, to be paid for at a certain time; there was no engagement by the seller to grant any forbearance, and the larger price which the buyer was afterwards to pay, in case he made default, was considered as a penalty. In that case, too, the Court placed some reliance upon the usage of the particular trade—a doctrine which it appears very difficult to support. [*Bayley, J.* When did the money become due which you say was forborne by the plaintiff?] Immediately on the settlement of the account, and the transfer of the estate: the plaintiff might then, but for the promissory notes, have maintained an action for the amount.

Lord TENTERDEN, C. J. The case which is now presented to the consideration of the Court, arises out of a contract for the sale of an estate, and not for the loan of money. The agreement was founded partly upon what was considered the present price of the estate, and partly upon what was considered its price if paid for at a future day. The only difficulty has been occasioned by calling the difference between these two prices *interest*; but it is our duty to look, not at the form and words, but at the substance of the transaction; and as, on the one hand, we should not pay attention to the words of the contract, if the substance of it went to defeat the provisions of the statute of the 12 *Ann.* c. 16, so, on the other hand, we ought not to rely upon the words, so as to defeat the contract, if in substance the *transaction was legal. It appears [*459 to me, that in substance this was a contract for the sale of the estate at the price of 20,800*l.*, to be paid by instalments; in that there was no illegality. The defence set up, therefore, fails, and the *postea* must be delivered to the plaintiff.

Postea to the plaintiff.

CLEMENT v. FISHER. Nov. 21.

(In Error.)

Declaration stated, that defendant, contriving, &c. did print and publish of and concerning the plaintiff a libel containing the false and scandalous matter following, without alleging that that matter was of and concerning the plaintiff, and then set out the libel, which, on the face of it, did not manifestly appear to relate to the plaintiff, and there was no innuendo to connect it with the plaintiff: Held, upon writ of error, that the count was bad.

THIS was a writ of error from the Court of Common Pleas. The first count of the declaration stated, that on, &c. at, &c. one *J. J. Stockdale*, falsely, wickedly, and maliciously did print and publish of and concerning the plaintiff, a false, scandalous, malicious, and defamatory libel, containing, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the plaintiff, that is to say, &c. It then set out the libel published by *Stockdale*, which imputed gross misconduct to the plaintiff, and then stated, "that in *Hilary* term in the 6 & 7 *G. 4*, the plaintiff below brought his action against *Stockdale* for publishing that libel, and obtained a verdict and judgment for 700*l.* damages; that the defendant well knowing the premises, but contriving, &c. to injure the plaintiff in his good name, and to cause it to be believed that the said libel was true, heretofore, to wit, on, &c. at, &c. falsely and maliciously did print and publish of and concerning the plaintiff, and of and *460] concerning the said libel, and of and concerning the said *verdict, a certain false, scandalous, malicious, and defamatory libel, containing the false, scandalous, malicious, defamatory, and libellous matter following; that is to say." It then set out the libel, upon which no question turned. The second count stated, "that the defendant further contriving, &c. on, &c. at, &c. falsely, wickedly, and maliciously did print and publish of and concerning the said plaintiff, and of and concerning the said first-mentioned libel, and of and concerning the said verdict, a certain other false, scandalous, malicious, and defamatory libel, containing, among other things, the false, scandalous, malicious, defamatory, and libellous matter following, that is to say." It then set out the libel, which purported to be a dialogue between *Stockdale* and a person named *Harriette*. There was no innuendo showing that it related to the plaintiff, nor did it appear from the subject-matter to relate to him, nor did it appear necessarily to relate to the libel in the first count; but it alleged, that it would be hard to pay for truth, and that all which *Harriette* had written was in substance true. The defendant below pleaded not guilty. At the trial the jury found a general verdict for the plaintiff, with thirty pounds damages; and judgment having been entered up for the plaintiff generally on all the counts, the record was removed into this Court by writ of error, and on a former day in this term the case was argued by

Platt for the plaintiff in error. The second count is bad, and the damages being general, the judgment must be reversed. The second count alleged, that the defendant "published of and concerning the plaintiff a libel containing the *461] false and scandalous matter following." *The libel was then set out; but it was not any where alleged that the matters in the libel were of and concerning the plaintiff, nor did it appear by the subsequent matter, nor was there any innuendo to connect the libellous matter with the plaintiff. Now, although the defendant may have published a libel concerning the plaintiff, it does not follow that the libel set out was concerning the plaintiff. That ought to appear either by averment or from the libel itself. He cited *Rex v. Marsden* (a), *The King v. Alderton* (b), *Johnson v. Aylmer* (c), *Lowfield v. Bancroft*

(a) 4 M. & S. 164.

(b) *Sayer*, 280.(c) *Cro. Jac.* 126.

(a), *The King v. Horne* (b), *Hawkes v. Hawkey* (c), *Com. Digest*, .t. Act upon the Case for Defamation, G. 7.

Manning contra. The declaration states that the defendant published libel of and concerning the plaintiff. In *Rez v. Marsden*, it was not alleged that the libel was published of and concerning the plaintiff. The count might have been bad on special demurrer, for not stating that the libellous matter was of and concerning the plaintiff, but is good after verdict, for the plaintiff could not have recovered a verdict unless it had been proved at the trial that the libel did relate to him, *Stennel v. Hogg* (d), *Skinner v. Gunton* (e).

Cur. adv. vult.

Lord TENTERDEN, C. J. We are of opinion that the second count is bad. The first count of the declaration states, that the plaintiff had brought an action against *one *Stockdale* for a libel, and obtained a verdict against him, and that the defendant contriving, &c. to injure the plaintiff, and to cause [*] it to be believed that the libel was true, published of and concerning the plaintiff a libel, which is set forth in that count. Upon that no question arises. The second count then proceeds thus: "the plaintiff further saith, that the defendant further contriving and intending as aforesaid, heretofore, to wit, on, &c. fals[e] &c. did print and publish of and concerning the plaintiff, and of and concerning the said first-mentioned libel, and of and concerning the said verdict, a certain other false, scandalous, malicious, and defamatory libel, containing, among other things, the false, scandalous, malicious, defamatory, and libellous matter following, to wit, to say," without alleging that that particular defamatory matter, which was afterwards set out, was matter of and concerning the plaintiff. Such an allegation would not have been necessary if there had been in the libel set out any thing which clearly applied to the plaintiff, or any distinct innuendo so applying the libellous matter, or if, upon the perusal of the matter set out, it had manifestly appeared that it related to the libel in respect of which the plaintiff had recovered damages. But looking at the libellous matter set out in this count, we find the initials of Mr. *Stockdale's* name, and the name of *Harriette*, and the libel alleges that it would be hard to pay for truth, and that all that which *Harriette* had written was in substance true. Now, upon reading that matter, it seems to me quite impossible to say that it has any relation to the plaintiff or to the former libel. There is no averment that the particular matter is of and concerning the plaintiff, or any innuendo showing that it related to the plaintiff, or any *thing [*] in the matter itself manifestly showing that it does relate to him. We are, therefore, of opinion, that the count is not good. The consequence is, that the judgment must be reversed, and a venire de novo awarded.

Judgment of the Court of Common Pleas reversed, and a venire de novo awarded.

(a) *Str.* 934.

(b) *Cowp.* 682.

(c) 8 *East*, 427.

(d) 1 *Saund.* 226.

(e) 1 *Saund.* 228, c.

REX v. MARY SOMERTON. Nov. 21.

An indictment charged that *A. B.*, on, &c. being the servant of *J. H.*, on the same day, &c. one gold ring, &c. then and there being in the possession of *J. H.*, and being goods and chattels, feloniously did steal: Held, that the fair import of the charge was that *A. B.* was the servant of *J. H.* at the time when the theft was committed, and the indictment therefore warranted judgment of transportation for fourteen years.

INDICTMENT charged that *Mary Somerton*, late of the parish of *Purton* in the county of *Somerset*, on the 1st of *March* 1827, at the parish aforesaid

the said county, being then and there servant to one *Joseph Hellier*, on the same day and in the year aforesaid, with force and arms at, &c. one ring, &c. then and there belonging to and in the possession of the said *Joseph Hellier*, and then and there being the goods and chattels of the said *Joseph Hellier*, then and there from the possession of the said *Joseph Hellier*, feloniously did steal and take, against the peace, &c. The defendant was found guilty at the Summer assizes for the county of *Somerset*, and was adjudged to be transported beyond the seas for the term of fourteen years. The record having been removed into this Court by writ of error, the errors assigned were, that the indictment did not warrant the judgment, inasmuch as it was not sufficiently alleged or shown, that the prisoner was the servant of the said *Joseph Hellier*, or that the prisoner was the servant of the said *Joseph Hellier* at the time of the committing of the larceny. The case was now argued by

*464] *Bompas*, Serjt., for the prisoner. The judgment of transportation for fourteen years is not warranted by the indictment, unless the prisoner was the servant of *Hellier* at the time when she committed the theft. First, it is not sufficiently averred that the prisoner was the servant of *Hellier*. The charge in the indictment must be direct and positive, *Rez v. Crouchst* (a), *Rez v. Whitehead* (b). Here there is no direct and positive charge that the prisoner was the servant of *Hellier*. The allegation is, that "she being the servant of *Hellier* did steal." That is not sufficient. Where the participle is connected with the verb it is an averment of a fact; but here the participle is unconnected with the verb which follows; *Long's case* (c). [Lord Tenterden, C. J. *Mary Somerton* is the nominative case to the verb *steal*, and the words "being the servant of *Hellier*," are a description of the person of *Mary Somerton*. That is a sufficient allegation that she bore that character.] Assuming that to be so, it is not sufficiently averred that the prisoner was the servant of *Hellier* at the time when she stole the goods. The allegation is, that she, on the 1st of *March* 1827, being servant, on the same day, and in the year aforesaid, did steal. In *William's case* (d) the indictment charged, that he, on the 18th of *January* aforesaid, assaulted *A. Porter*, with intent wilfully and maliciously to spoil her garments; and that he, on the said 18th day of *January*, did maliciously tear her clothes. The indictment was held to be bad, because, *465] for any thing that appeared to the contrary, the assault might have been on one part of the day and the tearing of the clothes on another. That case is precisely in point. Here the defendant may have been the servant of *Hellier* in the early part of the day, but not his servant at the time when the theft was committed. When time becomes material, it ought to be specially averred; and as it is not averred here, that the prisoner was the servant of *Hellier* at the time when the theft was committed, the Court ought not to intend it, *Francis's case* (e), *Keat's case* (f); for the matter of an indictment ought to be full, express, and certain: it is not to be maintained by argument or intendment; *Vaux's case* (g), 2 *Hawkins P. C. c. 25*, s. 60, *Rez v. Cheere* (h), *Rez v. Stevens* (i).

Jeremy contrā. The indictment is framed upon the 3 *G. 4*, c. 38, s. 2. The statute does not alter the character of the offence, but only increases the punishment. It is necessary to show that the party at the time of committing the theft was in the capacity of a servant, in order to apportion the punishment. The rule laid down as to the precision and certainty required in indictments, applies to distinct substantive acts which either per se or united constitute the crime. In *Hawkins*, *P. C. b. 2*, c. 25, s. 61, it is stated to have been adjudged, "that where an indictment finds that *J. S. existens* of such or such a degree or trade, &c. as brings him within the purview of the law whereon the indictment

(a) 2 *Ld. Raym.* 1363.(c) 5 *Coke*, 120.(e) 2 *Str.* 1015.(b) *Salk.* 371. 2 *Hawk. P. C. b. 2*, c. 25, s. 61.(d) *Leach's C. L.* 4th edit. 529, and 1 *East, P. C.* 424.(f) 5 *Mod.* 288. *Skin.* 666.(g) 4 *Co.* 44.(h) 4 *B. & C.* 902.(i) 5 *B. & C.* 246.

is founded, committed such a fact, it shall be intended that he was of degree, &c. at the time of *the fact, without any express allegation to that purpose, because that is the most natural construction of the participle *existens* going before the verb to which it is the nominative case." in *Ward's* case (a) it was expressly decided, that in a criminal information the participle applying to the person of the offender, in the same sentence with preceding the charge, shall be referred to the time when the offence is stated to have been committed, if it is not expressly referred to any particular time.

LORD TENTERDEN, C. J. It is impossible that any person who reads an indictment can doubt that it imports that *Mary Somerton* was the servant of *Hellier* when she stole the property. I agree that we cannot by intending an argument supply any thing which goes to constitute the guilt of the prisoner which may warrant a specific punishment in any particular case; but we must read and understand the language used in indictments as the rest of mankind would understand the same language if it were used in other instruments. In the exception of those cases where the law requires technical terms to be used, as in the case of murder. If we were to hold that the allegation that on the same day, the prisoner, being the servant of *J. Hellier*, did on the same day steal the goods of *J. Hellier*, did not import that she stole his goods at the time when he was his servant, we should expose ourselves to that reproof expressed by the learned and very humane Judge, viz. that it is a disgrace to the law, that persons should be allowed to escape by nice *and captious objections of form. The judgment must be affirmed.

BAYLEY, J. The case of *Rez v. Ward* (b) is in point, except that in that case there is a date given to the time when the prisoner was the servant of *Hellier*, which was unnecessary. I am of opinion that we are bound to consider the whole taken together, as an allegation that the defendant was servant at the time when the offence was committed.

LITTTLEDALE, J. It seems to me that the allegation is sufficient. In *Dig.*, tit. *Indictment*, G. 5, under the head "what is sufficient certainty of fact," it is said to be sufficient if the indictment allege "quod A. existens such an age, &c. fecit, without saying *tunc existens*; for where the fact relates to the person, and is not collateral, it shall have a general construction. The question in this case arises from the introduction of the words "on the same day and in the year aforesaid." But it seems to me, that this, which is an unnecessary matter, does not alter the sense, and that the judgment ought to be affirmed.

Judgment affirmed.

(a) 2 *Ld. Raym.* 1461. *Str.* 747.

(b) *Ibid.*

*ANN WILLIAMS v. GERMAINE the Elder.

Same v. GERMAINE the Younger. Nov. 21.

Where a bill of exchange, payable *after sight*, having been presented for acceptance, and duly protested, was eight days afterwards accepted by a third person for the honour of the drawer, and when at maturity, according to that acceptance, was presented for payment both to the drawee and the acceptor for honour: Held, in actions against the latter and the drawer, that these presentments for payment were made at a proper time, and that a protest for non-payment by the drawee was unnecessary. But it was held necessary that presentment to the drawee for payment should be averred in the declaration; and for want of such averment judgment was arrested.

THE former of these cases was an action by the indorsee against the acceptor of a bill of exchange for the honour of the drawer. In the first count

declaration it was stated, that *Germaine* the younger, on the 29th of *April* 1826, in parts beyond the seas, at, &c. drew a bill of exchange for 71*l.* 11*s.* 9*d.* upon Messrs. *Pugh and Redman, London*, payable, thirty days after sight, to the order of one *Henry Williams*, who indorsed it to the plaintiff; that on the 20th of *July*, in the same year, at, &c. the bill was presented to *Pugh and Redman* for acceptance, who then and there had sight of it, but did not, nor would then, or at any time before or afterwards, accept the same, or pay the sum of money therein mentioned, but wholly refused so to do. That the bill was duly protested for non-acceptance, whereof the defendant, on, &c. had notice, and thereupon the defendant, on, &c. at, &c. in order to prevent the said bill from being sent back and returned to the drawer, did, under the said protest, accept the said bill, and make it payable at No. 6 *Union Court, Old Broad Street*, and delivered the bill so accepted and indorsed to the plaintiff. That the bill, when it became due, to wit, on the 22d of *August*, was duly shown and presented at the place where it was made payable by the said acceptance, and payment of the sum of money therein mentioned, was duly demanded *469] according to the tenor and *effect of the bill, and of the acceptance and indorsement; but that neither the defendant, nor any person on account of the defendant, or the drawer, did, or would, pay the bill, &c. The second count was similar, with the exception that defendant's acceptance was stated as a general acceptance under protest, and not making the bill payable at a particular place. The third count stated an acceptance by defendant, payable at 6 *Union Court*, for the honour of the drawer, without averring a previous presentment to the drawees. The fourth count varied from the third, as the second from the first. Plea, the general issue. At the trial before Lord *Tenterden*, C. J., at the *Guildhall* sittings after *Michaelmas* term 1826, it appeared that the bill was drawn abroad by *Germaine* the younger, and indorsed by the payee to the plaintiff. On the 12th of *July* it was presented to the drawees for acceptance, and protested for non-acceptance. On the 20th of the same month *Germaine* the elder accepted the bill for the honour of the drawer, and this appeared on the face of the bill. On the 22d of *August*, when, according to the acceptance, the bill became due, it was presented for payment to the drawees, and to the acceptor for honour, and dishonoured and protested for non-payment. Notice of the non-acceptance and subsequent dishonour of the bill when presented for payment was not given to the drawer; but his residence being unknown, it was conceded that the holder was not bound to give it. *Parke*, for the defendant, objected that it was incumbent on the plaintiff to prove a due presentment for payment to the drawees, and protest for non-payment, before the acceptor for honour *470] could be called upon to pay, *Hoare v. Cazenove* (a), and that the *presentment to the drawees was not at the right time, for that the bill being made payable at a certain time after sight, was at maturity as against the drawees on the 14th of *August*, but it was not presented to them for payment until the 22d.

The second action was against the drawer. In this case the evidence was the same, and the same objection was taken to the plaintiff's right to recover. The Lord Chief Justice overruled the objection, and the plaintiff had a verdict in each case, the defendant having leave to move to enter a nonsuit. *Parke* in *Hilary* term 1827 renewed his objection to the plaintiff's right to recover, and contended that the case of *Hoare v. Cazenove* was a direct authority in his favour, unless it should be held that there was some sound distinction between a bill payable after sight, and one payable after date, or between actions against a drawer and indorser. The holder, by neglecting to present the bill to the drawees for payment at the time when it was due, according to the time when they had sight of it, gave time to them without the assent of the acceptor for honour, or of the drawer, who were thereby discharged.

Lord TENTERDEN, C. J. I am of opinion that there is not any sufficient ground for the motion, either on behalf of the drawer or the acceptor. This is a bill payable thirty days after sight. On the 12th of July it was presented for acceptance, and that having been refused, it was duly protested; but the drawer's address not being known, notice could not be given. The bill was then taken to *Germaine* the elder, and on the 20th of July he accepted for the honour of the drawer. Thirty days elapsed, and then, the usual discount having been allowed, it was presented to the original drawees, and to the acceptor for honour, but both refused payment. The first question is, Whether the drawer is liable under these circumstances? It is necessary to decide on the effect of an acceptance for honour, where no presentment for payment is made to the drawees. Here presentment was made to the drawer at the time when the bill became due, according to the acceptance for honour, and I think that sufficed. This circumstance distinguishes the present case from *Hoare v. Cazenove*. The bill in that case was payable at a certain period of time, and no presentment for payment was ever made to the drawees. The decision, therefore, cannot be cited as an authority for saying that a bill should be presented for payment to the drawees, and to the acceptor for honour, at two different times. Such a rule might be prejudicial to the acceptor for honour, and in the present case it has compelled the holder to present the bill to the drawee eight days before the expiration of the time allowed to the actual acceptor for payment.

Parke then moved in arrest of judgment in each case, on the ground that the declaration did not aver a presentment for payment to the drawee and protest for non-payment, but only to the acceptor for honour; and upon this point a rule nisi was granted, against which, on a former day in this term,

Campbell showed cause, first, in the action against *Germaine* the elder, that the engagement of an acceptor for honour is absolute, not conditional; it was, therefore, unnecessary to present the bill for payment to the drawee. *Secondly, supposing that to be necessary, still the declaration is sufficient after a verdict. This case is distinguishable from that of *Hoare v. Cazenove*, the bill being made payable after sight, whereas in that case it was payable after a certain date. If the two cases had been precisely similar, it would have been difficult to overrule that authority, although the reasons given in support of the decision are not satisfactory. Ex vi termini, an acceptor is in a different situation from the drawer or indorser; but the acceptor for honour is placed in the same situation as those parties, according to the decision referred to, which, indeed, proceeds to proceed on authority, and not on the convenience of the thing; and, looking at the authorities cited, they do not appear to warrant the judgment there. *Beaves Lex Merc. tit. Bills of Exchange, s. 43*, is cited, which is an authority for saying that the obligation of the acceptor for honour is absolute, not conditional (a). Then *Lewin v. Brunetti* (b), *Malyne*, p. 273, and *Contrat de Change*, part 1, c. 5, s. 137, are referred to, as proving the reverse. The first of these was an action by the first indorser, for whom the bill had been paid, against the acceptor for honour. The case was set out on the record. [*Bayley, J.* Lord *Ellenborough*, commenting on the custom set out, says—"Thus two protests, i. e. for non-payment as well as non-acceptance, were in this case held necessary by the custom of merchants."] No point was made about the second presentment or protest. It is his Lordship's observation, that no objection was made to the custom as stated. *no objection could be made to it on a writ of error. Then, as to the passages quoted from *Malyne* (c), it is plain, taking the whole together, that he is speaking of that which is necessary in order to give the payee

(a) But see the 48th section, which appears to explain and qualify the 43d in the manner suggested by Lord *Ellenborough* in *Hoare v. Cazenove*.

(b) *Lutw.* 896.

(c) Page 273.

honour a remedy over, and not of that which is necessary to make the acceptor for honour liable to the indorsee of the bill (a). Nor is it by any means clear, that *Pothier*, in the passage referred to, *Contrat de Change*, part 1, c. 5, art. 2, is discussing the exact point now before the Court (b); it would rather seem that he is pointing out the steps necessary to make third persons liable, after non-payment by an acceptor for honour. The reason of the thing certainly is not in favour of the objection. The holder of the bill, out of indulgence to the drawer, allows a third person to accept for his honour; it would be hard if, on that account, he were bound to take the extra trouble of presenting it a second time to the drawee. Besides, if that were so, presentment must be made, both to the drawee and the acceptor for honour, on the day when the bill becomes due; but this would be impossible if the parties lived at any considerable distance from each other. Secondly, if a second presentment to the drawee were necessary, still the declaration is sufficient after verdict. It states that the bill was *duly* presented, and payment *duly* demanded; but that could not be true, unless it were presented both to the drawee and the acceptor for honour, if such presentment be necessary. In *Solomons v. Stavelly* (c) it was held, that the omission of an allegation of protest was only matter of form, and could

*474] not be taken advantage of on general demurrer. If, without proof of such presentment at the trial, the plaintiff was not entitled to recover, then, after verdict in his favour, it must be presumed (as was the fact) that such proof was given; and then the omission in the declaration is aided, according to the cases cited in 1 *Wm. Saund.* 228, n. (1). As to the other case, there is no real difference between the action against the drawer and against the acceptor for his honour.

Parke contra. The only question for the Court is, whether *Hoare v. Cazenove* were rightly decided or not; and it is very important to adhere to decided cases on questions of commercial law, for subsequent contracts are made on the faith of them. The only authority cited on the other side, as at variance with that decision, is *Beaves Lex Merc.*; but that was noticed by Lord *Ellenborough*, and fully answered; and he assigns very sufficient reasons for the judgment then pronounced by the Court. Then it was said that *Hoare v. Cazenove* is not supported by the case of *Brunetti v. Lewin*; but the custom there set out on the record agrees with that which is now contended for, and it must be taken to have been proved as laid. A difficulty was also suggested, arising out of the supposed necessity of presenting to the drawee and acceptor for honour on the same day; but there is no authority for saying that the presentment to both must be on the same day; and the law always allows a reasonable time for the performance of that which it requires to be done. [Bayley, J. In *Hoare v. Cazenove* the acceptance was for the honour of the indorser.] Every indorser is in effect a new drawer; and although that was a bill payable after date, and this *is payable after sight, the principle

*475] of the former decision, viz. that the undertaking of the acceptor for honour is conditional only, is equally applicable to both, and cannot be affected by the mode of ascertaining the time of payment. The case, *Rushion v. Aspinall* (d), disposes of the next point that was made; and the argument as to the effect of the averment, that the bill was *duly presented* to the defendant, is answered by *Everard v. Paterson* (e), where, in an action on a bond, conditioned for the performance of an award, so as it was made *under the hands* of the arbitrators, it was averred that the arbitrators did *in due manner duly* make their award in writing; and on error this was held insufficient. In the other action against the drawer, *Pothier*, part 1, c. 5, s. 137, is a clear authority for the defendant, even supposing him to be treating of that which is necessary to charge third persons, as has been suggested.

Cur. adv. vult.

(a) See *Vandewall v. Tyrrell*, 1 *M. & M.* 87.

(b) See part 1 c. 4, art. 5.

(c) *Doug.* 684, n. 141.

(d) *Doug.* 680.

(e) *Marsh.* 304.

The judgment of the Court was now delivered by Lord TENTERDEN, C. J. There were two cases argued yesterday of *Williams and Germaine the elder*, and *Williams and Germaine the younger*; *Germaine the elder* being the acceptor of a bill of exchange for the honour of the drawer and *Germaine the younger* being the drawer of the bill. The objection taken in arrest of judgment was that the declaration did not allege that when the bill arrived at maturity, that is, at the expiration of the time after it was exhibited to the drawee, it was ever presented to that drawee for payment, or proof for non-payment. In support of the objection, counsel relied on a case in 16 *East, Hoare v. Cazenove*. That case underwent grave consideration by this Court, which, at that time, was filled by very learned Judges, the assistance of one of whom we have the satisfaction of having at the present moment. In the course of the argument much was addressed to us to show that that judgment ought not to have been given. If we could have been convinced that a judgment given even by persons of the description to which we have alluded, was founded on a mistake of the law, it would have been our duty to have decided contrary to it; but we ought not to overrule a sole decision of the Court unless we perfectly concur in saying that such judgment was founded on a mistake. It is of great importance in almost every case, but particularly in mercantile law, that a rule once laid down and firmly established and continued to be acted upon for many years, should not be changed unless it appears clearly to have been founded upon wrong principles. If, however, the matter were new, I am by no means prepared in my own mind to say I should not have come to the same decision, although I should have paused before I pronounced a judicial opinion on the subject, longer than having that authority before me, I think it necessary to do. Whatever is requisite to enable a person who has accepted a bill for the honour of another to call upon that person to repay him, and to enable him to recover against such person, may also be reasonably held necessary to enable another party to recover against such an acceptor for honour. For if you could recover against an acceptor for honour by proof of less than will enable him to recover against the party for whom he accepts, there would be an inconsistency; *it might be said with some reason, that if the acceptor for honour chose to pay without requiring all the proof from the holder which would be necessary for him to recover against the drawer, the payment would be made at his own wrong, and he would not be entitled to recover over. It seems to me therefore, that the same rule as to proof which prevails in the case of an acceptor for honour, in suing a party for whose honour he accepts, must also be observed when the holder of a bill sues the person so accepting. The result as it seems to me, of the decision to which I have alluded is, that an acceptor for honour is to be considered not as absolutely such, but in the nature of a conditional acceptance. It is equivalent to saying to the holder of the bill, keep this bill, don't return it, and when the time arrives at which it ought to be paid if it be not paid by the party on whom it was originally drawn, come to me, and you shall have the money. This appears to me to be a very sensible interpretation of the nature of acceptances for honour, where the parties say nothing upon the subject. In an action by the holder against the drawer of the bill, be sure he has a right to say, if you keep it till its time has run out, you ought to have presented it to the person on whom I drew it, and have seen whether he presentment he would pay; whereas, you forbore to do so, and have relied on an acceptance by some person for my honour made without my authority. We think that we are bound by authority, and I am inclined to say by reason, to confirm the decision in *Hoare v. Cazenove*; consequently the rule for arresting the judgment in this case must be made absolute.

Rule for arresting judgment made absolute.

•WHITTLE, Assignee of the late Sheriff of Essex, v. OLDAKER and two others. Nov. 21.

When the sheriff is raled to bring in the body, proceedings cannot be taken on the bail-bond until that rule has expired; and if bail above are justified before that time, the bail below may, in an action on the bond, plead comperuit ad diem, and that plea is satisfied by the production of the recognizance roll, containing an entry of the defendant's appearance generally.

Such roll may be made up at any time before the day given for producing it.

THE plaintiff issued a latitat into Essex, against the defendant *Oldaker*, returnable on *Monday* next after fifteen days of *St. Hilary*, the 29th of *January*. *Oldaker* was arrested, and gave bail to the sheriff. On the 5th of *February* bail above was put in. On the 6th an exception was entered, and notice of it given, and the sheriff was ruled to bring in the body. On the 8th notice of justification of the bail before put in was given for the 10th. On the same day a second notice was given for the 12th, and on that day the bail justified, and a rule for the allowance was duly served. On the morning of that day an assignment of the bail-bond was taken, and process issued in this action. A declaration on the bail-bond was delivered on the tenth day of *Easter* term. The defendants pleaded, inter alia, comperuit ad diem; plaintiff replied nul tiel record, and gave a rule to produce the record on *Monday* next after fifteen days of the *Holy Trinity*, when the defendants produced a recognizance roll, wherein, after setting out a bill supposed to have been exhibited by the plaintiff against *Oldaker*, on *Tuesday* next after eight days of *St. Hilary*, the appearance of the defendant was entered generally, and not of any particular day. This roll was not docketed or filed until the 23d of *June*, when it was docketed and filed as of *Hilary* term. Upon the production of this roll, judgment was entered for the

*479] defendants, that they had produced the record *according to the rule given. In the same term a rule nisi was obtained to set aside that judgment, and enter for the plaintiff judgment that the defendants had failed in producing the record; or that the appearance of the defendant *Oldaker* should be entered on the roll according to the fact, on the day when it took place.

Campbell and *Rowe* showed cause, and contended that by ruling the sheriff to bring in the body, the plaintiff had given time for justifying bail until the expiration of that rule; for that the sheriff would have been protected had the bail justified on the 12th of *February*. No attachment could have issued against him until that time, and, therefore, he was not damnified by the circumstance of bail not being justified on an earlier day. His assignee could not be in a better situation, and, therefore, had no right to sue until after the expiration of the body rule.

Marryat and *Reader*, contra, contended that although the sheriff could not have been attached until the body rule expired, yet the party was bound to put in and justify bail within four days after exception, *Bond v. Evans* (a). The defendants had no right to make up and bring in a roll not warranted by the real facts of the case; and unless the Court order the record to be amended according to the truth, the defendants will be allowed to defeat the action on the bail-bond by means of a fraud. Such an application was granted by the Court of Common Pleas in *Austen v. Fenton* (b).

Cur. adv. vult.

*480] *The judgment of the Court was now delivered by
BAYLEY, J. (c) The question in this case was, Whether the record on the recognizance roll had been made up in a manner warranted by the practice of the Court? If there had not been any rule to bring in the body, the

(a) 4 B. & C. 864.

(b) 1 Taunt. 23.

(c) Lord Tentarden, C. J., was not present during the argument.

time for justifying bail would have expired on the 10th of *February*. But upon an examination of the authorities we think it clear that, by giving the body the time for justifying bail was extended, and that the parties had until the 10th for that purpose, and having then done it, they were entitled to enter on recognizance roll, *comperuit ad diem*, or to enter an appearance generally, which must be taken to be an appearance according to the exigency of the writ. *Wright v. Walker* (a) it was expressly decided that if bail are put in and justified according to the rule upon the sheriff, the plaintiff cannot proceed upon bail-bond. The affidavits filed in *Blachford v. Hawkins* (b) raised the same question, and by them the case was put upon the same footing, although, according to the report, it proceeded upon the ground that the plaintiff, by ruling the sheriff to bring in the body, had shown an election to proceed against him, and could not afterwards take an assignment of the bail-bond. (c) The case *Bond v. Evans* (d) was mainly relied on by the plaintiff. It is certainly stated in the marginal note, that bail must justify within four *days after [an] exception, although the body rule has not expired. But by the case itself it does not appear that any such point was decided, nor did the affidavits raise the question, for they did not state that the sheriff had been ruled to bring in the body. Upon these authorities we are of opinion that the plea in this case was established by the record produced, and that the record was rightly maintained. And it is very important to country bail that this should be the rule of practice; for the ordinary course is, that the party rules the sheriff, and gives notice to the bail, and it would lead to much inconvenience if proceedings could be taken against them before that rule expires.

Rule discharged.

(a) 3 B. & P. 564.

(b) 1 Bing. 181.

(c) It was, at one time, the practice in K. B., that if the plaintiff ruled the sheriff to bring in the body, he could not afterwards take an assignment of the bail-bond; he was considered as having made his election to proceed against the sheriff. *Imp. Pr.* edit. 1788. 127. *Tidd's Pr.* 2d edit. 154.

(d) 4 B. & C. 864.

ELIZABETH HOWES v. BALL. Nov. 21.

A. agreed to give B., a coachmaker, 100*l.* for a coach, and to pay for the same by four bills of 25*l.* each; and further, that B. should have a claim upon the coach until the debt was duly paid. The bills were given, but the first was not paid when it became due. B. died; his administratrix sent the coach to B. to have the wheels repaired; B. detained it, on the ground that the bills had not been paid: Held, in an action of trover brought by the administratrix, that the agreement operated as a mere licence from A. to B. to take the coach if the bills were not paid; that it was not transferable, and that the coach having vested in the administratrix by operation of law, the defendant was not justified in detaining it.

TROVER for a stage-coach. Plea, not guilty. At the trial before Lord Tenterden, C. J., at the *London* sittings after *Hilary* term 1827, it appeared, that in the month of *April* 1826, the plaintiff's husband (since deceased) bought a coach in question of the defendant, and the following agreement was signed between them both: "I, *John Howes*, do hereby agree to give *Thomas Ball* the sum of 100*l.* for a new stage-coach; in payment of which, to give *Thomas Ball* four bills of 25*l.* each; and, *further, I *John Howes* do agree that *Thomas Ball* do have and hold a claim upon the coach until the debt be duly paid." The four bills were given at different dates, the first of which became due in the month of *October* 1826, and was dishonoured. *John Howes* was the

dead; but the plaintiff had taken out administration to him, and continued to carry on the business of a stage-coach keeper. In November 1826, some of the wheels belonging to the coach being in want of repair, were left at *Ball's* shop, and on the 10th of November those repairs being completed, the plaintiff's servant drove the coach to the shop door in order to have those wheels put on. The defendant desired him to drive into the yard, and take his horses from the coach, saying it required some other repairs, which was not true. The servant accordingly drove into the yard, and took off his horses, and then the defendant said, that he meant to keep the coach until the four bills, of which one only was then due, were paid, and he chained the wheels together in order to prevent him from taking the coach away. The Lord Chief Justice thought that the defendant was not justified in thus taking possession of the coach, and directed a verdict for the plaintiff, but gave the defendant leave to move to enter a nonsuit. A rule nisi for that purpose was granted in *Easter* term; against which,

The *Attorney-General* and *R. V. Richards* on a former day in this term showed cause. There are two questions; first, as to the meaning of the agreement; secondly, whether the defendant could resume possession of the coach by a trick, even if the agreement gave him any right at all to the possession? The coach was paid for by bills, and as a lien is inconsistent with credit, as soon *483] as the bills were given, the defendant would have been bound to give up possession of the coach, unless that were provided for by some special agreement. If the agreement gave him a right to keep the coach until the bills were paid, he was then in the same situation as a person who has contracted to sell an article for ready money; and in either case, if possession is parted with, the lien is at an end. The agreement is, moreover, quite uncertain; it does not specify whether the defendant is to retain the coach until the bill overdue is paid, and so to resume possession from time to time if the others are dishonoured; or, whether, having once obtained it, he is to keep possession until all are paid. Secondly, the defendant had no right to obtain possession of the coach by means of a fraudulent representation made to the plaintiff's servant, *Madden v. Kempster* (a).

Gurney and Chitty, contra. It is impossible to suppose that the parties intended to make an agreement that *Ball* should never part with the possession of the coach until all the bills had been paid, for then there could have been no motive for giving bills at all. They must have intended that he should part with the coach, but have a right to resume possession in the event of any one of the bills being dishonoured, and retaining it until that should be paid. This is a reasonable construction of the agreement, and the Court will be disposed to put any reasonable construction upon that instrument rather than that it shall be altogether unavailing. Then as to the mode of obtaining possession, it was *484] held in *Whitehead v. Vaughan* (b), that the lien of a policy broker revived upon his regaining possession of a policy, although that was effected by means of a trick.

Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court, and after stating the facts of the case, proceeded as follows:—

Taking into consideration the agreement, the fact of the delivery of the bills by *Howes* to *Ball*, and of the delivery of the coach by *Ball* to *Howes* at the same time, we think the transaction amounted to a sale of the coach, so as to transfer the property in it from *Ball* to *Howes*. That being so, the question is, Whether, after such a transfer of the property, the seller can have any valid claim on the property so transferred? Hypothecation is not allowed by the law of *England*, although in some parts of the Continent, not many years ago, it was allowed. The utmost effect, therefore, that can be given to this instrument is, to construe it as a licence given by *Howes* to *Ball* to resume possession of

(a) 1 *Campb.* 12.

(b) *Cook's Bankrupt Laws*, 547.

and retain the coach, in case *Hovces* did not pay the bills. Construing it as a licence, it is a personal licence, not available against any person to whom *Hovces* might transfer the property. It could not, therefore, be available against his administrator, to whom the property came by operation of law. If *Hovces* had lived, and the coach, on non-payment of the bills, had been taken out of his possession, and he had brought an action, the defendant might, in bar of that, have relied on the instrument. But as the licence was a mere personal *licence, not transferable, supposing the property had been transferred [*485 by the act of the party or by operation of law, we are of opinion that the defendant was not entitled to take and detain the coach. The rule for entering a nonsuit must, therefore, be discharged.

Rule discharged.

BURGESS v. SWAYNE. Nov. 23.

The defendant, having obtained a judge's order for delivery of particulars of plaintiff's demand, and for staying proceedings until they were delivered, cannot sign judgment of non pros against the plaintiff for not declaring.

THIS was a case of bailable process, returnable the 7th of *March* 1827. On the 2d of *May* the defendant obtained a Judge's order for particulars of the plaintiff's demand, and for a stay of proceedings until the particulars were delivered. No particulars having been delivered, the defendant, on the 8th of *November*, signed judgment of non pros for want of a declaration. A rule nisi having been obtained for setting aside that judgment for irregularity,

Archbold showed cause, and contended, that a defendant ought to be permitted to sign judgment after such a lapse of time, for otherwise it would be in the power of a plaintiff to suspend the case ad infinitum.

Lord TENTERDEN, C. J. The defendant might have obtained a Judge's order for the delivery of particulars within a given time; and then, if the particulars were not delivered within the time specified, he might have signed judgment. In this case, the defendant, by the order obtained by him, suspended the proceedings until *the particulars were delivered, and then, before any such particulars had [*486 been delivered, he signed judgment of non pros against the plaintiff for not proceeding.

Rule absolute.

REEVES v. SLATER. Nov. 23.

Where *A. B.* executed a warrant of attorney in the name of *C. B.*, and judgment was entered up, and a *fi. fa.* issued against him by that name: Held, that this was right, and that the sheriff was bound to execute it.

CASE against the defendant, late sheriff of *Sussex*, for a false return to a writ of *fi. fa.* The declaration stated that in *Easter* term, 6 *G. 4.* plaintiff obtained a judgment in *K. B.* against *John Stone Lundie* for a debt of 200*l.*, and 3*l.* 5*s.* damages and costs; that on the 16th of *May*, 6 *G. 4.* plaintiff issued a *fi. fa.*, directed to the then sheriff of *Sussex*, directing him to levy the said debt and

damages on the goods of *John Stone Lundie*; that the writ was indorsed to levy 17*l.* 17*s.*, and delivered to defendant, then sheriff of *Sussex*, who, by virtue of it, seized divers goods of *John Stone Lundie*, which he ought to have sold under the writ, but neglected to do so, and falsely returned nulla bona. Plea, the general issue, not guilty. At the trial before *Littledale*, J., at the *Sussex* Lent assizes 1827, it appeared that the judgment mentioned in the declaration was entered up on a warrant of attorney, filled up in the name of *John Stone Lundie*, and signed J. S. *Lundie*. A writ of fi. fa. was issued as alleged, commanding the sheriff to levy on the goods of *John Stone Lundie*, upon which a warrant was made out, and delivered to an officer, who, by virtue of it, seized goods and chattels to the value of the sum indorsed upon the writ, the property of the person who executed the warrant of attorney, but whose right name was *proved to be *John Stowe Lundie*. After the seizure was *487] made, the officer received notice that the goods were not the property of *Lundie*, but had, before his marriage, been conveyed to trustees for his wife. The sheriff, after some enquiry, believing this to be the fact, asked the plaintiff to indemnify him, who refused to do so, and thereupon the sheriff directed the officer to relinquish possession, and being afterwards ruled to return the writ, he returned nulla bona. The conveyance to trustees appeared not to be a bona fide transaction, and the defendant was compelled to rely on the fact that the party whose goods were seized by the officer was not *John Stone Lundie*, that there was no such person, and, therefore, the return of the sheriff that *John Stone Lundie* had no goods in his bailiwick was true. To this it was answered, that as *John Stowe Lundie* had executed the warrant of attorney in the name of J. S. *Lundie*, that must be taken to mean *John Stone Lundie*, the name inserted in the body of the instrument, and that he was estopped from afterwards disputing that he was so called; the sheriff was, therefore, bound to sell his goods when seized under the writ. The learned Judge was of that opinion, and directed a verdict for the plaintiff, but he gave the defendant leave to move to enter a nonsuit. A rule nisi for that purpose was granted in last *Easter* term, and *Morgan v. Brydges* (a), *Cole v. Hindson* (b), *Shadgett v. Clipson* (c) were cited.

Marryat, *Gurney*, and *Comyn*, now showed cause. This case is very distinguishable from those which were *cited on moving for the rule. In *488] *Morgan v. Brydges* a writ was sued out in order to arrest a person named *Maurice*, but who had told the plaintiff his name was *Godfrey*. In the writ he was called *Godfrey*, and it was held, that the sheriff, having arrested him, was not bound to keep him in custody under that writ. But it was said by the Court, that the plaintiff was himself in fault in not ascertaining the real name of his debtor, and putting that in the writ. Here the creditor had no option; the warrant of attorney and the judgment were in the name of *John Stone Lundie*, and it was necessary to make the writ agree with the judgment. Nor could the defendant in this case take any objection to the misnomer; he was estopped, *Gould v. Barnes* (d); and the sheriff by executing the writ would have incurred only the common responsibility of proving the identity of the party. And this distinguishes the present case from *Cole v. Hindson*, where it was held that under a distringas against C. B. the seizure of the goods of A. B. could not be justified, although it was averred that A. B. and C. B. were the same person; but it was then said that if A. B. had appeared, and omitted to plead the misnomer in abatement, he would have been estopped. *Shadgett v. Clipson* was a case on mesne process, and the party wrongly named was not estopped.

Taddy, Serjt., and *Bolland* contra. This is an action for a false return of nulla bona to a writ of fi. fa. issued against *John Stone Lundie*. The return is literally

(a) 2 *Stark. N. P. C.* 314. 1 *B. & A.* 647.

(b) 3 *East*, 328.

(c) 6 *T. R.* 234.

(d) 3 *Tams.* 504.

true, for no person of that name had any goods within the defendant's bailiwick. But it is said that the writ was, *in fact, against the goods of *John Stowe Lundie*, and that he had goods which the sheriff ought to have seized * [48] and sold. It is true, that *John Stowe Lundie* was the person intended in the writ; and the question is, whether the sheriff was bound to take notice of that and seize his goods. The case of *Morgan v. Brydges* is directly in point for the defendant: in that case the sheriff would have been justified in detaining the party whom he arrested by a wrong name; but the Court held that he was not bound so to do. So here, the party might indeed be estopped from saying that his name was not *John Stone Lundie*; and yet the sheriff might not be bound to take upon himself the risk and responsibility of executing such a writ, and the difference was relied upon by Lord *Ellenborough* in the case cited. It has been attempted to distinguish that case from the present, because the Court there said that the plaintiff himself was in fault. The same observation applies here: the plaintiff should have taken care that the warrant of attorney was filled up with the proper name of the debtor, and then no difficulty could have arisen. In *Cole v. Hindson* it was said, that the misnomer would not be cured unless the party appeared and omitted pleading in abatement: here, he had no opportunity of doing so.

Lord TENTERDEN, C. J. There is a very plain distinction between mesne and final process, and I think it is decisive of the present question. The facts of the case are very strong against the sheriff. He took possession, under the writ, of goods now admitted to have been the goods of the party, kept them for eighteen days, and then refused to sell on account of his having *received [48] a notice that they belonged to a third person. Nothing was at that time said about any error in the process. If the sheriff had entertained any doubt upon that point, he should have caused the judgment to be examined, and he would have found that it corresponded with the writ, and that the party was estopped from disputing the accuracy of his description. The party himself, having suffered judgment to be entered up against him by the name of *John Stone Lundie*, it was not for the sheriff to render that nugatory by refusing to execute the fieri facias, and he must be liable for the consequences of having done so.

BAYLEY, J. I have no doubt in this case. It is clear that the party could not have taken the objection now set up, but it is said that the sheriff may. There is, however, no reason why he should be allowed to do so when the party is clearly estopped by the judgment, and the sheriff incurs no more responsibility than in any other case; viz. the necessity of proving that the party whose goods are seized was the party in the suit in which the writ issued.

Rule discharged.

*LEIGH and Another v. TAYLOR. Nov. 24. [49]

An overseer has not, by virtue of his office, any authority to borrow money; and, in an action against a surety on a bond conditioned for the overseer's faithfully accounting for all sums received by him by virtue of his office, the surety is not liable for a sum lent to the overseer, and applied by him to parochial purposes.

DEBT on bond, dated the 25th of *March* 1817, for 800*l*. The defendant cravedoyer of the bond and condition. The condition, which recited that *John Hutton* had been duly elected overseer of the poor of the township of *Lynn*, in the county of *Chester*, in which situation he would have occasion to receive various sums of money, was, that if *Hutton* should, at all times during his com-

tinuance in his office of overseer of the poor of the township of *Lynn*, well and faithfully execute and perform the same, according to the directions of the several acts of parliament made for the regulation of overseers of the poor, and should truly account for, distribute, pay, and apply all such sums of money, not exceeding the sum of 400*l.*, as should come into his hands by virtue of his said office, then the obligation to be void, otherwise to be in full force. Plea, first, non est factum. Second, that the office was an annual office, which *Hutton* held for the space of a whole year, which had long since expired; that the bond was given to secure the faithful performance of said office of overseer during the said year, that is to say, from the 25th *March* 1817 to the 25th *March* 1818 only, and to secure the good and true accounting for, distributing, paying, and applying by *Hutton* of all such sums of money (not exceeding 400*l.*) as should arise or come into his hands by virtue of his said office, during the said last-mentioned year only; and that he did, in fact, during one whole year, from *492] said 25th *March* 1817 to the said 25th *March* *1818, duly and faithfully perform the said office of overseer of the poor; and that he did, likewise, during the whole of the said year, well and truly account for, distribute, and pay and apply all such sums of money, not exceeding 400*l.*, as did arise or come into his hands by virtue of his said office. Wherefore, &c. Replication, taking issue upon first plea; and as to the last plea, that during the said year, from 25th *March* 1817 to said 25th *March* 1818, and whilst *Hutton* was overseer, he received and had in his hands, by virtue of his said office, 83*l.* 10*s.*, which he had (although requested so to do) wholly neglected and refused to account for, distribute, &c., and the same is still wholly undistributed, &c. Wherefore, &c. Rejoinder, that *Hutton* did well and truly account for, distribute, pay, &c. all sums of money, not exceeding, &c. as came into his hands during the said year by virtue of his office. At the trial before *Warren*, C. J., of *Chester*, at the Spring assizes 1827, for that county, it appeared, that the plaintiffs were entitled to recover a sum of 56*l.*, provided all the sums which the plaintiffs sought to charge the defendant with could be considered to have been received by *Hutton* by virtue of his office of overseer. One of those sums was 100*l.*, borrowed of one *Fox* by *Hutton* and his co-overseer, and applied by them to parochial purposes. It was objected by the defendant's counsel, that that sum could not be recovered by the plaintiffs, inasmuch as it could not be said to have been received by *Hutton* by virtue of his office of overseer; an overseer, as such, having no authority to borrow money; *Massey v. Knowles* (a). *493] The learned Judge directed the jury to *find a verdict for the plaintiffs for 56*l.*, with liberty to the defendant to move to enter a nonsuit, if the Court should be of opinion that the defendant ought not to be charged with the sum of 100*l.* A rule nisi having been obtained in last *Easter* term for that purpose,

Jones, Serjt., and *Cottingham* now showed cause, and contended, that a sum of money borrowed and received by an overseer for and applied by him to the purposes of the township, must be considered as money received by him by virtue of his office of overseer. The township would be charged with the amount by the lender, who would treat *Hutton* as the agent of the township, and evidence to that effect would arise from the circumstance of the application of the money to the use of the township.

Cross, Serjt., and *J. Williams* contra. It is the duty of the overseer, when he requires money for parochial purposes, to cause the same to be levied by rate, and the money raised by the rate and paid into his hands, is properly money received by him by virtue of his office of overseer; but he has no authority as overseer to borrow money, and the township could not be compelled to pay the money so borrowed by him, and money coming into his hands by way of loan cannot be considered as money received by him by virtue of his office of overseer.

Lord TENTERDEN, C. J. The condition of the bond was, "that *Hutton* should truly account for all such sums of money, not exceeding 400*l.*, as should arise or come into his hands by virtue of his office of overseer;" * and the question is, Whether he can be considered as having received by virtue of his office of overseer this sum of 100*l.* which was advanced to him upon loan by *Fbz.* The borrowing of money is no part of the duty of overseer. If, indeed, it had been borrowed by the direction of the parishioners, there might have been grounds for saying that it came into his hands in his character of overseer; but that does not appear to have been the case. This, therefore, must be considered to have been a loan to *Hutton* and his co-overseer individually and not in their character of overseers; and if it was not money received by *Hutton* by virtue of his office, it is not within the condition of the bond. The rule for entering a nonsuit must therefore be made absolute.

Rule absolute.

DRIVER v. HOOD. Nov. 26.

Where an award directed that one of the two parties to the submission should pay the expenses of the reference, and that the other should repay them on demand; and the former having paid them, made an affidavit of debt against the other party, alleging such payment, but not stating any demand of repayment: Held, that this was not sufficient.

THE defendant in this case was holden to bail by virtue of a Judge's order obtained upon an affidavit stating that *Hood* had commenced an action against *Driver*, which was referred to an arbitrator by a Judge's order, afterwards made a rule of Court. The costs of the cause were to abide the event, and the costs of the reference to be in the discretion of the arbitrator. The arbitrator awarded that *Hood* had no cause of action, and that *Driver* should in the first instance, pay 17*l.* 17*s.* the costs of reference, and that *Hood* *should repay that sum upon demand. The affidavit then stated that *Driver* [* paid that sum, and that the costs of his defence had been taxed at 7*l.* 7*s.* 6*d.* which, together with the 17*l.* 17*s.*, amounted to 25*l.* 4*s.* 6*d.*, "and deponed further saith, that *Hood* is now justly and truly indebted to him, *Driver*, in the sum of 25*l.*, under and by virtue of the said order, rule, and award." A *replevi* nisi having been obtained to have the bail-bond delivered up to be cancelled,

Chitty showed cause, and contended, that the defendant, having been arrested upon a Judge's order, was in a different situation from persons arrested in an ordinary manner, upon an affidavit of debt. Although the affidavit does not allege a demand of the 17*l.* 17*s.*, yet if upon the whole it appeared that the plaintiff had a claim to that amount, the affidavit is sufficient, *Imlay v. Elms* (a). This resembles the case of a bill of exchange payable on demand, in which case it is not necessary to allege a demand.

Comyn, contra, contended, that this was an ordinary arrest as for a debt, and very different from an arrest by special order of a Judge where no debt existed. That it was also different from the case put as to a bill of exchange, for here there would be no cause of action for the 17*l.* 17*s.* until after demand made.

Lord TENTERDEN, C. J. We think this affidavit insufficient. It was incumbent on the plaintiff to show the existence of a debt, and that does not sufficiently appear. The bail-bond must be delivered up to be cancelled.

Rule absolute.

*REX v. HEADLEY et. al. Nov. 27.

By charter of the 10 *Jac.* 1, reciting that the borough of *D.* was an ancient borough, and that the mayor and burgesses, time out of mind, had enjoyed divers franchises, the king confirmed to the mayor and burgesses all privileges, &c., and granted to the mayor, burgesses, and their successors, that the mayor and town clerk, together with thirty-six burgesses, being the common council, or the greater part of them, should nominate one of the number of twelve chief burgesses *counsellors* to be mayor; and it further granted to the mayor, town clerk, and thirty-six chief burgesses, the power to elect all officers, and also of taking all *free burgesses* into the borough. It then granted to the mayor and chief burgesses, being *counsellors*, and the common council, a power of imposing fines; and that the mayor and burgesses, and their successors, should hold within the borough a court of record before the mayor, town clerk, and chief burgesses, being *counsellors*, and that all manner of pleas should be determined before the mayor, town clerk, and chief burgesses, being *counsellors*; and that the mayor, town clerk, and one of the chief burgesses *counsellors* (to be chosen by the mayor, town clerk, and common council) should be justices of the peace within the borough. By a subsequent charter, reciting the former, King *Charles* the First confirmed the same, and granted, inter alia, that the mayor and the recorder, and the chief burgesses, being the common council for the time being (of which chief burgesses some were known by the name of *chief burgesses counsellors*), should have the power to elect one of the aforesaid chief burgesses and *counsellors* to be mayor, and that the mayor and recorder, and chief burgesses of the common council of the borough, should have the power to elect all officers, and also of taking thereafter all free burgesses into the number of free burgesses: Held, that by these charters (there being no evidence of usage prior to the granting of the charter of *Jac* 1.) the twelve burgesses *counsellors* did not form an integral part of this corporation for the purpose of electing free burgesses, and that the right of electing free burgesses was in the mayor, recorder, and the thirty-six chief burgesses, or the major part of them, and, consequently, that to make a good election of a free burgess, it was sufficient if there were present the mayor, recorder, and a majority of the thirty-six chief burgesses.

A RULE nisi had been obtained, calling on the defendant *Headley*, and eleven other persons named in the rule, to show cause why informations in the nature of quo warranto should not be exhibited against them, to show by what authority they severally exercised the office of chief or capital burgesses of the borough of *Devizes*, in the county of *Wilts*, from the 1st of *August* 1825, to the 8th of *October* 1825; and by what authority they then claimed to exercise the said office within the said borough. The rule was obtained on the ground that there were only seven chief burgesses *counsellors*, and nine chief burgesses present, when they were severally elected and sworn into the said offices of chief or capital burgesses on the said 1st day of *August* 1825; and that only
 *497] nine chief *burgesses *counsellors*, or aldermen, and ten chief burgesses were present, when *Headley* and the other defendants named in the rule were respectively elected and sworn chief burgesses of the said borough on the 8th day of *October* 1825.

The affidavits in support of the rule, after stating that the borough of *Devizes* was a corporation by prescription, with twelve chief burgesses *counsellors* (or alderman), and twenty-four chief burgesses, set out a charter of King *James* the First, bearing date the 10th of *July*, in the third year of his reign, by which, after reciting that the borough of *Devizes* was an ancient and populous borough, and that the mayor and burgesses of the borough had time out of mind used and enjoyed divers liberties, franchises, &c. as well by the charters of his predecessors, kings of *England*, to them and their predecessors theretofore granted, and also by means of divers prescriptions and customs anciently used in the borough, and that the then mayor and burgesses had humbly besought his said majesty to extend to them his kingly munificence; and that his majesty, for the better rule and government of the borough, was willing to alter the time and manner of choosing the mayor of the borough; and did vouchsafe to explain and confirm other grants, liberties, and franchises, as well by the charters of his predecessors to the said mayor and burgesses and their predecessors theretofore made and granted, as also by means of divers prescriptions and customs there-

tofore anciently used, and to grant other liberties and ordinances profitable the good ruling of the borough; his majesty, yielding to their request, did, alia, confirm to the mayor and *burgesses of the borough, and their successors for ever, all and singular gifts, grants, &c. by any of his predecessors to the mayor and burgesses of the borough aforesaid theretofore granted and confirmed, or by reason of any lawful custom, use, or prescription theretofore had and enjoyed; and further, to avoid from thenceforth all such disorders which theretofore had arisen concerning the election of the mayor of the borough, his majesty did give and grant to the aforesaid mayor and burgesses and successors, "that the mayor and common clerk, called the town clerk, together with thirty and six burgesses, being the common council of the same borough for the time being, or the greater part of them, from time to time, and at times thereafter, should have power yearly and every year, on, &c. of choosing, nominating, and assigning, and that they should and might choose, nominate, and assign, one honest and discreet man of the number of twelve chief burgesses or counsellors of the borough aforesaid, who should be mayor for one whole year next ensuing, who, before he should be admitted to exercise the same office, that is to say, on, &c. should take his corporal oath well and truly to execute the same office before his last predecessor, being next before mayor of the borough, and the town clerk of the borough, in the presence of the aforesaid thirty and six burgesses, and other burgesses of the same borough for the time being, or the greater part of them; and that after such oath so taken, he should execute the office of mayor for one whole year next following; and that the mayor and town clerk for the time being, and thirty-six chief burgesses for the time being, or the greater part of them, from thenceforth should have the nomination and election, and that they should and might nominate and elect from thenceforth and for ever all and such officers and ministers whatsoever thereafter to serve within the same borough as theretofore had had and enjoyed offices within the same borough; and also of taking thereafter all and singular free burgesses of the borough into the number of free burgesses of the same borough. And that if any burgess or inhabitant of the borough should be elected after elected into the office of mayor of the borough, or into the number of chief burgesses or counsellors of the borough, or into the number of free burgesses of the borough, or to any other office within the borough, such person so chosen being apt and fit, and after the election should be made known to him, should refuse, without reasonable cause, to take upon him the office to which he should be elected, that then it should be lawful for the mayor and chief burgesses aforesaid, being counsellors, and the common council of the borough for the time being, or the greater part of them, to set a reasonable fine upon him for refusing." By another clause of the charter it was granted that the mayor for the time being, and the town clerk and chief burgesses for the time being, or the greater part of them, should have power to make statutes and reasonable orders for the good rule and government of the burgesses, artificers, and inhabitants of the borough; and that the mayor and town clerk, and chief burgesses, being counsellors, and the common council of the same borough, and the greater part of them as aforesaid, as often as they should make such laws, statutes, and ordinances, such and such like reasonable pains, penalties, and punishments, to impose and assess by imprisonment of their bodies, or by fines or amerciaments, or by any of them, against and upon all offenders contrary to such laws, as to the same mayor, town clerk, and chief burgesses for the time being, or the greater part of them as aforesaid, should seem reasonable and meet. And his majesty further granted to the mayor and burgesses of the borough, and their successors, that they from thenceforth and for ever thereafter should hold within the borough, in the guildhall of the borough, a court of record to be held and adjourned before the mayor, town clerk, and chief burgesses, being counsellors of the borough for the time being, or the greater part of them, to be held before twelve, eleven, ten, nine, eight, seven, six, five, or four

them, whereof the mayor of the borough for the time being, and the town clerk of the borough for the time being, his majesty willed to be two, and that in that court they might hold by plaint, to be levied in the same court, all manner of pleas, actions, &c., so as such pleas, &c. should be determined before the mayor, town clerk, and chief burgesses, being *counsellors* of the borough for the time being, or before twelve, eleven, ten, nine, eight, seven, six, five, or four of them, whereof the mayor and town clerk of the borough for the time being his majesty willed to be two. The charter then granted that the mayor and town clerk of the borough, and also one of the *chief burgesses and counsellors* of the borough, from time to time to be chosen by the mayor, town clerk, and common council of the borough for the time being, or the greater part of them, whereof the mayor and town clerk his majesty willed to be two, during the time wherein they should happen to be in their offices, should be his justices, and every of them was and should be *justice of his majesty, his heirs and successors,

*501] to keep the peace.

The affidavits then set out another charter of *Charles* the First, bearing date the 5th of *June*, in the fifteenth year of his reign, which, after reciting the former charter of *Jac.* 1, ratified and confirmed the same, appointed a recorder in lieu of the town clerk, and, among other things, granted, that the mayor of the borough for the time being, and the recorder of the borough for the time being (and in the absence of the recorder his deputy), and the *chief burgesses, being the common council* of the same borough for the time being (of which chief burgesses some were called, known, or distinguished by the name or distinction of chief burgesses *counsellors* of the borough aforesaid), or the greater part of them, at all times thereafter should have power and authority, yearly and every year, on, &c. to assemble in the guildhall of the borough, and then should choose one honest man of the aforesaid chief burgesses and *counsellors* of the borough aforesaid to be mayor of the borough for one whole year next following the eve of the feast of *St. Michael* after such election. And that the mayor and recorder of the borough for the time being (and in his absence his deputy), and the *aforesaid chief burgesses of the common council* of the same borough for the time being, or the greater part of them, from thenceforth should have the nomination, election, and appointing, and that they should nominate, appoint, and choose, from thenceforth, all officers and ministers whatsoever (other than the town clerk) to serve thereafter within the borough; and also all and singular free burgesses of the borough aforesaid, thereafter take into the

*502] number of free burgesses *of the same borough. The charter gave to the mayor, recorder, and chief burgesses the power of imposing fines upon any person refusing to serve an office, and to make bye-laws, and assess and impose fines for breach of the bye-laws, in like manner as in the recited charter of *James* the First was for that purpose contained. The affidavits then stated that these two charters had been accepted by the mayor and burgesses of the borough, and acted upon by them; that an election of free burgesses was had on the 1st of *August* 1825; that there were not present more than the mayor, recorder, seven capital burgesses counsellors, or aldermen, and nine capital burgesses, when the defendants were elected and sworn capital burgesses; and that on the 8th of *October* 1825 there were present not more than the mayor, recorder, nine capital burgesses counsellors, or aldermen, and ten capital burgesses, when the defendants were again elected and sworn capital burgesses, and that they severally exercised the office of a capital burgess; and that they respectively ought not to exercise the office of a capital burgess, inasmuch as they were not any of them duly elected and sworn capital burgesses of the borough.

The *Attorney-General*, *Taunton*, and *Mercwether*, Serjt., now showed cause. It must be conceded that the first election was void, because a majority of the thirty-six burgesses was not present. But the defendants never acted under that election, and they are willing to disclaim as to the period which elapsed

any usage *before the time when the charter was granted; and although the corporation may be a corporation by prescription, and although it may be collected from the charter granted by King *James the First*, that before that time there had been thirty-six persons, capital burgesses, of whom twelve were counsellors, yet it does not thereby appear for what period of time they had existed, or what their respective rights were. Now the language of the charter will show, whether it was intended there should be a concurrence of a majority of the twelve burgesses counsellors, and a majority of the twenty-four chief burgesses. If that were intended, the language used in the charter should have been, that the election should be by the mayor, the town clerk, the twelve burgesses counsellors, and the twenty-four capital burgesses. This is the language used in the charter, when it gives the power to impose fines. But the language of the clause of the charter giving the right of electing the mayor is, "that the mayor and common clerk, called the town clerk of the borough, together with *thirty and six burgesses* of the same borough, being the common council of the same borough for the time being, the greater part of them, shall from time to time and at all times have power of electing the mayor." The right is therefore given to the thirty-six, as if there was at that time a known body consisting of that number; and no distinction is made between any of the component parts of that body. In all the cases where the presence of every integral part of a corporation has been held to be necessary, the different component parts of the corporation have been specifically mentioned. The charter then provides for the election of officers, and says, "that the mayor and town clerk of the borough, and the thirty-six chief burgesses of the same borough, or the greater part of them, from thenceforth for ever shall have the election of all officers." The right of electing officers is given, therefore, not to the twelve and twenty-four, but to the mayor and to the thirty-six, no distinction being made between individuals of whom the thirty-six are composed. There are in this charter clauses by which a power of imposing fines is granted, and the language of those clauses is very different from that used in the clauses giving the right of election. One of those clauses gives the mayor and chief burgesses, being counsellors, and the common council, or the major part of them, the power of imposing a reasonable fine upon any person refusing to take an office. The other gives the mayor, town clerk, and chief burgesses, being counsellors, and the common council, the power of imposing penalties upon all offenders against the bye-laws. In these two clauses the twelve burgesses counsellors and the twenty-four chief burgesses are treated as two distinct bodies. It is essential, therefore, that a majority of each of those bodies should be present at any meeting where a fine is to be imposed. But in the clause giving the right of electing the mayor, officers, or free burgesses, the thirty-six chief burgesses are treated as an aggregate body, and therefore it is sufficient, that at any such election a majority of that body should be present. The language used in the charter of King *Charles the Second* requires a similar construction. It states, that there was at that time in the corporation a body of thirty-six; that the thirty-six consisted of twelve who were counsellors, and twenty-four who were not. That being the case, if it had been *intended that at the election of officers there should be a concurrence of the definite body of twelve, and of the definite body of twenty-four, the language which would obviously have been used would have been, that the right of election should be in the mayor and in the counsellors, and in the residue of the capital burgesses of the said borough. But the language actually used is, "that the mayor, the recorder, or in his absence deputy, and the chief burgesses, being the common council of the same borough for the time being, of which chief burgesses some are called, or known, or distinguished by the name or distinction of chief burgesses, counsellors of the borough aforesaid, or the greater part of them, at all times hereafter, shall have power and authority to choose, nominate, and appoint one honest man of

aforesaid chief burgesses and counsellors of the borough aforesaid to be mayor;” and then it afterwards provides, “that the mayor and recorder for the time being (and in his absence his deputy), and the aforesaid chief burgesses of the common council of the borough for the time being, or the greater part of them, from henceforth shall have the power of nominating and appointing other officers.” Here again the same language occurs, and no distinction is made between the twelve and twenty-four; but the right of election is given to the whole collective body of chief burgesses as a mass, and no distinction is made between the different classes of which that body consists. In the case of the *King v. Devonshire (a)*, the point did not of necessity arise, but it did arise incidentally. In that case, *511] upon the death of a capital burgess, the right of electing another was *in the capital burgesses at that time surviving and remaining, or the greater part of the same. Of the capital burgesses four were aldermen. The charter required that two aldermen should be present at the election of all officers. There were not two aldermen present at the election of the defendant as a capital burgess. It was contended, that the presence of two aldermen was necessary, because capital burgesses came within the meaning of the word officers; but it was never suggested that the concurrence of three aldermen was necessary. For these reasons I am of opinion that the construction of this charter does not admit of any reasonable degree of doubt, so as to warrant us in making this rule absolute. As to the other point, the rule may be enlarged, as the parties have been again elected, in order to enable them formally to disclaim, in case any quo warranto information be filed against them.

HOLROYD, J. This is a very plain case. If there were any reasonable doubt, we should be bound to make the rule absolute. But there appears to me to be none whatever. The question, which is as to the power of electing the chief burgesses, turns entirely upon the construction of the charter, independent of any usage. By the charter of *Charles the First* the election of the chief burgesses is to be by “the mayor and recorder of the borough for the time being (and in his absence his deputy), and the aforesaid chief burgesses (they being thirty-six) of the common council of the same borough for the time being, or the greater part of them.” It is insisted that the common council consists *512] of two classes of persons, viz. of twelve burgesses counsellors, and *the remaining chief burgesses, and that a majority of each of these bodies ought to have concurred in the election. But it seems to me that the charter does not require a majority of each of these bodies, and that every word of the charter is satisfied by holding it to be sufficient that, besides the mayor and recorder, there should be present a majority of the thirty-six chief burgesses, because the power of election is given to them, or the major part of them. If the power of election had been given to the twelve burgesses counsellors and to the twenty-four remaining chief burgesses, then it would have been requisite that there should be a majority of each body. In the other clauses of the charter which give the power of imposing fines, the chief burgesses counsellors are mentioned by name. For these reasons I think that the rule must be discharged.

LITTLEDALE, J. I am of the same opinion. In most charters there is a distinct declaration that there shall be one mayor, a definite number of aldermen or capital burgesses, and some definite number of persons to compose the common council. In such cases the charter recognizes the existence of all these as separate and distinct bodies. But the charters in this case do not recognize the twelve burgesses counsellors as a body distinct from the chief burgesses. It seems from the recital in the charter of *James the First*, that this is a corporation by prescription. The charter does not point out specifically whether the twelve burgesses counsellors and the remaining chief burgesses are to be considered as separate existing bodies, or as composing one class, which

is generally called the common council. *It might have been shown by affidavit what the usage of the borough had been prior to the granting of the charter of *James* the First, and if the practice had been to require corporate meetings the attendance of a majority of the twelve chief burgesses and counsellors, that would have been a recognition of the twelve as a distinct separate body. But as there is no affidavit of any usage, we must form our opinion on the charters alone. There is a distinction between the charter of *James* the First and that of *Charles* the First. Each of them, with respect to the election of mayor, speaks of thirty and six chief burgesses being the common council of the borough. The words of the charter of *James* are, "the mayor and town clerk, together with thirty and six burgesses of the borough, being the common council of the borough for the time being, or the greater part of them, shall have the power of choosing one honest and discreet man of the number of twelve chief burgesses counsellors of the borough, shall be mayor." The language of the charter of *Charles* is, "that the mayor and the recorder (who is substituted for the town clerk), and in the absence of the recorder, his deputy, and the chief burgesses, being the common council of the borough for the time being (of which chief burgesses some are called or known by the name of chief burgesses counsellors of the borough aforesaid), or the greater part of them, shall have power to assemble and choose one honest and discreet man of the aforesaid chief burgesses and counsellors of the borough aforesaid, to be mayor." There might be some ambiguity, if the charter of *Charles* had stood alone, because it says, "of which chief burgesses some are known by the name of chief burgesses counsellors." The prior charter of *James*, however *(which may be supposed to refer to the ancient usage of the borough), only says, that they are to choose one honest and discreet man of the number of twelve chief burgesses counsellors. The charter of *Charles* the First goes further to recognize the twelve burgesses counsellors as an integral part of the corporation than that of *James*; but the charter of *James* not having named the burgesses counsellors as an integral part of the corporation, the words above cited from the charter of King *Charles* are in my opinion, sufficient to make them an integral part. Nor can it be collected from any other parts of this charter, that the thirty-six persons constituting the common council were intended to be divided into two distinct integral bodies, as to make the attendance of a majority of each necessary, in order to constitute a good corporate meeting.

Rule discharged.

REX v. The Bridgewater and Taunton Canal Company. Nov. 27.

Where a high constable presents persons for a nuisance in a highway, he must go before the grand jury and give his evidence on oath.

R. HOOPER, high constable of the hundred of *Whitley*, in the county of *Somerset*, attended at the quarter sessions for that county, and being sworn to present all offences within his hundred, and being interrogated by the court whether he knew of any nuisance to persons or any highways out of repair within his hundred, answered, that he intended to present the defendants for a nuisance. He was then directed to go to the indictment office (a room under the same roof with the court), and give his instructions. He there signed the following presentment in writing upon paper:—"I *present the Company of Proprietors of the *Bridgewater* and *Taunton* Canal Navigation for a nuisance, in erecting a certain swing-bridge over and across a common high

leading from," &c. &c. The clerk of the indictments (who was employed by the clerk of the peace) turned the presentment into the form of an indictment beginning with the words, "The jurors of our lord the king." The indictment, and the constable's presentment on paper, were then filed by the clerk of the peace, together with the other indictments found at that sessions; but the constable of the hundred never went before the grand jury, or gave any evidence; nor was the presentment ever submitted to the consideration of the grand jury. The affidavits stated that this was the usual practice as to presentments by the high constable at the court of quarter sessions for the county of *Somerset*, and that the same practice had prevailed on the western circuit for forty years. A rule nisi had been obtained for quashing this presentment, against which

Rogers now showed cause. The ancient practice was for the constable to present all offences within his knowledge, which concerned the peace, at the leet or tourn; and such presentment was then acted upon without being sanctioned by a grand jury. The jurisdiction which the tourn had over such offences was, by the statute 1 *Ed. 4, c. 2*, transferred to the quarter sessions. It still continued to be the duty of the constable to present such offences at the sessions, and there, his presentment, like that of a justice, was considered equivalent to an indictment found by a grand jury. *Lambard's Eirenarcha*, p. 508, shows that the presentment of a justice upon his own knowledge, of offences against certain *516] statutes there mentioned, hath the force of a *presentment of twelve men; and the same learned author afterwards says, "Of some such like strength also (as I think) is the presentment of constables concerning sundry points contained in the statute of *Winchester*, 13 *Edw. 1*." In *Fitzherbert's Justice of the Peace*, p. 125, under the head of "Where a presentment or certificate made by a justice or by other persons to sessions shall be like a presentment found by the verdict of twelve men," it is laid down, "that the presentment at the sessions by justices of the peace upon their knowledge of such a highway being out of repair, is like the presentment of twelve men, upon which the justices may pass a fine." Now a high constable presents on his own knowledge; he is not bound, on the information of others, to present a highway out of repair, *Anon. 1 Vent. 337*; and being, like a justice, a person clothed with public authority, his presentment is equivalent to a presentment found by the verdict of twelve men.

Lord TENTERDEN, C. J. The instrument prepared by the officer employed by the clerk of the peace, purports, on the face of it, to be an indictment found by a jury; but the subject-matter of the charge contained in the instrument, in fact, never was submitted to the consideration of any jury. To warrant such a proceeding, the high constable ought to have gone before the jury and given his evidence on oath. The presentment of a justice on his own knowledge has, by statute, in some cases, the force of a presentment by a grand jury; and those are the cases referred to in *Lambard* and *Fitzherbert*. It is not suggested that the proceeding in this instance was warranted by any statute. It is clearly bad. The rule must, therefore, be made absolute.

Rule absolute.

*517] *FLETCHER v. JOHN HEATH et. al. Nov. 27.

Where a broker, having accepted bills for his principal on the security of goods then in his hands, pledged the goods with a person who had notice of the agency, but did not inform the principal of this transaction: Held, that under the 6 *G. 4, c. 94, s. 5*, the broker could only transfer such right as he had, which was a right to be indemnified against the bills which he had accepted; and that the principal having satisfied those bills, was entitled to have back his goods from the pawnee, without paying the amount for which they were pledged.

TROVER for twenty bales of silk, and twenty warrants for the delivery of said silk. Plea, not guilty. At the trial before Lord Tenterden, C. J., at Guildhall sittings after Easter term 1826, the jury found a verdict for plaintiffs, subject to the opinion of this Court on the following case:

In February 1825 John Billinge, a silk broker, purchased for the plaintiff twenty-four bales of silk lying in the warehouse of the East India Company. The plaintiff paid for the silks when due, and received twenty-four warrants for the delivery of them in the usual form. On the 7th of June 1825, the plaintiff sent the twenty-four warrants to Billinge, inclosed in a letter, of which the following is a copy:

London, 7th June 1825.

Mr. John Billinge,

I enclose you twenty-four East India warrants of silk, with a statement of costs, amounting to 3761*l.* 13*s.* 7*d.* Upon these I have drawn upon you bills, 1500*l.*, 1550*l.* 10*s.*, at three months from 6th instant, which please to accept, to stand against the proceeds of said silk when sold.

M. Fletcher.

Billinge accepted the two bills above mentioned, amounting in the whole to 3050*l.* 10*s.*, and returned them to the plaintiff. Billinge could not sell the silks before the bills became due. The plaintiff promised to provide to pay the bills; but a few days before they fell due, he said to Billinge that it would be inconvenient for him to do so, and proposed that Billinge should draw bills upon him, which he would accept, and that Billinge should get them discounted, and pay his own acceptances. In consequence of this proposal, Billinge drew upon the plaintiff four bills of exchange, payable to his own order, one, dated 3d September 1825, for 600*l.* at two months; another, of the same date, for 638*l.* at three months; another, dated 8th September 1825, for 700*l.* at three months; another, dated 9th September 1825, for 700*l.* at four months, amounting in the aggregate to 2638*l.* These bills were accepted by the plaintiff, and delivered to Billinge, who promised to get them discounted, and to take up his own acceptances. On the 5th of September 1825, he discounted the bill for 638*l.*; but on the 9th of September, when his own acceptances became due, and were paid, as after mentioned, he had not discounted any of the others. On that day he went to the counting-house of the defendants, showed them the plaintiff's letter of the 7th of June, and asked them to borrow 3000*l.* upon the security of the warrants, to enable him to pay his own acceptances; he did not mention to the defendants the last-mentioned bills, which were accepted by the plaintiff. The defendants advanced him 3000*l.* on the security of the warrants which he left with them, together with the aforesaid letter of the 7th of June 1825. This money he immediately paid into his bankers, and his acceptances were made payable, and without it the bankers had not been able to pay them. In this manner the acceptances were paid on that day. Billinge borrowed the 3000*l.*, and left the warrants with the defendants, as he had not paid any of his acceptances. Billinge had no authority from the plaintiff to borrow the said sum of 3000*l.* from the defendants. On the 26th September, Billinge carried to the defendants bills for 3366*l.*, and desired them to discount these bills for him, to repay themselves the 3000*l.* which they had advanced to him and interest, and to pay him the balance. The defendants so, and paid him a balance of 269*l.* 7*s.* 1*d.* All the bills accepted by the plaintiff Billinge discounted, and applied the proceeds to his own use, but carried the amount to the plaintiff's credit in their account current. He sold one bale of the silk on the 12th September, and three more on the 2d November. The defendants gave him up the four warrants, and have retained the others in their possession. Billinge did not pay the proceeds of the four bales which he sold to the plaintiff, but he credited his account with the amount. The plaintiff has accepted all the bills accepted by him as they became due. On the 10th of October

Billinge drew upon the plaintiff another bill of exchange, payable to his own order, for 400*l.*, at three months, which was also accepted by the plaintiff, and which *Billinge* applied to his own use. A third set of bills was drawn by the plaintiff on *Billinge*, and accepted by him; one dated 1st *December* 1825, for 700*l.*, at three months; another dated 8th *December* 1825, for 800*l.*, at three months; another dated 29th *December* 1825, for 500*l.*, at three months; and another dated 2d *January* 1826, for 600*l.*, at three months. *Billinge* stopped payment on the 17th *January* 1826, and a commission of bankrupt was soon after sued out against him. Till then the plaintiff knew nothing of *Billinge* having borrowed money from the defendants, or having deposited the warrants with them. *Billinge* when he stopped was and still is indebted to the plaintiff in the sum of 494*l.* The plaintiff negotiated the third set of bills accepted by *Billinge*; but he took them up when due, and they have been

*520] no charge on **Billinge's* estate. *Billinge* was not indebted to the defendants when he deposited the warrants with them; but he was indebted to them when he stopped payment to the amount of 4000*l.* and upwards. The bills for 3366*l.* delivered by *Billinge* to the defendants on the 26th *September* produced to the defendants 2327*l.* Some of them were dishonoured, and remain in their hands, making a deficit of 1039*l.*, besides interest. Before the commencement of the action the warrants were demanded on behalf of the plaintiff from the defendants, who refused to deliver them up, claiming a lien upon them for the balance due to them from *Billinge*. The question for the opinion of the Court was, Whether the defendants had any and what lien upon the warrants?

Campbell for the plaintiff. The warrants in question, the property of the plaintiff, were pledged without his knowledge or authority by his agent. The right to do so depends upon the 6 G. 4, c. 94, s. 5. (a) The question then is, Whether, on the 9th of *September*, when the deposit was made with the defendants, the agent *Billinge* had any, and what lien upon the warrants? He had come under acceptance for the accommodation of the plaintiff to the extent of 8050*l.* 10*s.*, and in order to

*521] provide funds to take up those bills, the plaintiff had *accepted others which *Billinge* had undertaken to get discounted. At the time of the pledge the first set of bills had not been taken up, and therefore *Billinge* had not disbursed any money for the plaintiff, but had merely incurred a liability. The bills accepted by the plaintiff in the whole amounted to 2638*l.*, leaving a sum of 412*l.* only uncovered, and of these *Billinge* had discounted one for 638*l.* If all the bills were to be placed to the plaintiff's credit, *Billinge*, on the 9th of *September*, could have no lien beyond 412*l.*, or if he gave credit for the 638*l.* only, that would leave 2412*l.* in his favour. But supposing him to have had power to transfer to the defendants a lien to that amount, that was discharged on the 26th of *September*, when he took to them bills for 3366*l.* to be discounted, and out of them they repaid themselves the 3000*l.* before advanced, and paid *Billinge* the balance, 269*l.*; for the discount of a bill is a sale of the bill. Thus the defendants, in fact, were paid the whole of that sum by taking credit for it in account with *Billinge*. It is true that some of these bills were dishonoured; but that could not alter the case, it merely created a new debt from *Billinge* to them. Should it, however, be held that the lien given to the defendants on the 9th of *September* was not discharged by this transaction on the 26th, still it was afterwards discharged by what took place between the plaintiff and *Billinge*. The former paid all the bills drawn by *Billinge* upon him. The bills afterwards

(a) By which it was enacted, "That it shall be lawful for any person, &c. to accept and take any such goods, or any document (for the delivery thereof) in deposit or pledge from any factor or agent, notwithstanding such person shall have notice that the person making such deposit or pledge is a factor or agent. But in that case such person shall acquire no further or other right, title, or interest in or to the said goods, or any document for the delivery thereof, than was possessed or might have been enforced by the factor at the time of such deposit or pledge as a security; but such person shall and may acquire, possess, and enforce such right, title, or interest, as was possessed and might have been enforced by such factor or agent at the time of such deposit."

accepted by *Billinge* never became a charge upon his estate, for they were paid by the plaintiff, and he was a creditor of *Billinge* at the time of his failure. *Billinge*, therefore, could have no right to retain these warrants, neither could these defendants, for they having taken them with notice of the agency, only set up the pawnor's rights, and the *principal cannot be affected by [the state of the account between the agent and the pawnee. At common law the agent having a lien, could not transfer it, *Daubigny v. Duval* and *M'Combie v. Davies* (b). The object of the recent statute was merely to enable him to do that, and now the pawnee must abide the result of the account between the pawnor and his principal. If, however, the defendants in this case had any lien, it certainly was not to the extent claimed, and the refusal to give up the goods until that claim had been satisfied was a conversion, *Boardman v. Sill* (c).

Reader contra. In that case the defendant did not claim any lien, but asserted a right to retain the goods upon a different ground, and Lord *Ellenborough* held that he must be considered as having waived his lien. Here the defendants expressly insisted upon their lien, and their only mistake was claiming too much. The amount due to them is, however, unimportant: nothing was tendered before the commencement of the action, and, therefore, if any thing be due, a nonsuit might be entered. Upon the statute 6 G. 4, c. 94, s. 5, the only question is, whether the broker at the time of the pledge? He had accepted bills to the amount of 3050*l.*, and even if the counter-acceptances by the plaintiff are set against that sum, 412*l.* remained uncovered. Nor was that lien discharged by any thing that took place between *Billinge* and the defendants, or between him and the plaintiff. It has been said that the bills discounted by the defendants, were sold to them. The transaction might, perhaps, have been so considered, had the warrants been delivered up or the bills paid; but the former were *retained as a collateral security, and upon the bills there was a deficit of 1039*l.* Then as to the subsequent dealings between the plaintiff and *Billinge*. At the time of the pledge, the latter had accepted bills upon the security of certain warrants. To the extent of those acceptances he had an absolute lien, and that he transferred to the defendants: it was not a defeasible but an absolute lien, and the defendants have a right to stand in the same situation as the broker was in at the time of the transfer, unless the specific lien then acquired has been paid off. It is clear that it never has been paid off, and that the defendants are entitled to retain the warrants either for the sum of 1039*l.* or 412*l.* [Lord *Tenterden*, C. J. The owner of goods deposits warrants to draw a bill, which is accepted: the acceptor has a lien while the bill is running, but when at maturity he does not take it up, and the drawer does so, what becomes of the lien? If the acceptor, under such circumstances, has it not, can he, before the bill becomes due, transfer an absolute lien?] At all events he had an absolute lien for 412*l.*

Cur. adv. vult.

Lord *TENTERDEN*, C. J., now delivered the judgment of the Court.

It being clear that the defendants in this case could not, by the common law, acquire a lien upon the warrants by the pledge of the broker *Billinge*, the question upon the argument was, Whether he had acquired such a lien under the provision of the fifth section of the late statute 6 G. 4, c. 94? By the plaintiff's letter of the 7th of June 1825, which was communicated to the defendants by *Billinge*, at the time of depositing the warrants with them, the defendants were informed that *Billinge* held those documents as an agent, and, *therefore, according to the terms of the statute, they could acquire no further right, or other right, title, or interest in them, than was possessed and could have been enforced by *Billinge* at the time of the deposit, that is, on the 9th of September 1825. And we are, therefore, to see what right or interest *Billinge* had at that time.

In the month of *June*, *Billinge* had acquired a right to hold these warrants as an indemnity against two bills of exchange accepted by himself for 3050*l.* 10*s.*, which fell due on the 9th of *September*. The amount of the bills was to stand against the proceeds of the silk when sold. It was probably expected that sales would be made so as to meet these bills: but that had not been done: and the plaintiff had promised to find funds to meet them; but this becoming inconvenient, it was agreed between them that *Billinge* should draw bills upon the plaintiff, discount them, and with the proceeds discharge his own acceptances: and he did, in fact, before the deposit with the defendant, draw, and the plaintiff accepted, four bills to the amount of 2638*l.*, and he, *Billinge*, might then have drawn for the remaining 412*l.* 10*s.* if he had thought proper, as he soon afterwards did for 400*l.* The right, therefore, of *Billinge* was to an indemnity against bills of exchange: and the fact that a still further acceptance of bills afterwards took place, does not alter the nature of his right. If in the result of the transaction, *Billinge* discharged the bills out of his own funds, his right would be converted into a lien for money actually advanced, and the plaintiff must repay the money to have the warrants. If in the result of the transaction the bills were all discharged by the plaintiff's money, or by the sale of his goods, the right of *Billinge* would cease and become void, and the plaintiff become entitled to the possession of the warrants. And from the failure of *Billinge* *525] this event happened. The plaintiff had the same right to receive the warrants from the defendants as he would have had to receive them from *Billinge*, or the assignees under his commission, if they had never been deposited with the defendants; the right of the defendants being at its commencement, and throughout the whole time until the close of the transaction, the same and no other than the right of *Billinge*. We therefore think the defendants had no lien on the warrants, and the *postea* is to be delivered to the plaintiff.

Postea to the plaintiff.

KEATE and another *v.* GOLDSTEIN and CASTLES. Nov. 28.

Where one of several defendants, in a proceeding by foreign attachment in the Mayor's Court of London, removes it by certiorari, he must put in bail in K. B. for all the defendants, otherwise a *procedendo* will be granted.

A BAILABLE action against the two defendants was entered in the Mayor's Court, London, on the 25th of *April* 1827, upon an affidavit of debt for 116*l.* An attachment issued thereon upon monies and goods in the hands of one *Thomas Walter*. On the 28th of *August* a certiorari issued to remove the proceedings into this Court. On the 20th of *September* a rule for bail was served, and bail was put in for *Goldstein*, but not for *Castles*. In this term *Comyn* obtained a rule nisi for quashing the certiorari, and issuing a *procedendo* upon an affidavit setting forth the facts above mentioned; and also, that by the practice of the Mayor's Court, an attachment against two persons cannot be released or dissolved unless bail is put in for both.

Goulburn showed cause, and contended that *Goldstein* could only be compelled to put in bail for himself. That, in any case commenced in this Court, a *526] defendant was not bound to put in bail for co-defendants; and that, when a cause was removed by certiorari from an inferior court, the parties were here only bound to do that which would have been incumbent on them if the suit had been commenced in this Court.

BAYLEY, J. Suppose the case of two persons being served with process out of an inferior court; one of them sues out a writ of certiorari, and appears in

the court above for himself alone. The case is certainly not well removed that is in fact the very case before us. There is no hardship in this. The case was commenced in the court below, and the attempt to remove it fails because both the defendants are not before this court.

Rule absolute

BAKER v. ALLEN. Nov. 28.

Where a bill of *Middlesex* issued upon an affidavit of debt duly sworn, and that was followed up by a latitat into *Surrey*, upon which the party was arrested: Held, that the case was only a continuance of the former process, and that it was not necessary that a new affidavit of debt should be made.

In this case an affidavit of debt was made at the bill of *Middlesex* office by the proper officer. A bill of *Middlesex* was issued, and afterwards a latitat issued into *Surrey*, whereupon the defendant was arrested and gave bail. A copy of the affidavit of debt sworn at the bill of *Middlesex* office was filed at the office of the signer of the writs before the latitat issued, but no other affidavit of debt was made before that officer. *Barstow* obtained a rule nisi for dissolving up the bail-bond to be cancelled, on the ground that an affidavit should have been made before the signer of the writs or his deputy, the statute 12 G. 2, s. 2, requiring that before any arrest takes place, an affidavit of debt should be made *before a judge or commissioner of the Court out of which the process issues, or before the officer who issues the process or his deputy. [

Hutchinson, on a former day in this term, showed cause, and contended that the latitat was merely a continuance of the bill of *Middlesex*, which it had formerly been necessary to issue in all actions by bill. He relied on *Dorville v. Whoomwell* (a), and *Evans v. Bidgood* (b).

Barstow, contra, replied upon *Dalton v. Barnes* (c), *Boyd v. Durand*, and *Anderson v. Hayman* (e).

Cur. adv. vult.

Lord TENTERDEN, C. J. It appeared in this case that a bill of *Middlesex* had issued upon an affidavit properly sworn at the bill of *Middlesex* office, and that that process was followed up by a latitat, upon which the defendant was arrested. A copy of the affidavit so sworn was filed with the signer of the writs before the latitat issued; but it was objected that there ought to have been another affidavit made before that officer or his deputy. We think, however, that the latitat was only a continuance of the bill of *Middlesex*, and therefore the statute was satisfied by the affidavit sworn before the officer who issued the first process.

Rule discharged (f)

(a) 3 Bing. 39

(c) 1 M. & S. 230.

(e) 2 B. Moore, 192.

(b) 4 Bing. 63.

(d) 2 Tanneton, 161.

(f) See *Plummer v. Woodburne*, 4 B. & C. 625

*Ex parte E. HORSFALL. Nov. 28.

An attorney, upon receiving the amount of his bill, is bound to deliver up to his client, not only original deeds, &c. belonging to him, but also the drafts and copies.

A *rule nisi* had been obtained for setting aside an order made by *Bayley, J.*, and which had afterwards been made a rule of Court, whereby *Lythgoe*, an attorney of this Court, was ordered to deliver up the drafts, copies, &c. of certain deeds then in his custody. It appeared that *Lythgoe* had been employed for several years by Mr. *Horsfall* as an attorney. After his death, his daughter, *E. Horsfall*, applied to have all deeds, papers, &c. in *Lythgoe's* possession delivered up, and offered to pay whatever bill was due to him. *Lythgoe* delivered up all the deeds and original documents, but claimed a right to retain the drafts and copies, which his client had paid for. Upon a summons, *Bayley, J.*, made an order upon him to deliver them up. That order was made a rule of Court, and in this term a rule nisi for setting aside that rule and order was obtained.

Joshua Evans was now heard against the rule, and the *Solicitor-General* in support of it.

Lord TENTERDEN, C. J. It may be convenient in some cases to leave drafts and copies of deeds or other documents in the hands of an attorney; but the client is the proper person to judge of that. He who pays for the drafts, &c. by law has a right to the possession of them. The rule must be discharged.

Rule discharged.

END OF MICHAELMAS TERM.

*529] *GIBBINS and another, Assignees of ASTON, a Bankrupt, v. PHILLIPS (a).

Where a trader, in embarrassed circumstances, gave a bill of sale of part of his property to a particular creditor: Held, that, upon a question, whether this was an act of bankruptcy within the 6 G. 4, c. 16, s. 3, it was properly left to the jury to say, whether it was a voluntary deed, and given in contemplation of bankruptcy.

TROVER for certain goods and chattels which had been the property of the bankrupt, alleging in one count a conversion before the bankruptcy, in another a conversion after the bankruptcy. Plea, not guilty. At the trial before *Lit- tledale, J.*, at the *Staffordshire* Summer assizes 1827, it appeared that the action was brought against the defendant, as late sheriff of *Staffordshire*, to recover certain property seized by him under a fieri facias issued against the bankrupt after an act of bankruptcy had been committed. An attempt was made on behalf of the plaintiffs to prove several acts of bankruptcy prior to the levy; but the only one which it is material to notice was a bill of sale of his household property, which the bankrupt gave to his sisters, for the alleged consideration of 700*l.*, a few days before the fi. fa. in question issued. It appeared that he was indebted to them in the sum of 530*l.*, but they had never pressed him for payment, and the bill of sale was voluntarily given by him, with a remark that

(a) The Judges of this Court sat, as on former occasions, from *Friday* the 30th day of *November* to *Saturday* the 15th day of *December* inclusive. During that period, this and the following cases were argued and determined.

he had made it for 700*l.*, as they might be called upon to pay for some of furniture which had been recently purchased; but it did not appear that sisters were legally liable to this demand. *There was strong evidence to show that the bankrupt at this time knew he must stop payment. The learned Judge, in summing up the case to the jury, observed, that "by the 6 *G. 4, c. 16, s. 3*, it was enacted, 'That if any trader shall make any fraudulent gift or conveyance of any of his lands, tenements, goods, or chattels, &c., or any fraudulent gift, delivery, or transfer of any of his goods or chattels, with intent to defeat or delay his creditors, he shall be deemed to have thereby committed an act of bankruptcy.' The plaintiffs say the bill of sale was a fraudulent grant of some of his goods, with intent to delay his creditors; and if it were it was an act of bankruptcy." The learned Judge then made some observations tending to show the absence of fraud in fact; and then added, "The most important thing to be considered is, whether this was a voluntary deed, and in contemplation of bankruptcy? for then it would be a fraudulent deed." The jury having found a verdict for the defendant,

Taunton, in last *Michaelmas* term, moved for a new trial on various grounds and relied upon this as a misdirection, for which he cited *Pulling v. Tucker*. A rule nisi was granted; against which,

Campbell, Russell Serjt., and *Barstow*, showed cause, and as to this point contended, that the direction of the learned Judge was consistent with the decision in *Pulling v. Tucker*. That case did not decide that a deed conveying lands and chattels was an act of *bankruptcy, merely because made voluntarily, if it were not fraudulent in fact, nor made in contemplation of bankruptcy. If that were otherwise, the richest traders might be in danger of bankruptcy every day, for they could never pay a debt safely until after death made, unless they at the same time paid all their creditors; for such payment might be considered giving a preference to the creditor paid. In *Pulling v. Tucker* there were abundant proofs of fraud in fact; and *Abbot, C. J.*, observed that if it were material that the deed should have been made in contemplation of bankruptcy, there was abundant evidence of that fact. [*Bayley, J.* In this case, although the question of contemplation of bankruptcy was not put distinctly to the jury, yet a new trial was refused, because the Court thought the deed was made when the trader was in such circumstances that he must have contemplated bankruptcy.] That may be collected from the whole of the argument taken together; and although the Lord Chief Justice remarked, that in *Morgan v. Horseman (b)*, *Mansfield, C. J.*, did not rely upon the *express statement* that the thing was done in contemplation of bankruptcy, that leaves the case in precisely the same situation; it merely shows that the Court of Common Pleas thought the deed fraudulent if made under circumstances in which the trader must be presumed to have expected bankruptcy. In that case, too, the learned Judge expressly stated that the deed *was fraudulent*; and although the Lord Chief Justice did not in terms rely on those words, his judgment must be considered with reference to the case upon which it was pronounced.

**Taunton, Whately*, and *Holroyd*, contra. The direction of the learned Judge was not consistent either with the words of the statute 6 *G. 4, c. 16*, or the decision of this Court in *Pulling v. Tucker*. In that case the learned Judge who tried the cause left it to the jury to say whether the conveyance was fraudulent, *voluntarily made by the bankrupt in order to give a preference to particular persons to the prejudice of his general creditors*; so, it was an act of bankruptcy. The Lord Chief Justice *Abbott*, in giving judgment on the motion for a new trial, adopted the language of *Mansfield, J.*, in *Morgan v. Horseman*, that "a conveyance either of all or part of a trader's property, in favour of fewer than all his creditors, is an act of bankruptcy because it is the means whereby the creditors may be defeated or delayed."

And *Best, J.*, observed, that “the stat. J. 1, c. 15, does not require that the conveyance should be made in contemplation of bankruptcy, but it is sufficient if it be such whereby the creditors may be delayed.” Neither is there any thing in the stat. 6 G. 4, c. 16, about contemplation of bankruptcy. Those words must, if they mean any thing, import that the bankrupt looks forward to bankruptcy as a consequence of his act. But there may be many cases in which a bankrupt may give a fraudulent preference to one creditor for the very purpose of avoiding a bankruptcy, and yet it would be an act of bankruptcy. The learned Judge put to the jury two things as necessary to make this bill of sale operate as an act of bankruptcy, viz. that the deed was voluntary and in contemplation of bankruptcy, whereas it should have been in the alternative, viz. whether it was voluntary with intent to defeat or delay creditors, or in contemplation of bankruptcy. For the intent to defeat or delay creditors, and the

*533] contemplation of bankruptcy, are not convertible expressions. If a deed in favour of a particular creditor be made in contemplation of bankruptcy, no doubt it must defeat or delay other creditors; but it may also have that effect although bankruptcy be not in the contemplation of the party making it; and according to *Pulling v. Tucker*, the latter was the proper question for the consideration of the jury. Where a man is perfectly solvent, a deed providing for the payment of a particular creditor will not have the effect of defeating or delaying the others, but it will have that effect where the party is insolvent, although he may not contemplate bankruptcy, and although he may execute the deed for the express purpose of avoiding bankruptcy. [*Bayley, J.* If in this case there was no contemplation of bankruptcy, what was there to make the deed fraudulent?] Suppose a trader to hear that a particular creditor intended to strike a docket, and in order to avoid that, to give a security or transfer goods to provide for the debt, that would be an act of bankruptcy, although the very object of the trader would be to avoid bankruptcy. [*Bayley, J.* You seem to treat contemplation of bankruptcy as the contemplation of a commission of bankruptcy, which is not the legal meaning of that expression.] If the expression is open to such different constructions, it could hardly be expected that a jury would understand it; the matter would have been much more intelligible to them had the question been put in the words of the statute, and in the manner approved of by the Court in *Pulling v. Tucker*, viz. Whether the bill of sale was given voluntarily, and in order to prefer a particular creditor, and whereby the rest of the creditors might be defeated or delayed?

*534] *BAYLEY, J.* I am of opinion that there ought to be a new trial, but that it can only be had upon payment of costs, inasmuch as there does not appear to have been any misdirection on the part of the learned Judge, considering his summing up with reference to the facts of this particular case. It was necessary that there should be two ingredients in the transaction of the bill of sale, in order to make it an act of bankruptcy, viz. fraud, and the delay of creditors. It certainly appeared that the bill of sale was given by the bankrupt of his own will, and not on pressure or demand by his sisters, but it was not, therefore, necessarily fraudulent; it was incumbent on the plaintiffs to show fraud aliunde. If the party so securing the debt had been solvent, the transaction could not have been deemed fraudulent, although it might have the effect of delaying other creditors, but if he knew himself to be in such a situation that he must be supposed to have anticipated that a bankruptcy would in all human probability follow, then I think it was fraudulent within the meaning of the 6 G. 4, c. 16. In this sense contemplation of bankruptcy has always been considered evidence of fraud, although the party may not have expected the actual and immediate issuing of a commission. Nor does this appear to me by any means at variance with the decision in *Pulling v. Tucker*. That merely decided that it was not necessary in every case to put the question of contemplation of bankruptcy to the jury in express terms. In *Morgan v. Horseman* the whole Court of Common Pleas appear to have assumed that the thing was done in contemplation of

bankruptcy. In the present case I think the learned Judge did right in leaving to the jury the question as to the opinion of the bankrupt respecting the state of his affairs, rather than *the intent to defeat or delay other creditors; and if any doubt had been entertained at the time as to the language used being intelligible to the jury, a suggestion of counsel as to that point would have been attended to, and the supposed difficulty obviated.

Rule absolute on payment of costs

(a) In an action of trover against the sheriff for goods taken in execution, it is sufficient for the plaintiff to give in evidence the warrant issued by the under-sheriff, under the seal of office, and he is not bound to prove the writ.

At the *Stafford* Lent assizes, 1828, the cause was again tried before *Park, J.* The plaintiffs, in order to prove the seizure of the goods by the defendant, gave in evidence a warrant issued by the under-sheriff, under the sheriff's seal of office, but did not produce a writ of fieri facias. For the defendant it was contended, that the under-sheriff had no authority to issue warrants in those cases only in which writs were lodged at the sheriff's office; and that unless the writ of fieri facias in this case were produced, it would not appear that the under-sheriff acted within the scope of his authority. The learned Judge overruled the objection, and the plaintiffs obtained a verdict.

In *Easter* term, *Campbell* moved for a rule nisi for a new trial, and renewed the objection.

Per Curiam. The warrant was produced in evidence, bearing the sheriff's seal of office, and it was right to presume that the seal was properly affixed, unless evidence to the contrary was adduced. The plaintiffs therefore established a *prima facie* case against the sheriff by the production of the warrant; and if the under-sheriff had improperly issued the warrant without having received a writ, upon which it purported to be founded, the defendant might have proved that as an answer to the plaintiffs' case.

Rule refused.

*BRANWELL v. PENNECK.

Where a person employed by an attorney to keep possession of goods seized under a writ of fieri facias made complaint to a magistrate, that he could not obtain payment for his services, and the magistrate having summoned the party, and heard the complaint, proceeded to make an order upon the attorney for payment of a certain sum, which was afterwards levied on his goods: Held, that the magistrate was liable in an action of trespass, for that the service performed was not of such a nature as to be within his jurisdiction under the 22 G. 2, c. 19.

TRESPASS for breaking and entering plaintiff's dwelling-house, and taking away his goods and detaining them until he paid the sum of 1*l.* 2*s.* 6*d.* Plaintiff pleaded guilty. At the trial before *Burrough, J.*, at the last Summer assizes for the county of Devon, it appeared that the plaintiff was an attorney residing at *Penzance*, and the defendant at the time of the alleged trespass was mayor of that town. The plaintiff, in virtue of his office a justice of peace. In *December* 1826, one *Richards* was employed by the plaintiff to keep possession of certain goods seized under a writ of fieri facias issued by the plaintiff, on behalf of a client, out of the books of the court of record of *Penzance*. The warrant was, by the plaintiff's direction, directed to *Richards*, who was left in possession for five days, and in consequence of some dispute with the plaintiff, being unable to obtain payment for his trouble, he laid an information upon oath before the defendant, who summoned the plaintiff, and after hearing the complaint and answer, made an order upon the plaintiff to pay to *Richards* 13*s.* 6*d.* The plaintiff having refused to obey the order, a warrant was granted by the defendant, which recited that *Richards*, of, &c., labourer, had complained unto him (defendant) that he was employed by *Branwell*, and sent to the house of *A. B.*, and there employed

take care of certain goods taken in execution, where he continued for five days; that he, *Richards*, had duly performed that service, and that no particular wages were specified; it then recited the previous proceedings before *th[
 *537] mayor, and the plaintiff's refusal to obey the order before mentioned, and then directed that the sum of 13s. 6d. and expenses should be levied on the goods of the plaintiff. It was contended, that as *Richards's* name was inserted in the warrant under which the goods of which he had to keep possession were seized, he was in the situation of a bailiff, and, therefore, could not claim to be paid by the attorney; and, further, that if this were otherwise, still *Richards* was not a labourer within the meaning of the statute 20 G. 2, c. 19. The learned Judge adopted this view of the case, and the plaintiff obtained a verdict for 11. 2s. 6d. In *Michaelmas* term a rule nisi for a new trial was granted, and *Foster v. Blakelock* (a) was cited to show that a bailiff has a right to be paid by the attorney who employs him.

Halcomb showed cause. If the magistrate had no jurisdiction in this case, it is immaterial by whom the party ought to be paid (b). The question of jurisdiction depends upon the 20 G. 2, c. 19. By this statute, after a recital that the laws then in being for the better regulation of *servants*, and for the payment of wages to them, and to *artificers, handicraftsmen, and labourers*, were insufficient and defective, it was enacted, "that all complaints, differences, and disputes which shall happen and arise between masters or mistresses and servants in husbandry hired for one year or longer, or which shall happen or arise between masters or mistresses and artificers, handicraftsmen, miners, colliers, *keelmen, pitmen, glassmen, potters, and other labourers employed for
 *539] any certain time or in any other manner, shall be heard and determined by one or more justice or justices of the peace of the county, &c. where such master or mistress shall inhabit, although no rate or assignment of wages has been made that year by the justices of the peace of the shire, &c. where such dispute shall arise." By the second section, the magistrate is empowered to punish the servant for misconduct by commitment, reduction of wages, or discharging him from service; and in case the servant or labourer is ill used, the magistrate may release him from his service. *Lowther v. Lord Radnor* (c) will no doubt be cited for the defendant; but there the party complaining had been employed as a labourer, although not in any of the particular occupations enumerated in the statute; he might, therefore, fairly be considered as included in the general words *other labourers*. *Richards*, the person complaining in this case, could not with any propriety be called a labourer on account of his employment by the plaintiff, nor was his situation such as to authorize the interference of the magistrate between him and his employer in the manner pointed out by the second section of the act.

C. F. Williams and *Carter*, contra. The object of the statute 20 G. 2, c. 19, is clearly pointed out by Lord *Ellenborough* in *Lowther v. Lord Radnor*, where he says, "The act now under our consideration appears to have had for its object the affording to certain servants and workmen, and to labourers in general, a speedy, easy, and cheap mode of recovering their wages, when they *amount to a small sum." Such a statute should receive a liberal con-
 *539] struction; and as there was no more reason in that case to call the party claiming wages a labourer than there is in this, the decision, which was in favour of the justice, is a direct authority for the present defendant. [*Holroyd, J.* The warrant does not contain either an allegation or recital that *Richards* was a labourer, but it sets out the specific employment in respect of which the wages were claimed.] Although he was not so described, yet if the

(a) 5 B. & C. 328.

(b) As the case was ultimately decided on the question of jurisdiction, under the stat. 22 G. 2, c. 19, the arguments arising out of the fact of *Richards's* name being in the warrant have been omitted.

(c) 8 East, 113.

hours during which they may be required to work. That provision explains what sort of labourers were intended in the former part of the act, and is wholly inapplicable to such services as were performed for the present plaintiff by *Richards*; and the nature of the service on similar *occasions is so '542] uncertain as to make it impossible to fix a priori any rate of wages. I am, therefore, of opinion, that the legislature never intended to give justices of the peace power to interfere in such cases, and that the defendant, having acted without jurisdiction, was liable to the action. The rule for a new trial must, therefore, be discharged.

Rule discharged.

JOHN JONES v. TANNER, Executor of BENJAMIN JONES.

An action at law for a distributive share of an intestate's property cannot be maintained against the administrator; nor against his executor, although he may have expressly promised to pay.

ASSUMPSIT on the money counts, and account stated, alleging promises by the testator. Fifth count alleged that testator was indebted to the plaintiff for money lent, money paid to his use, money had and received by him to plaintiff's use; and for money due to the plaintiff on an account stated between them, and that the said sums of money remaining unpaid, defendant, as executor, promised to pay. Sixth count, on an account stated by the defendant of monies due to the plaintiff from him as executor. Pleas, non assumpsit, set-off, and the statute of limitations, upon which issues were taken. At the trial before *Burrough, J.*, at the last Summer assizes for *Somerset*, it appeared that the plaintiff and *Benjamin Jones* were sons of *William Jones*, who died intestate in 1803, leaving five children. *B. Jones* took out administration to his father, and possessed himself of all his effects. *B. Jones* died in July 1826, having by his will appointed the '543] defendant his executor. After *B. Jones's* death, an *application was made to the defendant for 70*l.*, as the plaintiff's share of his father's property. The defendant said it was right, and should be paid, and he produced an account from *B. Jones's* books, by which it appeared, that upon a division of the property each of his father's children would be entitled to 70*l.* An attempt was also made to prove an acknowledgment by the testator, shortly before his death, that he had received 200*l.* of the plaintiff's money. For the defendant it was contended, that the evidence as to the 200*l.* was not sufficient to be left to the jury, and as to the 70*l.*, that an action at law could not be maintained for a distributive share of an intestate's property. The learned Judge overruled this objection, and left the whole case to the jury, who found a verdict for the plaintiff for 270*l.* He then gave the defendant leave to move to reduce the verdict to 70*l.* In *Michaelmas* term a rule nisi for a new trial was granted, and now

Erskine and *R. Bayly* showed cause. They did not insist upon the claim of the 200*l.*, but contended that an action was maintainable upon the defendant's express promise to pay the plaintiff's share of his father's property. The acknowledgment that the demand was right was equivalent to an admission that *B. Jones* had received so much money to the use of the plaintiff, and the promise by the executor bound him to pay it. Or if the evidence be applied to the count on the account stated by the defendant, it was an admission that he, the defendant, had received so much money due to the plaintiff from the testator. [*Hol-*
oyd, J. There was not any proof that *B. Jones* ever made distribution of his

father's property, so as to ascertain *what was due to each child.] As against the defendant who made a promise to pay after he had seen the accounts, and after a specific sum had been demanded, that may be proved, and then the case is precisely similar to that of *Gorton v. Dyson* (a). [But in this case the account did not show that the money ever was in the hands of the father.] He took the whole of his father's property, and as he had as much as would have been bound by an express promise to pay, according to *Ash v. Hill* (b), and *Hawkes v. Saunders* (c). The case of *Deeks v. Strutt* is different, for there the executor had not made an express promise to pay, and the circumstance was particularly noticed by *Grose, J.* [*Littledale, J.* The decision of Lord *Kenyon, C. J.*, did not proceed upon that distinction, and has not been considered as an unqualified decision that an action at law cannot be maintained for a legacy.]

C. F. Williams and *Carter*, contra, were stopped by the Court.

BAYLEY, J. This is certainly a very singular action. In the first instance it is for a distributive share of an intestate's property, which cannot be recovered in this Court. The right arises altogether out of the statute 22 & 23, c. 10, and that gives it sub modo: the administrator is not to make distribution until a year has elapsed from the intestate's death, and then to take a bond conditioned to refund part of the money, *if thereafter afterwards appears necessary for the payment of creditors. The suit for the share should be in a court where that bond can be enforced. Then, against whom does the right exist? Clearly against the personal representative of the intestate. *W. Jones*, the father, was the intestate, and the defendant is not his personal representative. The plaintiff is, therefore, in a court of law upon a right which cannot be enforced there, and the action against a person not in any way liable to the demand. The defendant is executor of *B. Jones*, and a promise made by himself is relied on. A promise will not bind if made without sufficient consideration; and it does not appear that *B. Jones* ever made himself personally liable, therefore no consideration for his executor's promise to pay. The plaintiff has, therefore, made a double mistake; he has sued the wrong person, and in the wrong court. The rule for a new trial must be made absolute.

HOLROYD and *LITLEDALE, Js.*, concurred.

Rule absolute.

(a) 1 B. & B. 219.

(c) *Cowp.* 289.

(b) *Cowp.* 284.

(d) 5 T. R. 690.

*REX v. The Inhabitants of Brington.

A woman seized of a messuage, &c. in the parish of A., as tenant in common with three sisters, married, and resided for some years with her husband in the parish of B., where he was legally settled. The husband was transported, and the wife, afterwards, went with her daughter to live in the messuage in A., in which the three sisters resided: Held, that she was irremovable; and the sessions having quashed the removal of her and her daughter, it was presumed that the latter was within the parish of B. by nurture, and therefore irremovable.

UPON appeal against an order of two justices, whereby they removed the wife of *Edward Chambers*, then a convict at *Van Diemen's Land*, from the parish of *Brington*, in the county of *Northampton*, to the parish of *Badby*, in the same county; the sessions

the order, subject to the opinion of this Court, as to whether, under the following circumstances, the pauper was removable :

John Elliott, in consideration of a marriage intended between himself and *Mary Thornton*, by indentures of lease and release and settlement of the 6th and 7th January 1772, granted and released a messuage in *Little Brington*, and about twenty acres of land, to trustees, to the use of himself till the marriage ; remainder to himself for life ; remainder to trustees to support contingent remainders ; remainder to the use of the said *Mary Thornton* for life, in full of jointure ; remainder to trustees, their executors, &c. for 500 years from the decease of the survivor of the said *John Elliott* and *Mary Thornton*, subject to the trusts thereafter declared ; and after the expiration of the said 500 years, and subject thereto, remainder to the use of the first son of the body of the said *John Elliott* on the body of the said *Mary* lawfully to be begotten, and the heirs of such first son lawfully issuing ; remainder to the use of the second, third, fourth, and all and every other the son and sons of the body of the said *J. Elliott* on *547] the body of the said *Mary* lawfully begotten, successively, in seniority of age and priority of birth, and the heirs of his and their body and bodies lawfully issuing, the elder of such son and sons, and the heirs of his and their body or bodies, being to be preferred ; remainder to the use of all and every the daughter and daughters of said *J. Elliott*, on the body of the said *Mary* lawfully to be begotten, and the heirs of the body and bodies of all and every such daughter and daughters, the said daughters, if more than one, to take as tenants in common ; and for want of such issue, to the use of *J. Elliott*, his heirs and assigns for ever." The marriage took effect, and there was issue four sons and eight daughters, all of whom died without issue, in the lifetime of their mother, except four daughters, viz. *Elizabeth*, *Alice*, *Maria*, and *Sophia*, who survived her. *Maria*, the pauper, intermarried with and is now the wife of *Edward Chambers*, whose legal settlement is in the parish of *Badby*, where she was living until February 1826 (her husband being at that time, and continuing at the date of the order of removal, absent from *England*), when she went to *Brington* (the parish in which the property lies) to her sister's, who lives in the house mentioned in the marriage-settlement, and resided there thirteen weeks, until she was removed to *Badby*.

Holbeck in support of the order of sessions. The pauper has an equitable estate in the premises from which she was removed, as tenant in common in tail with her sisters, and she was not removable from her property. In *The* *548] *King v. Aythorpe Rooding* (a), the wife, upon being left by her husband, went to reside in a copyhold tenement of her husband's in *Aythorpe Rooding*, and she was held to be irremovable from her husband's property ; but the present case is stronger, because here she was residing on her own estate, of which her husband had only a joint seisin in her right. A party residing on his own estate acquired by purchase, even if it be under the value of 30*l.*, is irremovable, but he would not thereby gain any settlement in consequence of the provisions of the statute 9 G. 1, c. 7, *Rex v. Martley* (b). And mere residence for forty days, in a parish where the estate of the party is, confers a settlement, provided it be of sufficient value, although the owner has not the actual possession, *Rex v. Hasfield* (c), *Rex v. Houghton le Spring* (c), or has not an exclusive right, but merely in common with others ; as, for instance, an estate as tenant in coparcenary, *Rex v. Dorston* (e). A fortiori, the wife who was residing on her own estate, of which she was tenant in coparcenary, was irremovable.

Dwarris and *Humfrey* contra. The pauper was not irremovable, because she had no present estate in the premises, as the right of possession and the

(a) *Burr. S. C.* 412.

(e) *Burr. S. C.* 147.

(b) 5 *East*, 40.

(d) 1 *East*, 247.

(c) 1 *East*, 296.

right to take the rents and profits were in the husband. She could not at common law; and the modern subtleties of trusts and powers and uses, to her to alien, show that at common law she had no present estate. She could not interfere in the management of the estate, and, therefore, the reason upon which the right to reside in the parish is founded, viz. the right to superintend her property, does not apply. *Rex v. *Eatington* (a) shows that she could not gain a settlement by residing on this land, if the right of possession were in her husband. A mere right to possession is not sufficient to make a person irremovable; as, for instance, when a woman is entitled to dower, but there has been no assignment, *Rex v. The Inhabitants of North Weald Bassett* (b). Although the residence need not be on the premises, yet it should be with reference to them; but here she merely went to visit her sister: *Rex v. Aylmer-Lyne* (c) shows that there must be an intention of residing. The wife of *Rex v. Aylthorpe Rooding* (d) is distinguishable from this. The wife was not chargeable there; and as no dissent appeared on the part of her husband from her going into that parish, the Court presumed his consent, as he had been away, and she went to his property. But here the wife resided in the parish of the husband's settlement for some time after his absence, and then went to her own parish. His consent cannot, therefore, be presumed. Besides, in *Rex v. Aylthorpe Rooding* she went to the husband's property, which, during his absence, required some one to manage it. There was no joint occupation in this case, by the sister. If the wife be irremovable, it will follow that the mere accidental residence of a workman on a job in a parish where he has no property will make him irremovable. Besides, the order of removal concerns the daughter as well as the wife. Now it does not appear that the daughter was within the age of nurture, and if she was not, then she might be removed, without her mother, to her (the daughter's) place of settlement. *The daughter's settlement followed that of her father, which was in *Badby*. She was removable, therefore, to *Badby*.

BAYLEY, J. The sessions, by quashing the order of removal, both as to the mother and the daughter, have virtually decided that the child was within the age of nurture, and, therefore, not removable from her mother. There is no ground for reversing the order of sessions in that respect. As to the principal point, the question is not as to the place where the wife is settled; that, without doubt, is in her husband's parish, *Badby*. This is a case in which the part of the wife's estate, of which she has a seisin. The husband had no sole seisin for when an estate in fee comes to a feme covert, the interest of the husband and wife is a seisin in fee in both in right of the wife, *Polyblank v. Hawke*. *Rex v. Aylthorpe Rooding* (f) is not so strong a case as the present: the property was the husband's, while here it is the property of the wife, descended to her heirs. There is no distinction between a sole occupation and an occupation in coparcenary. Although no partition had been made, the wife has the right to say that she would occupy her part, and not suffer other persons to occupy it. And there might be a good reason for it here, as by the husband's absence abroad it might have been difficult for her to collect the profits of the residence. The pauper, therefore, was irremovable, though she could not have gained any settlement by her residence in *Brinton*.

HOLROYD and LITTLEDALE, Js., concurred.

Order of sessions confirmed.

(a) 4 T. R. 177.

(b) 2 B. & C. 734.

(c) 4 M. & S. 357.

(d) Burr. S. C. 412.

(e) Doug. 329.

(f) Burr. S. C. 412.

*REX v. The Inhabitants of Herstmonceaux.

In December 1825 a house was hired at twenty guineas a year, the rent to be paid weekly, and either landlord or tenant to be at liberty to determine the tenancy at three months' notice from any quarter-day: Held, that this was a renting of a tenement for one whole year, within the meaning of the stat. 6 G. 4, c. 57, and that the pauper, having occupied the same, and paid the rent for a year, gained a settlement*.

UPON appeal against an order of two justices, whereby *J. Start*, his wife, and children, were removed from the parish of *All Saints, Hastings*, in the county of *Sussex*, to the parish of *Herstmonceaux*, in the same county; the sessions quashed the order as to the eldest daughter, she being illegitimate, and confirmed it as to the other paupers, subject to the opinion of this Court on the following case:

On the 26th December 1825, the pauper, *J. Start*, being then settled at *Herstmonceaux*, agreed with *John Foster* to take a house in the parish of *All Saints, Hastings*, at twenty guineas a year; the rent to be paid weekly, and either party to be at liberty to give three months' notice from any quarter-day, and at the expiration thereof to determine the tenancy. The pauper continued above a year in the occupation of the premises, and paid a full year's rent. The case was argued on the first day of these sittings, by

Long and *Capron* in support of the order of sessions. The pauper gained no settlement in *All Saints, Hastings*, by renting this tenement. First, the parties at the time of the agreement did not intend that it should continue for a year; secondly, if they did, it was only a defeasible interest determinable by either party upon three months' notice, and so does not satisfy the statute. The 6 G. 4, c. 57, requires, inter alia, that the tenement shall be bona fide rented for *552] the term of one whole year. The *object of that statute, as of the prior statute (the 59 G. 3, c. 50), which it repeals, was to simplify the mode of gaining settlements by the renting of tenements; it should, therefore, receive such a construction as will best effectuate the intention of the legislature. And construing the words, "bona fide rented for the term of one whole year," with reference to the object of the legislature, the fair meaning of them is, that at the time of taking the tenement there should be a contract absolutely binding one party to part with, and the other to retain, the possession of the premises for one whole year. If that be so, then in this case there was no contract by which the landlord was bound to give up the premises, or by which the tenant was bound to keep them for one whole year, for either party might determine the tenancy by three months' notice. It is true that under the contract made in this case, the tenancy might endure for a year, and in fact did so. The agreement to let the house at twenty guineas a year imports only at the rate of twenty guineas, and therefore it did not follow necessarily from this contract that the house should be held for a year. The tenant might hold for half a year only; for the tenancy was to be determined by three months' notice expiring at any quarter-day. The tenant therefore took the same interest in the premises as if in terms it had been a quarterly tenancy. If a settlement was gained in this case, this consequence will follow, that a renting by the year, determinable at a week's notice, will also gain a settlement. So that a settlement may be gained in a case where the parties to the contract are bound for one week only. The legislature by this, as well as other statutes relating to the poor, viz. 18 & 14 Car. 2, c. 12, and the 59 G. 3, c. 50, intended that settlements should *553] be gained by those who came into a parish not for temporary purposes, but for a permanent residence. Here the pauper at the time of the contract did not contemplate a permanent residence in the parish for one whole year, for it was part of the contract that it might be determined by three months' notice.

Bolland contra. In the stat. 6 G. 4, c. 57, there are three ingredients neces-
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sary to complete a settlement by renting a tenement, viz. annual rent of 10*l*. the least, occupation for a year, and actual payment of the rent for one year. The pauper has fulfilled all these conditions; and though the legislature contemplated a renting for a year, it need not be an indefeasible contract for a year. The tenant did not come for a temporary purpose into the parish; the agreement was for a tenancy that would enure for a year, and the occupation for a year shows that it was the intention of the parties that it should continue so long. Here is a case, therefore, within the words and policy of the act. If there were a tenant for years with rent reserved quarterly, and a tenant for re-entry on non-payment of rent, and a forfeiture occurred before the end of the first year, the landlord might turn him out, and there would be no sufficient occupation to satisfy the statute 6 *G.* 4, and yet it cannot be intended that such a tenant would not gain a settlement after a year's occupation, although at the time of taking the tenement the contract was defeasible.

Cur. adv. vult.

BAYLEY, J., now delivered the judgment of the Court. This is a question under the 6 *G.* 4, c. 57. The pauper *agreed to take the house in December 1825, after the passing of the 6 *G.* 4, and having complied with the other requisites, if there was a renting for a whole year, he clearly gained a settlement. This act repeals the 59 *G.* 3, c. 50, and then enacts, "that no person shall acquire a settlement by renting a tenement, unless it consists of a separate dwelling-house or land, *bonâ fide* rented for the sum of 10*l.* a year, the least for the term of one whole year, nor unless it shall be occupied for such yearly hiring, and the rent for the same actually paid." There is no objection in the preamble of the 6 *G.* 4, c. 57, or of the 59 *G.* 3, c. 50, which is that it was in the contemplation of the legislature to require more than a year would constitute in ordinary cases a tenancy for a year. The preamble of the 59 *G.* 3 recites nothing more than that many disputes and controversies had arisen respecting the settlement of poor people in parishes in *land* by the renting of tenements. The 6 *G.* 4 begins by reciting "whereas the settlement of the poor has been made in some instances to depend upon the annual value of tenements which they may have rented, and whereas the ascertaining such value in such cases has given rise to expensive litigation," &c., and then repeals the act 59 *G.* 3. There is no objection in either, that any inconvenience had arisen where the tenancy by the ordinary hiring was defeasible. There is nothing to show that the words, "for one year," in the 6 *G.* 4 require a different agreement from that which is necessary in common cases to constitute a yearly taking. Is then "a taking at twenty guineas a year, the rent to be paid weekly, and either party to be at liberty to give six months' notice from any quarter-day, and at the expiration thereof to determine the tenancy," to be considered "a *bonâ fide* renting of a tenement for the term of one whole year?" A taking at an annual rent, though the rent is to be paid weekly, is *primâ facie* a yearly tenancy; if there had been no proviso about quitting at three months' notice, there could have been no doubt of the subject, as it would then have been an ordinary yearly tenancy, with the rent to be paid weekly instead of quarterly or half-yearly. What, then, is the legal effect of a tenancy for a year, with a proviso for determining it in the middle of the year? Such a proviso does not prevent it from being a yearly tenancy: when the party is *in*, he is *in* of the whole estate for a year, and not to a defeasance on a particular event. In all cases of defeasible estates, when the party enters, he is *in* of the whole estate, though an event may afterwards occur which would prevent the estate from continuing during the whole period of time contemplated in the original grant of it. As where there is a lease for twenty-one years, determinable at the end of seven or fourteen years, the party when he enters, is *in* of a term of twenty-one years, but a defeasible term which may terminate by matter *ex post facto*. So in the case of a conditional lease, with proviso for its defeasance by non-payment of rent, non-performance

of covenants, or the like, the party enters for the whole term, liable to be defeated by a future event. Lord Coke, 1 *Inst.* 42 a, puts several cases of defeasible estates: "If a man grant an estate to a woman dum sola fuit, or durante viduitate, or quamdiu se bene gesserit, &c. in all these cases the lessee hath in judgment of law an estate for life determinable, and in pleading shall allege the lease, and conclude that by force thereof he was seised generally for *556] term *of his life." This is on the principle that when an interest is granted to him, liable to be determined on a particular event, the whole interest is vested in him in the first instance, but it may be taken out of him by the occurrence of that event. On the same principle *Buller, J.*, speaking of the effect of a lease from year to year in *Birch v. Wright (a)*, says, "If a tenant from year to year holds for four or five years, either he, or his landlord, at the expiration of that time, may declare on the demise as having been made for such a number of years." This is on the principle that it is to be considered a lease for so many years as the party shall occupy, unless in the mean time it shall be defeated by notice on the one side or on the other. On the like principle, in this case the taking by the pauper is to be considered a lease for one whole year in its creation, although an event might happen by which the original interest so created in the first instance would be changed. The event did not happen: he occupied the house for a whole year, and paid the rent, which exceeded 10*l.*, during the same period. He, therefore, gained a settlement in *All Saints, Hastings*, and the order of sessions must be quashed.

Order of sessions quashed (b).

(a) 1 T. R. 378.

(b) The decision in this case is precisely within the principle laid down in *Rees v. Byker*, 2 B. & C. 120, as to conditional hirings of servants. "If the bargain be originally made for an entire year, and terms are introduced applicable to a continuance of the relation of *master and servant* (landlord and tenant), during the whole year, but there is also a provision, that in a given event it shall be competent to the parties to put an end to or suspend the *service* (tenancy) for a part of the year, still a settlement is gained if the *service is actually performed* (tenancy actually exists) for a whole year, and neither party avails himself of the condition. A conditional *hiring* (renting) is for this purpose the same as an absolute *hiring* (renting), unless the condition is acted upon."

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**REX v. The Inhabitants of Sandhurst. Nov. 3.*

A pauper was hired by the commanding officer of a royal military college to act as a servant in that establishment. By the terms of the hiring, he was to obey all orders of the officers of the institution, and to be allowed weekly wages, and if he wished to quit the college he was to give one month's notice; but should the college be dissatisfied with his conduct, it retained the power of dismissing him at a moment's notice: Held, first, that this was a good hiring for a year, although either party might determine it before the expiration of the year; secondly, that a settlement was gained by such hiring, although it was not to a private person, the statute 3 W. & M. c. 11, s. 7, only requiring a lawful hiring, and a service under it.

Upon appeal against an order of two justices, whereby *T. Slark*, his wife, and children, were removed from the parish of *Easthamsted* to the parish of *Sandhurst*, both in the county of *Berks*, the sessions confirmed the order, subject to the opinion of this Court on the following case:

The pauper, *T. Slark*, being unmarried, and without any child, was hired on the 13th of *May* 1813, as a servant on the establishment of the Royal Military College at *Blackwater*, in the parish of *Sandhurst*. By a warrant under the hand of his late Majesty, bearing date the 27th *May* 1808, all matters relating

to the interior regulations and economy of the establishment were placed under the cognizance of a collegiate board, consisting of the governor and several other persons mentioned in the warrant. Certain regulations for men-servants hired for the Royal Military College are entered in a book kept for that purpose, containing, among other rules, the following: "The servants are to obey all orders they may receive from the officers of the institution, the staff-serjeants, and the surveyor. They are allowed wages at the rate of sixteen shillings per week with one dress and one undress suit of clothes per annum, subject to such stoppages as may be ordered, but which shall be paid up every three months, after deducting for the charge of breaking furniture, crockery, &c. belonging to the college, that may have been committed during that period. Should a servant wish to quit the college, he must give one month's previous notice, but should the college see reason to be dissatisfied with his conduct, it retains the power of dismissing him at a moment's notice." The customary mode of hiring such servants was by reading the rules over to them at the time of hiring, and then requiring their signature to them, in witness of their agreement to serve on the terms prescribed. The pauper was hired by Colonel Butler, the lieutenant-governor, one of the officers constituting the collegiate board, to whom the servants were usually hired. He heard the above regulations read at the same time by the quarter-master, and signified his assent in the usual manner, by subscribing his mark to them. He remained in the service, and received his wages as above agreed on, for two years and a half before he married. He lived and slept in the body of the college, and was employed in making the beds of the gentlemen cadets, assisting in sweeping and cleaning the rooms, and various other occupations for the service of the college exclusively as directed by the officers of the college. He was discharged, with several other public servants of the college, without notice, in the year 1819, on a reduction of the establishment by order of government. The body of the college was exclusively appropriated to public uses for study and lodging of the gentlemen cadets, and is exempt from poor-rates, as being a public building. The pauper and thirty-two other persons were employed in the same service, not as the private servants of any individual, but as the public servants of the establishment, to obey generally the officers of the college: and they were paid by the pay-serjeant, out of the funds supplied for the maintenance of the college; and they were not returned to the collector of the taxes, nor paid for nor assessed as servants. The pauper, *T. Slark*, afterwards married his present wife, and the children removed with him are the issue of the marriage. Upon these facts, the sessions found that there was a general hiring sufficient to constitute a settlement, if a settlement could be acquired by such hiring and service in a public establishment like the college; and submitted this question for the opinion of this Court, Whether the pauper, *T. Slark*, acquired a settlement by such hiring and service in the college? This case was argued at the sittings in banc after last *Trinity* term.

Shepherd and *Talfourd* in support of the order of sessions. This was a yearly hiring, and as the college did not exercise the power of dismissing the pauper, he gained a settlement at the end of his first year's service. Besides the sessions find expressly a general hiring, and only ask the opinion of this Court on the effect of "such general hiring and service." It is immaterial whether the contract be to serve one or more masters, as the statute 3 W. & 1 c. 11, s. 7, does not mention any person as master to whom the hiring is to be made, but only enacts that the person in order to gain a settlement shall be unmarried without child or children, and shall serve under a lawful hiring for a year. It is the nature of the service, therefore, that must determine the settlement. There is no reported case in which a servant of his Majesty has gained a settlement by such service; but that may be because such right was never disputed. By the statute 52 G. 3, c. 72, s. 8, an act for the inclosure of the *New Forest*, the servants of the crown are expressly excluded from gaining a settlement.

ment, and it may, therefore, reasonably be inferred that, without such a disability by statute, they would have gained a settlement by such service.

The Solicitor-General, Nolan, and Stone, contra. If the facts in a case show that the sessions have decided on wrong grounds, the Court is not limited by the return of the justices; and the reason is, that the case when returned by the certiorari becomes part of the records of the Court; and as the Court will enforce obedience to any decision which they come to, they will take care that the record will lawfully enable them. First, there is no yearly hiring within the statute. An unilateral contract is not sufficient; it must be reciprocal. Supposing the contract on the part of the servant to be a general hiring, yet the power retained by the college of dismissing him at a moment's notice, should they see reason to be dissatisfied with him, is parcel of the original contract, and is inconsistent with the notion of a yearly hiring. He was in fact discharged at a moment's notice, not for any fault, but on the reduction of the establishment, which explains how wide a meaning was given to the word "dissatisfaction" by both parties at the time of hiring. Besides, it is an exceptive hiring: the terms of the engagement were read to the pauper at the time of hiring, and the persons hiring cannot go beyond these; so that when he had done his work, he was for the rest of the day *sui juris*. Secondly, from the nature of the establishment, a service in it will not confer a settlement. It was intended by the statute *561] *8 & 9 W. & M. c. 30, s. 4, that persons gaining a settlement should have benefited the parish for one whole year, but the establishment where the service was performed pays no rates, and if it could confer settlements it would impose burthens on the parish without contributing to their support. The statute 52 G. 3, c. 124, which vests in the crown certain lands for the Royal Military College, recites that his majesty had been pleased to establish a royal military college, and had directed that certain persons should form a collegiate board for the control of the interior regulations of such establishment; the persons in the establishment are, therefore, the servants of the crown, though hired by the officers of the establishment, and the crown not being mentioned in the act of *William* is not subject to its operation, and its servants cannot gain a settlement. Indeed this is more like an office than a service, and the person serving, like a soldier, who is the servant of the king, and may be dismissed at the discretion of the crown, and receives pay from the public purse, not from the pocket of any individual. No declaration could be framed in which such servant could bring an action against any of the officers for being turned away on the reduction of the establishment.

Cur. adv. vult.

BATLEY, J., on this day delivered the judgment of the Court. In this case the question is, Whether the pauper had acquired a settlement in consequence of having been hired into the establishment at *Sandhurst*, and having served there for a year. That establishment is in the nature of a collegiate board, and the terms on which the servants are hired are, that "they are to obey *562] *all orders they may receive from the officers of the institution." They are allowed at the rate of 16s. per week, with one dress, &c. per annum, subject to such stoppages as may be ordered, but which are to be paid up every three months, after deducting for the charge of breaking furniture, &c.; and should a servant wish to quit the college, he must give one month's previous notice, but should the college see reason to be dissatisfied with his conduct, it retains the power of dismissing him at a moment's notice. The sessions thought that this was a general hiring, so as to constitute a hiring for a year; but they entertained a doubt whether the hiring, being by the officer of the establishment, was sufficient to confer a settlement on the individual hired. Another point raised in the discussion was, whether the power reserved in the original contract, of putting an end to the service by a month's notice on the part of the servant, or at a moment's notice by the college, should they be dissatisfied with him, prevented this from being a hiring for a year. On this point we are satisfied

that this is to be deemed a yearly hiring, notwithstanding the power of determining it in the mean time, as that power was not exercised before the expiration of the year. It is like the case of a defeasible contract (similar to that in *Rex v. Herstmonceaux*) (a), to be determined on some contingency; but the contingency not having happened, and the contract not having been defeated during the year, it enures after the year's service as a yearly hiring. But it was also said, that as this hiring was by the officer of the establishment, and the party was to serve the officers of the establishment, and *the young gentlemen supported at it, and was not hired by, or to serve a private individual, that distinguished this from the ordinary cases of hiring, and prevented a settlement from being gained. The stat. 3 W. & M. c. 11, s. 7, contemplates a lawful hiring and service under it; it does not say by whom the hiring is to be made. It has been urged in argument, that the party is to be considered as holding an office, not as a servant. But a man who does all menial offices of a servant, and is at the command of the persons in the establishment, is a servant, and not an officer. We think that the legislature did not mean to make any distinction between one description of hiring and another, or a particular description of persons; all that it required was, that the hiring should be lawful, and that there should be a service under it. Here there was a lawful hiring and a service under it in the parish of *Sandhurst*, and, therefore, a settlement was gained.

Order of sessions confirmed.

a) Ante, p. 551.

REX v. The Inhabitants of Stoke Damerel.

The 56 G. 3, c. 139, s. 11 recited, that the salutary provisions enacted by the 43 Eliz. were frequently evaded in the binding out of poor children, and that the premium of apprenticeship was clandestinely provided by parish officers, who were thus enabled to bind poor children without the sanction of justices of the peace, and then enacted, "That any indenture of apprenticeship, by reason of which any expense whatever shall at any time be incurred by the public parochial funds, shall be valid and effectual, unless approved by two justices of the peace under their hands and seals, according to the provisions of said act and of this act:" Held, that in order to make an indenture by reason of which any expense had been incurred by the public parochial funds valid and effectual, the approval of two justices should be under their hands *and seals*, and that such an indenture approved of by two justices under their *hands only*, was void and not voidable, and no settlement was gained by serving under it.

Upon appeal against an order of two justices, whereby *Jane Coleman* was removed from the parish of *Stoke Damerel* to the parish of *Charles*, in the *borough of *Plymouth*, both in the county of *Devon*; the sessions quashed the order, subject to the opinion of this Court on the following case:

The pauper, *Jane Coleman*, daughter of *Thomas Coleman*, of the parish of *Stoke Damerel*, in the county of *Devon*, was bound an apprentice on the 1st of October 1823, to *Jeremiah Ellis*, of the parish of *Charles*, within the borough of *Plymouth*, in the said county. The indenture, which was on a 1^l. station, was executed by the master, the pauper, and her father, but *not by the overseers of the poor of the parish of Stoke Damerel* (who were not parties thereunto) and the following allowance was written on the margin of the same:—"We, to wit; We, whose names are hereunder written, justices of the peace for the county aforesaid, whereof one is of the quorum, do consent and allow to be put forth *Jane Coleman* an apprentice, according to the intent and mean-

of the said indenture." This allowance was signed by *E. Lockyer* and *S. Pym*, two justices of the peace for the county of *Devon*, but was not under their seals. Upon the binding of *Jane Coleman* by the indenture, an expense was incurred by the public parochial funds of *Stoke Damerel*, (i. e.) the sum of 9*l.*, being the consideration-money mentioned in the indenture; and a further sum, being the costs and charges attending the binding. No notice was given to the overseers of the poor of the parish of *Charles* (or to the guardians of the poor of *Plymouth*, or to any of them, of the intention to bind out such apprentice) previous to the binding. *Plymouth* is a borough, situate in the county of *Devon*, having justices who have exclusive jurisdiction therein. The pauper resided in service under this indenture with *Ellis*, in the parish of *Charles, Plymouth*, from the date of the

*indenture until she was discharged from further service under it, on
 *565] the 3d July 1826, by two magistrates.

Nolan and *Praed* in support of the order of sessions. No settlement was gained in *Charles* by the service under this indenture. The pauper would have gained a settlement by such service, if the binding was valid either as a parish indenture or as a binding between the parties. But it cannot be good as a binding by the parish, because the parish officers were no parties to the deed. *Rez v. Arundel* (a) shows that this is a good binding between the parties, unless it be void by reason of non-compliance with some of the provisions of the statute 56 G. 3, c. 139. The early sections of that statute relate to indentures where the parish officers are parties; and the second section requires that notice shall be given to the overseers of the poor of the parish in which such child shall be intended to serve an apprenticeship, before any justice shall allow such indenture. *Rez v. Newark-upon-Trent* (b) shows that such notice is necessary in the case of parish apprentices. The eleventh section, after reciting that the salutary provisions enacted by the 43 Eliz. are frequently evaded in the binding out of poor children, and that the premium of apprenticeship, or a part thereof, is clandestinely provided by parish officers, who are thus enabled to bind out such poor children without the sanction of the justices of peace, enacts, "that no indenture of apprenticeship, by reason of which any expense

*566] whatever shall at any time be *incurred by the public parochial funds, shall be valid and effectual, unless approved of by two justices of the peace under their hands and seals, according to the provisions of the said act and of this act." One of the provisions of that act is, that notice shall be given to the overseers of the poor of the parish in which such child shall be intended to serve an apprenticeship. That regulation therefore must be considered as incorporated in the eleventh section; and the indenture in question is not valid for want of such notice. Secondly, the indenture was void, because the approval by the two justices was not under their seals. This is a power given to the justices which is to bind third persons, and the affixing of their seals is a condition annexed by the legislature to the execution of the power, and the justices therefore cannot dispense with it. The allowance of parish indentures and of certificates are analogous to each other. Now, by the 8 & 9 W. 3, c. 30, persons coming to inhabit, and bringing with them a certificate under the hands and seals of the churchwardens and overseers of the poor of any parish, owning them to be inhabitants of such other parish, are irremovable until actually chargeable. It was decided, in *Rez v. Austrey* (c), not only that there must be a seal to such certificate, but that there must be a separate seal for each party granting the certificate, and that upon the ground that it was the mere case of the execution of a power, and that all the circumstances required by the creators of the power, however unessential and otherwise unimportant, could only be satisfied by a strictly literal and precise performance.

*567] **Bolland* and *Coleridge* contra. The eleventh section does not incorporate all the provisions of the previous sections, but is a distinct enact-

ment, applicable to a particular species of apprenticeship, where the parish officers are not parties to the indenture, but where some part of the expense is paid out of the parochial funds. It has a preamble of its own, and was evidently introduced for the purpose of preventing the parish funds from being impropriately appropriated by the overseers. Then as to the sealing, the act is only directed. By the 43 *Eliz. c. 2, s. 5*, the parish officers, by the assent of two justices, are authorized to bind poor children apprentices; but such assent is not required to be given under seal. In the very same section, the overseers of the poor are empowered to treat with lords of manors for waste land for the erection of cottages, and the agreement must be under the hand and seal of the lord of the manor. So, in the first section of the act 56 *G. 3, c. 139*, the justices are required to sign the allowance of the indenture where the parish officers are parties, but no greater power is given to the justices by the eleventh section than the power given to the overseers. Why, therefore, should a greater degree of solemnity be required in the case of the indenture required to be done by them under the eleventh section than under the first section? *Rex v. Austrey (a)* does not apply, because a certificate is the act of the parish officers, and the sealing is indispensable to make it valid. Here, the indenture was a complete instrument before the approval of the magistrates. By statute 43 *Eliz. c. 4, s. 41*, it is enacted, "that all indentures made otherwise than in that statute appointed, shall *be clearly void to all intents and purposes;" but the word void has received a limited construction, and has been construed to mean voidable; as in *Rex v. St. Nicholas Ipswich (b)*, *Granger v. Cookson (c)*, *Gye v. Felton (d)*. And the test, whether such instrument is void or voidable, is said to be the imposition or omission of a penalty for not completing it according to the provisions of the act. In this case there is no penalty, and, therefore, according to the rule laid down, this indenture is not void, but voidable only. The eleventh section of the act says, that the indenture shall not be valid unless approved of by the justices in the manner pointed out; that may mean, that it shall not be valid between the parties, so as to enable the master to compel the completion of the service, or to proceed on any of the covenants. In *Rex v. St. Nicholas Ipswich*, Lord Hardwick was of opinion "that the forty-first section of the 5 *Eliz. c. 4*, did not make the indenture void, but voidable by the parties themselves only." The settlement of paupers is not the subject-matter of the statute 56 *G. 3, c. 139*; it is for the binding of parish apprentices. But where the legislature intended to take away settlements it has done so in express terms, as in sections 5 and 9. In section 11, settlements are not mentioned.

BAYLEY, J. I do not know how to get rid of the words of this section of an act of parliament, and where the legislature in a very modern act of parliament have used words of a plain and definite import, it is very dangerous to put upon them a construction, the effect *of which will be to hold that the legislature did not mean that which they have expressed. This act was passed to regulate the binding of parish apprentices. The early sections apply together to bindings by parish officers, but as there might be instances in which the parish officers were not ostensibly the parties binding, although they were their influence and furnished the means out of the parochial funds by which the binding was effected, it occurred to the legislature that it might be expedient to make some provision for that class of cases, and the eleventh section was introduced for that purpose. It begins with a new recital, as if it were altogether a new enactment, and one to which the former sections did not apply: "Whereas the salutary provisions enacted by an act of the 43 *Eliz.* are frequently evaded in the binding out of poor children, and the premium of apprenticeship, or a part thereof, is clandestinely provided by parish officers, who are thus enabled to bind out poor children without the sanction of justices of peace." The mischief was therefore, recited, was, that the provisions of the 43 *Eliz.* were evaded in c

where the parish officers were not the ostensible, though the substantial parties binding, and they were thereby enabled to bind out poor apprentices without the sanction of justices. It then enacts, "that no indenture of apprenticeship, by reason of which any expense whatever shall at any time be incurred by the public parochial funds, shall be valid and effectual, unless approved of by two justices of the peace, under their hands and *seals*, according to the provisions of the said act and of this act." This is a case in which expense has been *570] incurred by the public parochial funds, and, therefore, it *is within the spirit and the words of the act; and, the indenture not having been approved of by two justices, under their hands and seals, is not valid and effectual. The words, "according to the provisions of the said act and of this act," *reddendo singula singulis*, mean that there shall be such approbation by the justices as the 43 *Eliz.* and the 56 *G. 3, c. 139*, require. Now, the latter statute requires that the indenture shall be approved of by the justices under their *seals*. I cannot tell why the legislature required that the indenture should be approved of under their seals; but they have so required it in express terms, and I cannot say that they did not mean that which they have so expressed. It has been contended, that the words *not valid and effectual* are to be construed so as to make the indentures not absolutely void, but voidable only at the option of either party; and that, therefore, the indentures will not be valid and effectual if either party dissent during the period of apprenticeship, but that if there be no such dissent, they will be valid and effectual. I think it was the intention of the legislature that there should be such an allowance by the justices, in the first instance, as to make the indenture binding ab initio, and not voidable at the option of either party. For otherwise it would be at the option of the master or of the apprentice to determine the indentures at any period within the seven years. The master might, therefore, after six years and three quarters service, at his own election, deprive the apprentice of the benefit of his indentures; or the apprentice, on the other hand, might, after he had received instruction sufficient to enable him to act for himself, also determine the indentures to the *571] prejudice of his master. I think that that would be an *unreasonable construction to be put on those words, and that the true construction of them is, that the indentures shall be void ab initio, unless they have the approbation of the justices under their hands and seals.

HOLROYD, J. I think that this was not a binding by the parish officers, within the early sections of the statute, but that it was a binding within the meaning of section 11. That section enacts, not merely that no *parish* indenture, but that no indenture shall be valid and effectual unless it has the approbation of two justices under their hands and seals. It has been argued, that it is not requisite that the approbation of the justices should be under their hands and seals, but that those things shall be done which are required by the statute of the 43 *Eliz.* and by the earlier sections of this act; and that they not requiring that the allowance of the justices shall be under their seals, the words "under their hands and seals," are to be qualified by the latter words, "according to the provisions of the said act and of this act." It seems to me that the true construction of *those words* is, that the approval shall be such as is required by the 43d of *Eliz.*, and by the former sections of the 56 *G. 3, c. 139*, and shall also be under the hands and seals of the justices. Then, it has been contended, that the words "not valid and effectual," may be construed to make the indenture voidable only; upon that point I have entertained some doubt. But it is admitted, that it was competent to either party to avoid such an indenture before the service expired. Now, here it was avoided, for the pauper was discharged *572] from her service by an order of two magistrates. Assuming that the *indentures were voidable only, still, as they were avoided, no settlement could be gained. As to the question, whether the indentures were absolutely void or voidable only, it is to be observed, that this statute says not merely that they shall not be valid, but they shall not be valid and effectual.

The case, therefore, is different from others, where it has been held, in order to prevent mischief, that the word void shall be construed voidable. But without deciding that point, I think that as the indenture was avoided by the parties, it was thereby rendered not valid and effectual, and that no settlement was gained by the service under it.

LITTLEDALE, J. No settlement was gained by the service under this indenture. The law undoubtedly makes a difference between instruments under seal and those which are not, and regards the former as acts done with more solemnity; and the legislature may have required the justices to allow the indenture under seal, in order to make them treat the act of allowance as a matter of great importance. It has been argued, that the words "and seals," are directory, and that they are not, for you must take the whole section together. It is clear that the whole is not directory, and one part cannot be directory if the whole is not so. It is argued that this indenture, though it may not be effectual for all purposes, is sufficient for the purpose of enabling the pauper to gain a settlement. That is a consequence resulting from serving under a valid indenture of apprenticeship. Here the act of parliament says, that no indenture of apprenticeship shall be valid and effectual, unless approved of by the justices under their hands and seals; and that being so, the allowance not having been approved under the seals of the magistrates, this indenture was not valid and effectual, and all the consequences which would otherwise have resulted from it are prevented, and the service under it did not confer a settlement. In the fifth section it was necessary to take away the power of gaining a settlement in express terms, as the provisions are affirmative; but in section 11, they are negative, and, therefore, that was not necessary. If the indenture had not been destroyed by the enactment, that it shall not be valid unless approved by the justices under their hands and seals, there was no necessity for a special enactment, that no settlement should be gained by service under it.

Order of sessions confirmed.

REX v. The Inhabitants of Whitchurch.

A parish certificate, dated the 7th of September 1758, purported, in the body of it, to have been granted to a pauper and his family by two churchwardens and two overseers, and was signed and sealed by two overseers, and by one churchwarden only. The churchwardens for the year 1758 were nominated at Easter, and were proved to have been sworn into office on the 15th of September, at the visitation. But there was no evidence of their having been sworn into office before that time. The certifying pauper, after the date of the certificate, had frequently relieved the pauper and different members of his family while they were residing in other parishes: Held, that in favour of such ancient certificate, which had been treated by the certifying parish as valid, the justices would presume that the churchwarden who executed the certificate was sworn before he executed it, and, therefore, that it was duly executed by him as churchwarden: secondly, that the execution by two overseers and one churchwarden was an execution by the major part of the churchwardens and overseers within the statute 8 & 9 W. 3,

UPON appeal against an order of two justices, whereby they removed *Bray* the younger, his wife and children, from the parish of *Whitchurch*, in the county of *Southampton*, to the parish of *Saint Mary Bourne*, in the county of *Southampton*, the sessions quashed the order, subject to the opinion of this Court in the following case:—

*The following certificate was produced on the part of the parish of *Whitchurch*:—"Southampton, to wit: We, *John Harbutt*, *William Piper*, *William Arundel*, *William Philpott*, churchwardens and overseers

the poor of the parish of *Saint Mary Bourne*, in the county aforesaid, do hereby own and acknowledge *William Bray* junior, and *Elizabeth* his wife, *William*, aged about five years, *Mury*, aged about three years, and *Elizabeth*, aged about two years, their children, to be our inhabitants, legally settled in the said parish of *Saint Mary Bourne*. In witness whereof, we have hereunto set our hands and seals this 7th day of *September* 1758."

The instrument was signed by *W. Piper*, as one of the churchwardens, and by *W. Arundel* and *W. Philpott*, the two overseers, and attested by two witnesses, and was duly allowed by two justices on the 12th *September* 1758, who certified that *Alexander Neave*, one of the witnesses who attended the execution of the certificate, had made oath before them that he saw the churchwardens and overseers of the said parish, whose hands and seals were subscribed and set to the certificate, severally sign and seal the same, and the names of the said *Alexander Neave* and *Thomas May*, whose hands were subscribed as witnesses to the execution of the certificate, were of their own proper hand-writing respectively.

Richard Loft produced the certificate from the parish chest of *Whitchurch*, which was admitted as coming from the proper place. It was proved that *William Bray* junior, the grandfather of the pauper, resided in *Whitchurch* till the time of his death in 1799; that *W. Bray*, his son, also named in the certificate, has resided there ever since the certificate was granted; and that the pauper *575] resided there from the time of his *birth until the time of his removal under the order. It appeared by the visitation-books produced by the registrar of the bishop's court, that *Saint Mary Bourne* is in the diocese of *Winchester*, and is a peculiar in the jurisdiction of the Chancellor's visitation; that *John Harbutt* and *William Piper* were sworn churchwardens for *Saint Mary Bourne* in the year 1758, on the 15th *September* in that year; that no churchwardens appeared by the books to have been sworn in at the visitation from the year 1751 to 1758; that the visitation-book for 1750 was lost. It also appeared from the evidence of the registrar, that it was the course of office to make an entry in the visitation-books of the swearing in of churchwardens at the time of swearing, whether the swearing took place at the visitation or afterwards; that if it took place afterwards, the registrar always entered it, but he had not looked over the books before his time to see whether there were any entries of such subsequent swearing. It appeared that at *Easter* 1750, *J. Longman* was nominated as churchwarden; that in 1757, *J. Cowdery* and *E. Ratin* were nominated churchwardens, and that *John Harbutt* signed the nomination; that at *Easter* in 1758, *Thomas Harbutt* and *W. Piper* were nominated churchwardens. It appeared also that *W. Bray*, the pauper, was, on the 7th *December* 1790, bound by indenture to his grandfather *W. Bray* junior, named in the certificate, for the term of seven years, which time he served in *Whitchurch*; and that the pauper had done no act since the service under the apprenticeship to gain a settlement. It appeared that *W. Bray* (son of *W. Bray* junior, mentioned in the certificate), the father of the pauper, sixteen or seventeen years ago, received relief from the overseers of *Saint Mury* *576] *Bourne*, *he at the time residing in *Whitchurch*; that he had also constantly, for the last four years, received relief from the last-mentioned parish; and that no objection was made upon his application to the overseers of that parish for relief when he requested it. It also appeared that *W. Bray*, the pauper, had been occasionally relieved by the parish officers of *Bourne* nearly ever since his apprenticeship, whenever he wanted it, and had so received relief constantly for the last seven years. The court of quarter sessions thought the certificate inadequately executed, and quashed the order, subject to the opinion of this Court.

Nolan, *Selwyn*, and *Poulter*, in support of the order of sessions. This is a bad certificate; and if it be so, then it is clear that it cannot conclude the

parish of *St. Mary Bourne*. *Rex v. Clifton* (a), *Rex v. St. Mary W.* (b), *Rex v. Wootton St. Lawrence* (c), *Rex v. Tamworth* (d), *Rex v. gam* (e). The certificate is bad because it is signed and sealed by one churchwarden only. It ought to have been signed and sealed by both. The 8 & 9 W. 3, c. 30, s. 1, provides for the delivery to the churchwarden or overseers of the poor of the parish or place into which poor persons come to inhabit, "of a certificate under the hands and seals of the churchwardens and overseers of the poor of any other parish, township, or place, the major part of them, or under the hands and seals of the overseers of the poor of any other place where there are no churchwardens." The words "the major part of them," must be confined to the "last antecedent" (f), because in the case of there being no churchwardens, the certificate must be under the hands and seals of the overseers, i. e. of them. But, secondly, the certificate is bad, because the persons who are described in the body of it as churchwardens, were not at the time of its execution or allowance by the magistrates churchwardens de jure. They had not at that time been appointed, but they were not sworn in until the 15th of September. Now it is a principle of law, that persons appointed to an office, are not completely in office until they are sworn. Mayors, constables, and annual officers are good officers after the year for which they are elected or appointed to office is expired, until their successors are sworn in, per King, C. J., in *J. Prowse* (g). The churchwardens of the preceding year must, therefore, be considered as in office until the 15th of September, when their successors are sworn in; and Piper, who signed the certificate in this case, was not in office as a lawful churchwarden before he was sworn in; for otherwise there would have been two sets of persons at the same time capable of giving certificates. This is consistent with the ecclesiastical law, for by Canon 118, the office of all churchwardens and sidesmen shall be reputed to continue until the new churchwardens that succeed them be sworn in. The records of the ecclesiastical court exclude any presumption that these persons were churchwardens in the preceding year, and continued in office until the swearing in of their successors. It appears that other persons had been appointed. The distinction between a churchwarden de facto and de jure, is recognized in *Vin. Abr. tit. Churchwardens*, A. 2, pl. 13. "If there be a churchwarden de jure and a churchwarden de facto in the same parish, this latter cannot justify the churchwarden de facto out of or receiving money, but he is accountable to the churchwarden de jure. He is no more than another man (per *Powel* and *Powis*, Justices), and he is de jure may bring indebitatus assumpsit against the other." The 54 Geo. 3, c. 187, which enacts, that where churchwardens of a parish have given certificates from townships within it, such certificates shall be good, though they have not been sworn in for the township, requires, as a condition precedent, that they shall have been duly sworn in as churchwardens of the parish. The certificate is bad upon the face of it, because it professes to be the certificate of two persons; whereas it is signed only by one churchwarden and two overseers, and, therefore, it is not properly executed. It is not like a deed, binding upon the parties executing it, but it is a corporate act of the parish officers, and should be signed by all. The cases of *Rex v. Catesby* (h), which arose on the certificate, and *Rex v. Hinckley* (i), and *Rex v. Earl Shilton* (k), which arose on the certificate binding poor children apprentices, may be cited in answer. In those cases the churchwarden and one overseer were parties to the certificate and the indictment. But all the persons who purported to grant the certificate, or join in the indictment,

(a) 2 East, 168.

(c) Burr. S. C. 581.

(e) 1 T. R. 775.

(f) See *Rex v. St. Margaret, Leicester*, 8 East, 332, and *Rex v. Burton*, 3 T. R.

(g) 1 Str. 625.

(i) 12 East, 361.

(b) 3 T. R. 44.

(d) Burr. S. C. 770.

(h) 2 B. & C. 814.

(k) 1 B. & A. 275.

duly executed them; and being well executed *prima facie*, the court, in order
 *579] to give validity to the instruments in the absence of all evidence to the
 contrary, presumed, in one case, that there was a custom to elect one
 churchwarden only; and in another, that at the time of execution one overseer
 was dead. But in this case there is no room for any inference that the other
 churchwarden was dead, as he was afterwards sworn in. No such presumption
 was made in *Rex v. Austrey (a)*, where two churchwardens and one overseer
 had signed, but only two seals were on the instrument. Besides, the attestation
 is wrong, as the witness swears that he saw the churchwardens sign, when only
 one signed in fact. The age of a certificate will not found a presumption to
 make it valid, if it is not pursuant to the act of parliament, *Rex v. Tamworth (b)*,
Rex v. Margam (c), in the first of which cases the certificate was forty-seven
 years old. The maxim of law applies to a defective instrument, *quod in initio*
non valet tractu temporis non convalescit.

Dampier and *H. Bosanquet* contra. The certificate in this case was valid.
 Every indentment ought to be made in its favour, not only by reason of its an-
 tiquity, but because the parish which granted it have from time to time treated
 it as a valid certificate. They have relieved the father of the pauper while he
 was residing in another parish, and also the pauper himself, who, but for this
 certificate, would have been clearly settled by apprenticeship in the parish of
 *580] *Whitchurch*. Now, where there has been a long enjoyment of land, *or
 of any right annexed to land, the law considers it to be rightful, and
 will, therefore, presume the existence of instruments of conveyance, and the
 observance of all acts necessary to make those instruments of conveyance valid;
 and in favour of a parish certificate it will be intended that it had a lawful be-
 ginning, and, accordingly, in *Rex v. Catesby (d)*, the Court, in favour of a cer-
 tificate sixty years old, presumed that an overseer, who if living ought to have
 signed and sealed the certificate, was dead at the time when it was granted. So
 in *Rex v. Long Buckby (e)*, where an indenture above thirty years old was
 lost, although it was proved there was no entry that any such indenture had
 been stamped, yet this Court held, that in favour of such an ancient document,
 the sessions had properly presumed that it had an appropriate stamp. Upon
 this principle, therefore, that the law presumes every thing to be rightly done,
 the Court, in favour of the validity of this instrument, will intend any state of
 facts under which it could by any possibility be valid. Now, it is not clearly
 established that a churchwarden must be sworn before he can act; in *Viner's*
Abr. tit. Churchwarden, pl. 9, it is said that a churchwarden may execute his
 office before he is sworn in; and in *Rex v. Wymondham (f)* the Court held
 that a certificate signed by a majority of the parish officers *de facto* was valid,
 and they would not enquire into the title of those who signed the certificate.
 Now *Piper*, who signed the certificate in question, was clearly a churchwarden
de facto. But assuming that a person elected churchwarden must be sworn into
 *581] office before *he can act, still, if he continue to act after the expiration
 of the year for which he was elected, there is a virtual assent of the
 parish to his continuance in the office, into which he had been admitted and
 sworn, and then it is unnecessary that he should be re-sworn. It is consistent
 with all the evidence in this case, that *Piper* may have been elected and sworn
 into office in 1750, or before that year, and that he may have continued in office
 by the tacit consent of the parishioners until 1758, when the certificate was
 granted. It is true that other persons were nominated churchwardens in the
 period intervening between 1750 and 1758, but they were not sworn in; there
 was no evidence, therefore, that they became churchwardens *de jure*, and if they
 did not, then *Piper* may have been the only churchwarden *de jure* at the time
 when the certificate was granted.

(a) *Phill. Ev.* 471. 7th edit.
 (d) 2 B. & C. 814.

(b) *Burr. S. C.* 770.
 (e) 7 *East*, 45.

(c) 1 T. R. 775.
 (f) 6 T. E. 552.

BAYLEY, J. The question in this case is, Whether a certificate, given nearly seventy years ago, is valid? By the instrument, four persons are subscribed as churchwardens and overseers of the parish of *St. Mary Bourne*; but it appears, by the visitation-books, that *Piper*, who signed the certificate, was not a churchwarden, and *J. Harbutt*, who was described in it as the other churchwarden, were sworn in three days after the allowance of the certificate by the magistrates. It is contended, therefore, that as *Piper*, who signed the certificate, was not sworn into office at the time when it was executed, he was not a churchwarden de jure, and that the certificate was not binding on the parish, and if that argument prevails, then, although a fraud was practised upon the parish by the churchwardens and *overseers of *Whitchurch*, to whom the certificate was granted, it will be competent to the parish by whom the fraud was committed, by showing that those persons were not then sworn into office, to vacate the certificate, and say that it is not binding on the parish of *St. Mary Bourne*. If we were to hold that at any distance of time a certificate might be impeached on such grounds, the consequence would be that no officer in future would be safe in taking a certificate. A man may, with full knowledge, and by the permission of the parish, act, in point of fact, as a churchwarden, before he is sworn into office; he may, therefore, be a churchwarden de facto, while some other person may be churchwarden de jure. No man would operate as a great encouragement to a parish to induce a man to act before he is sworn in, and thereby enable him to practise a fraud in granting certificates, if we were to hold the certificate in this case to be void. At present I am strongly inclined to think, that the fact of a churchwarden not having been sworn in until a period subsequent to the date of the certificate, is not of itself sufficient in any case to avoid the certificate. In this case, the parish of *St. Mary Bourne*, who must have known under the circumstances the certificate was granted, have, from the year 1758 to the present time, when the order of removal was made, treated the certificate as valid; for they have, from time to time, relieved the pauper, and different members of the family, while they were residing in the parish of *Whitchurch*. As against the parish of *St. Mary Bourne*, therefore, I think we are warranted in favouring the validity of this certificate to presume any circumstances under which it may have been valid. Now an instance may be put, in which the certificate may, consistently with all the facts stated in the case, have been a valid certificate. Suppose *Piper*, soon after his nomination at *Easter 1755*, before he did any act as churchwarden, to have gone to the commissary, and have been sworn into office before him. The commissary might afterwards have required both the churchwardens to be re-sworn at the time of the nomination, in order that the fact of their having been so sworn might appear in the visitation-books. If *Piper* alone was sworn into office before the visitation, he may have been the only churchwarden de jure at the time when the certificate was granted, and *Harbutt* may have declined to sign the certificate because he had not been sworn into office. I think it fair and reasonable to make this presumption in favour of the certifying parish, who, by their certificate, held out to the parish of *Whitchurch* that *Piper* and *Harbutt* filled the office of churchwardens. We may make such a presumption in favour of the validity of this certificate, and presume that the parish of *Saint Mary Bourne* contemplated a fraud upon the parish of *Whitchurch*; but we ought not to presume fraud. On the contrary, we ought to make every presumption in favour of the validity of that certificate. I think, therefore, we ought to presume that *Piper* alone had been sworn into office at the time when he executed the certificate; that he was consequently the only churchwarden de jure, and that the certificate was a good certificate. It therefore becomes unnecessary to decide the question, whether a certificate signed and sealed by a churchwarden de facto is valid.

*LITLEDAL, J. I think also that the certificate may be supported. Upon the question whether a churchwarden can lawfully do any act

before he is actually sworn into office, I entertain some doubt. That matter was not fully discussed in the case cited from *Ventris*. It is unnecessary, however, to decide that point, because here the certificate was granted nearly seventy years ago. Now sixty years bars a writ of right, and although the validity of certificates of that age may perhaps be enquired into, yet after such a lapse of time, and after the certificate has been acted upon and treated by the certifying parish as valid, we ought, upon the principle upon which courts of law act in making presumptions, to intend that *Piper* was actually sworn in at the time when he executed it. The real fact cannot now be ascertained. The persons who alone could have any knowledge upon the subject are either dead or have left the parish. The fact, therefore, not being capable of proof, it appears to me reasonable to presume, that individuals appointed to a public office would not act for six months without taking that oath which the law required them, and which it was their duty to take. It does not appear whether it was usual to hold visitations at the time when churchwardens were elected. From the year 1751 to 1758, there is not in the visitation-books any entry of churchwardens having been sworn in. I cannot presume that, during that period, the practice was not to swear the churchwardens into office. The reasonable presumption is, that the persons who were appointed churchwardens in those years went to the commissary, and were sworn in before him; and the fact of there being in the visitation-books no entry of the swearing in of the churchwardens during that *585] period, is consistent with this presumption, for it may have been thought unnecessary that they should be again sworn in at the visitation. I think, therefore, that in this case we ought, upon general principles, to intend that every thing necessary to be done to make this certificate valid was done; and, consequently, that we ought to intend that *Piper*, before he executed it, was sworn into office in the manner suggested by my Brother *Bayley*, or even, if necessary, that *Piper* and *Harbutt* were appointed churchwardens and sworn into office in 1750, and that they continued to act as churchwardens at the time when the certificate was granted. But it was objected that it was not signed by all the churchwardens, although in the body of the instrument it purported to be the act of all; but that is immaterial. The act of parliament only requires that the certificate shall be signed by the churchwardens and overseers, or the major part of them. The words "the major part of them," do not mean the major part of the overseers, but of the churchwardens and overseers taken as one aggregate body, and it is only necessary, therefore, that a majority of that aggregate body should concur in the act required to be done. The certificate in this case having been signed by three out of four, I think it is sufficient, and that being so, it is valid; and the order of sessions must, therefore, be quashed.

Order of sessions quashed.

*586]

*BENNETT v. EDWARDS.

By statute 17 G. 2, c. 3, s. 2, it is enacted, "that overseers of the poor shall permit inhabitants of the parish to inspect rates at all seasonable times;" and by sect. 3, "if any overseer shall not permit an inhabitant to inspect the rate, such overseer, for every such offence, shall forfeit and pay to the party aggrieved the sum of 20*l*." Held, first, that a demand to inspect a rate made on the overseer by a rated inhabitant in the presence of his attorney, was a lawful demand.

Secondly, that the refusal to produce the rate upon a lawful demand, constitutes the inhabitant a party grieved within the meaning of the statute.

Thirdly, that a notice that a rate of so much in the pound would be collected forthwith,

was a good publication of the rate, although it was not stated that it had been allowed by the justices.

Fourthly, that a demand to see "the rate" was sufficiently specific, there being only one rate in esse at that time.

Fifthly, that the overseer, by refusing to show the rate, and referring the party to the vestry as a place where he would be allowed to inspect it, incurred the penalty imposed by the 17 G. 2, c. 3.

Sixthly, that an assistant overseer, appointed by a select vestry under the provision of the 59 G. 3, c. 12, s. 9, is not liable to the penalties imposed by the 17 G. 2, c. 3, s. 3, for not permitting inhabitants to inspect the rate, unless it be proved that the select vestry have imposed upon such assistant overseer the duty of producing the rate to the inhabitants.

DEBT on the statute 17 G. 2, c. 3. The first count of the declaration stated that the plaintiff was an inhabitant of the parish of *Almondsbury*, in the county of *Gloucester*, and that the defendant was one of the overseers of the poor of that parish; that on the 1st *March* 1827, the churchwardens and overseers of the parish made a rate for the relief of the poor, which was afterwards allowed by two justices, and published by the churchwardens and overseers of the poor of the parish; and that afterwards, and at a reasonable time in behalf, to wit, on the 23d *May* 1827, the plaintiff requested the defendant as such overseer, to permit him to inspect the rate, and tendered the defendant 1s. for the same, and although the defendant, as such overseer, produced the rate in his possession, yet he would not permit the plaintiff to inspect it, but refused, contrary to the form of the statute, whereby the defendant forfeited 20l. Second count, for not furnishing a copy of the rate, averring that the plaintiff tendered of 6d. for every twenty-four names; third count, the same as the second, omitting the making, allowance, and publication of the rate, and the possession of the defendant. There was a similar set of counts, charging the defendant "as assistant overseer." Plea, general issue, and issue thereon. At the trial before *Littledale, J.*, at the Summer assizes for the county of *Gloucester* 1827, it appeared that the plaintiff was a rated inhabitant of the parish of *Almondsbury*, and the defendant was an assistant overseer, appointed by a select vestry. On the 19th *April*, *Steele*, an attorney (not a parishioner) applied to the defendant, and said he was professionally engaged for *Bennett* (the plaintiff), who was dissatisfied with the rates and accounts, and had directed him, *Steele*, to inspect them. The defendant said that the books were at his house, and that *Steele* might inspect them there any day. The plaintiff *Steele* afterwards required to see the rates, but did not tender the defendant any fee for showing them. On the 23d *May* the plaintiff, accompanied by *Steele*, went to the defendant's house; the defendant met them in the yard close to the door. *Steele* said, "it is intimated to Mr. *Bennett* (the plaintiff) that the rate you refused to show the accounts was because the proper fees were not tendered; I hope you will take the money, and let us see the rate." The defendant then said, "I cannot; I have the books, but I have orders not to show them;" and a moment afterwards added, "*Bennett* may see them by going to the vestry," (explaining, upon enquiry, that he meant the select vestry, which had consented to meet at short notice should the plaintiff apply for inspection of the rate and accounts). The plaintiff then tendered 1s. 6d., and said he demanded inspection of the poor rate; and the defendant said, that he had orders not to show them. A rate was allowed on the 17th *May* 1827, and published in the church on the 20th, in the form following: "This is to give notice, that a rate or assessment of one shilling in the pound will be collected forthwith." The next preceding rate had been made the 8th *December* 1826, and published on the 24th. The action was brought before *June* 15th, so that no sessions intervened between the time of the refusal, and the commencement of the suit. Upon this evidence it was objected, inter alia, that the plaintiff having been aggrieved by the defendant's refusal to produce the rate, could not maintain this action within the 17 G. 2, c. 3, s. 3, which gives the penalty

the party aggrieved; and *Spenceley v. Robinson* (a) was cited: and on the authority of that case, but against his own opinion, the learned Judge directed a nonsuit, but reserved liberty to the plaintiff to enter a verdict for the penalty, if this Court should be of opinion that the plaintiff was a party grieved within the meaning of the statute. In *Michaelmas* term last, a rule nisi was obtained by *Campbell*.

Taunton, Ludlow, Serjt., and Justice showed cause. There was no legal demand made by the plaintiff to inspect the rate. It is quite clear, that the demand by the attorney, who was not an inhabitant of the parish, was not sufficient. And the subsequent demand made by the plaintiff (accompanied by the attorney) was not a compliance with the statute 17 G. 2, c. 3, s. 3, because the latter had no right to inspect the rate, and the defendant was required to permit the plaintiff and his attorney to inspect the rate. Neither did the demand point specifically to any particular rate. Secondly, the statute gives the penalty to the party aggrieved. Now here the plaintiff was not aggrieved by the refusal to produce the rate, for notwithstanding such refusal, he might *599] have appealed to the next sessions. He was not, therefore, a party aggrieved within the meaning of the statute, *Spenceley v. Robinson* (b). Thirdly, there was no due publication of the rate, for it was not stated in the notice that the rate was allowed by the justices. Fourthly, the defendant's refusal was not absolute, but qualified; for he told the plaintiff that he might inspect the rate by going to the vestry. That was not an unlawful refusal. Fifthly, an action is not maintainable against an overseer who acts under the directions of a select vestry. By the 58 G. 3, c. 69, s. 6, the vestry have power to order how the books may be kept, and the defendant was justified in refusing to produce the rate, if he acted under the directions of the vestry. Besides, if they have appointed any particular place for depositing the books, the house of the assistant overseer would not necessarily be the proper place to make the demand. The defendant stated, that the plaintiff might see the books at the select vestry. He ought to have asked for an inspection at the vestry room, where the select vestry was sitting. But this action is not maintainable against the defendant, who was proved to be an assistant overseer appointed by a select vestry. The plaintiff can only be entitled to recover on those counts which describe the defendant as assistant overseer. Now the statute 59 G. 3, c. 12, s. 9, first authorizes the appointment of assistant overseers, but it does not make them liable to any penalty for refusing to deliver the accounts. The statute 17 G. 2, c. 3, s. 3, only subjects the overseer or other persons authorized to take care of the poor to penalties for not delivering accounts. The defendant *fills an office created *590] subsequently to the passing of that act. He is not, therefore, an overseer within that act. The words "other persons authorized" apply to other officers then in being, such as chapel wardens.

Campbell and Philpotts contra. There was a sufficient demand by the plaintiff to inspect a specific rate; for although his attorney had no right to such inspection, he might lawfully accompany the plaintiff in order to prove the refusal, if such refusal was made. The demand was, to be allowed to inspect the rate. That must have referred to the rate in question, which was the only one then in existence. Next, the plaintiff was a party aggrieved within the meaning of the statute, for the withholding the inspection of the rate to which the plaintiff had a right, was in itself an injury. *Spenceley v. Robinson* was decided on the ground that the plaintiff had not made his demand at a reasonable time and place; and the dicta of two of the learned Judges, that the refusal to allow a rated inhabitant to inspect a rate is no grievance, cannot be supported. For it is necessary for a party to inspect the rate, in order to prepare his notice of appeal. The rate was duly published; for the statute only requires that notice shall be given of a rate allowed by the justices, and

(a) 3 B. & C. 558.

(b) *Ibid.*

that was done. Besides, it is not competent to the defendant to say that the rate was not regularly published. It is sufficient that there was a rate demanded and that the overseer treated it as an available rate, in order to give the inhabitants right to inspect it. There was also a refusal within the statute, for the defendant required the plaintiff to go before the select vestry. That was a condition which he had no right to impose, and, therefore, the refusal was unlawful. Then as to the objection that an *assistant overseer is not within the 17 G. 2, the verdict may be confined to the counts charging the defendant as assistant overseer, and then that objection will appear upon the record and may be the subject of a motion in arrest of judgment. But that statute imposes the penalty on any churchwarden or overseer authorized to take care of the poor. The defendant here was an overseer authorized by the select vestry to take care of the poor, and was therefore subject to the penalty.

BAYLEY, J. In the course of the argument six questions have been presented, on one only of which we have felt any doubt. We will first dispose of the others in order. First, the presence of the attorney has been made an objection to the mode of making the demand; and it is said, that, not being a parishioner, he and the plaintiff improperly required the defendant to give them inspection. But it appeared in the course of the evidence that the attorney had explained to the defendant that he asked for inspection on behalf of Mr. Bennett, his client; and although by the statute 17 G. 2, c. 3, s. 3, an inhabitant alone is entitled to inspect the rate, yet his attorney, or any other person, may go and demand him to make the demand, or in case of an improper refusal, how can the demand be proved? Secondly, I think the plaintiff was a party aggrieved. The plaintiff had a right to see the rate, in order to satisfy himself whether he was fairly dealt with, and whether other parties were assessed at all, or at a full value, or whether he was overrated; and this inspection was wrongfully denied him. Thirdly, it is said that there was no proper publication in church, because the notice did not state that the rate had been allowed, but merely that it would be collected forthwith. Now the act requires no such publication in words. *All that it requires is, "that the churchwardens and overseers, or other persons authorized to take care of the poor in every parish, township, &c., shall give or cause to be given public notice in church of the rate for the relief of the poor allowed by the justices of the peace, the next day after the same shall have been so allowed; and that no rate shall be reputed valid and sufficient, so as to collect and raise the same, unless such notice shall have been given." It does not say that notice shall be given that the rate has been allowed," but "*of every rate allowed.*" This has been done here. It must have been in fact allowed, or the publication would be useless. A notice that a rate is about to be collected, ex necessitate implies that it has been allowed. Fourthly, the objection that there was not a sufficient demand is answered by the fact that the plaintiff asked for *the* rate. There was no rate in esse at the time of such demand except this, which was published in church on the 20th of May, and demand was made on the 23d. Fifthly, it is said that the refusal was not absolute, because the books were offered to be produced to the vestry. But if a party entrusted with the rate has no right to insist on such terms, then a refusal qualified by such terms as he has no right to insist on is an unlawful refusal; and he thereby commits the offence of not permitting parishioners to inspect the rate within the words of this act of parliament. The remaining question on which we doubt, is, whether the defendant as assistant overseer be liable within the act of parliament. We all think that this ought not to be absolute for entering a verdict for the plaintiff. For if we doubt that an assistant overseer may be liable to the penalty imposed by the 17 G. 2, c. 3, s. 3, it will still be a question of fact whether the defendant was *an assistant overseer. If it was part of his duty to produce the rate, the plaintiff will be entitled to a verdict. But if that was not part of his duty, there ought to be a nonsuit. Assuming, therefore, that we should be of opinion that an assistant overseer (whose duty it is to produce the rate),

overseer within the meaning of the 17 G. 2, c. 3, s. 3, it will still be a question for the jury, whether the defendant was such an overseer. The rule, therefore, can only be made absolute for a new trial.

HOLROYD, J. The law knows what an overseer is, but it does not know what is an assistant overseer. He may be appointed generally to do all the business of an overseer, as a deputy, or only to keep the accounts or perform other particular business. If it were his duty to do all the acts which an overseer is bound to do, then he ought to have produced the rate. A jury must decide this by ascertaining the nature of his duty.

Cur. adv. vult.

BAYLEY, J. The question reserved for our consideration was, whether this action was maintainable against the defendant, an assistant overseer, appointed under the statute 59 G. 3, c. 12, s. 7, which enacts, "that it shall be lawful for the inhabitants of any parish, in vestry assembled, to elect any person to be assistant overseer of the poor of such parish, and to determine and specify the duties to be by him executed; and every person so appointed assistant overseer shall be authorized to execute all such of the duties of the office of overseer of the poor as shall in the warrant for his appointment be expressed in like manner, and as fully, to all intents and purposes, as the same may be executed by any ordinary overseer of the poor." The select vestry, therefore, are to *594] determine and specify the duties to be performed by the assistant overseer. It did not appear upon the trial, what duties the defendant was liable to perform. He may be liable to perform all or only some of the duties of overseer. It must depend on the nature of his appointment, therefore, whether it was part of his duty to exhibit the rate to the plaintiff in this case. There having been no evidence to show that it was his duty as assistant overseer to produce the rate, the case must go down to another jury, in order that the nature of his duties may be ascertained. If the jury shall find upon the evidence that it was part of the duty of the defendant, as assistant overseer, to produce the rate, he will be liable to the penalty. The rule for a new trial must, therefore, be made absolute.

Rule absolute (a).

(a) At the second trial, before PARK, J., at the Spring assizes 1828, in addition to the evidence given at the former trial, it appeared that the plaintiff had given the defendant notice to produce his appointment to the office of assistant overseer. The defendant's counsel refused to produce it. The learned Judge left it to the jury, to infer from the conduct of the defendant when the rate was demanded of him, and from the fact of the non-production of his appointment, that it was part of his duty, as assistant overseer, to produce the rate. The jury found a verdict for the plaintiff on those counts which charged the defendant as assistant overseer.

PARKER v. EDWARDS.

Where a demand to inspect a rate was made upon an overseer on his own premises, not far from his house, and he refused to allow the inspection, but not on the ground that it was inconvenient to go to his house for that purpose: Held, in an action against him for the refusal, that this was a reasonable demand.

This was a similar action against the same defendant, and the circumstances differed only in this respect, that the plaintiff on the 1st of June went to the defendant's house, and was informed by his wife that he was *595] not at home, but in a field 300 or 400 yards distant from his (the defendant's)

house. The plaintiff then went to the field and saw the defendant, and demanded an inspection of the rate; the defendant refused to produce it, me saying that he had orders not to show it. In addition to those objections were made to the plaintiff's right of recovery in *Bennett v. Edwards*, it insisted in this case, that the demand was not sufficient, because it had not made at the house of the overseer. The plaintiff was nonsuited for the cause as in *Bennett v. Edwards*, and in last term *Campbell* obtained a rule to enter a verdict for the plaintiff.

Taunton, *Ludlow* Serjt., and *Justice*, showed cause. The demand ought have been made on the overseer at his house, where the rate books are usually deposited. There is no obligation on an overseer to be always at home to give inspection to the inhabitants, much less to have the rate with him in a place wherever a rated inhabitant may demand it. *Spenceley v. Robinson* shows that the house of the overseer is the place where the demand ought be made. Unless it be held that the overseer was bound to go back at home and exhibit the rate, this demand was not proper; he might, on the same principle, be called upon to go five miles as well as a hundred yards. The plaintiff should have sought him at home, and repeated the demand there.

Campbell and *Philpotts* in support of the rule. The statute by implication requires that a reasonable demand should be made. In *Spenceley v. Robinson* (b), the Court held, that, in ordinary cases, the house of the overseer was a reasonable place for making the demand. This was a reasonable demand, for it was made near the owner's house, and upon his premises.

BAYLEY, J. I think this demand was made at a reasonable place. The defendant was on his own premises, and near his residence at the time of the demand, and he did not object to produce the rate on the ground that it was inconvenient to him to go home. Let there be the same rule as in the other case.

Rule absolute for a new trial.

(a) 3 B. & C. 658.

(b) *Ibid.*

REX v. The Inhabitants of Whitnash.

The statute 29 Car. 2, c. 7, s. 5, enacts, that no tradesman, artificer, workman, labourer or any person whatsoever, shall do or exercise any worldly labour, business, or work on their ordinary calling on the Lord's day, and subjects parties offending to a penalty: and that this statute only prohibits labour, business, or work done in the course of a man's ordinary calling, and, therefore, that a contract of hiring made on a Sunday between a farmer and a labourer for a year, was valid, and that a service under it conferred a settlement.

UPON an appeal against an order of two justices, whereby *J. Edgington* and his family were removed from the parish of *Rudford Semele*, to the parish of *Whitnash*, both in the county of *Warwick*; the sessions confirmed the order, and the Court was subject to the opinion of this Court on the following case:

The pauper, who was legally settled by parentage in the parish of *Rudford Semele*, was offered by his father to one *Cook*, of the parish of *Whitnash*, on Sunday, the 12th October 1817, as waggoner's boy, and was hired by *Cook* on Monday for a year. The pauper went into *Cook's* service on Tuesday, the 14th, and served him under the above mentioned hiring, in the parish of *Whitnash*, until the 12th of October in the following year. *Cook* was a farmer, residing in the parish of *Whitnash*, and has been dead twelve months. The pauper worked for different persons in the parish of *Rudford Semele*, as a labourer in husbandry, both before and after the hiring in question.

Amos and Hill in support of the order of sessions. The question is, Whether a hiring on a *Sunday* is a valid hiring or not by the statute 29 *Car. 2*, c. 7, s. 1, (a). It may be conceded, that if the making of the contract of hiring subjected the parties to the penalty imposed by the act, the contract was void. But this is not a case within the words or the mischief contemplated by the legislature. The object of the act was to prevent tradesmen and other persons of inferior condition in life from doing their daily work or business on *Sundays*, and, therefore, persons of that description are prohibited from doing any worldly labour, business, or work of their ordinary callings on a *Sunday*. Now the ordinary calling of a man is that daily occupation by which he gains his livelihood. The ordinary calling of the pauper was the performance of his daily *599] work; *the ordinary calling of the farmer was the cultivation of his land and the sale of his produce. The making of a contract of hiring for a year, was not the worldly labour, business, or work of the ordinary calling of either the master or servant. Besides, the statute imposes the penalty upon persons being of the age of fourteen years. Now here it does not appear that the pauper had attained that age, and if he had not, then he was not guilty of any offence within the act, and the contract was not void.

Goulburn and Pennington contra. The contract of hiring was illegal and void, and no settlement was gained by a service under it. The statute 3 & 4 *W. & M.*, c. 11, s. 7, requires that a person shall be "*lawfully*" hired; and the statute 29 *Car. 2*, c. 7, expressly enjoins every person and persons whatsoever (not mentioning persons who have an ordinary calling) to apply themselves to the observance of religious duties, "publicly and privately;" and prohibits any tradesman, artificer, workman, labourer, or other person whatsoever, "from the exercise" of any worldly labour, business, or work of their ordinary calling. In *Fennell v. Ridler* (b), it was laid down by *Bayley, J.*, that the statute applies to acts which do not meet the public eye, but which interfere with a man's religious duties. The words "worldly labour, business, or work of their ordinary calling," are not to be construed collectively, but disjunctively, and the contract in this case was worldly *business*, even if it was not in the course of the ordinary calling of the parties making it. In *Smith v. Sparrow* (c), *599] which is a very strong case (for there the party, at whose *request the contract was entered into, was allowed to take advantage of his own wrong, and set it aside), *Park, J.*, says, "the expression, '*any worldly labour*,' cannot be confined to a man's *ordinary calling*, but applies to any business he may carry on, whether it be in his ordinary calling or not." But, secondly, the contract here was clearly "business in the ordinary calling," as well of the master as of the pauper. As to the former, it is a part of the ordinary calling of a farmer to hire labourers and farming servants; it is an act without which the business of a farmer cannot be carried on. And so as to the pauper, who was a "*labourer*," and within the express words of the statute, he could not carry on his ordinary calling of labour without hiring himself. Suppose he had hired himself on *Sunday* for that day's work, could he have sued on such a contract? and can it make any difference whether the contract be for a day, a month, or a year? It is equally an act in his ordinary calling; for without it his ordinary calling could not be carried on. It is a contract in which on the one side there is labour, and on the other money, and being made on the *Sunday*, is within both the words and spirit of the act.

(a) Section 1 of that statute enacts, "That all and every person and persons whatsoever shall, on every Lord's day, apply themselves to the observation of the same by exercising themselves thereon in the duties of piety and true religion, publicly and privately; and that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary calling upon the Lord's day, or any part thereof (work of necessity and charity only excepted), and that every person being of the age of fourteen years or upwards offending in the premises, shall, for every such offence, forfeit the sum of five shillings."

(b) 5 *B. & C.* 406.

(c) 4 *Bing.* 84.

BAYLEY, J. The act of parliament ought to be so construed as to advance the objects contemplated by the legislature, but not so as to make every work or business done on the Lord's day illegal. The words of the statute are "that no tradesman, artificer, workman, labourer, or other person whatsoever shall do or exercise any worldly labour, business, or work, of their ordinary callings, upon the Lord's day." Now if the legislature had intended to embrace every description of persons, *and every species of business, it would not have been necessary to make an enumeration of several classes of persons exercising particular descriptions of labour or business. It would have been sufficient to say that no person whatever should do any work or business on the Lord's day. If the enactment had been intended to be general, the legislature would have used general words. It has been argued that the words "worldly labour, business, or work of their ordinary callings," are to be construed disjunctively. The true construction of the clause appears to me to be that the persons there mentioned shall not, on the Lord's day, do or exercise any labour of their ordinary calling, any business of their ordinary calling, or any work of their ordinary calling. The hiring of a servant seems to me properly within the meaning of the word *business*. And if the true construction of the act be, that every description of business is prohibited, all contracts whatever made on a *Sunday* will be void. I think that that was not the intention of the legislature. Religion and piety do not require that every moment of every *Sunday* should be devoted to the performance of religious exercises. To a reasonable degree, a man may on that day consider his own condition and that of his neighbour, and may do acts beneficial to himself, and calculated to promote the comfort of his neighbour. I am of opinion that this act of parliament does not prohibit labour, business, or work of every description; and the hiring of a servant by a farmer on a *Sunday* is not work or business within the meaning of the act of parliament. I also think that it is not labour, business, or work of the ordinary calling of the farmer. He, like every other person who requires servants, must hire them. The true construction of the words "ordinary calling," seems to me to be, not that without which a trade or business cannot be carried on, but that which the ordinary duties of the calling bring into continued action. Those things which are repeated daily or weekly in the course of trade or business are parts of the *ordinary calling* of a man exercising such trade or business, but the hiring of a servant once in the year does not come within the meaning of those words. For these reasons, I am of opinion that the contract of hiring in this case was valid, consequently that a settlement was gained.

HOLROYD, J. I also think that the contract of hiring was not void by reason of its having been made upon a *Sunday*. The great object of the statute was to prevent persons carrying on their trade and ordinary occupations and calling on the Lord's day. And, although it may perhaps be desirable that offences of a secular concerns (besides those expressly mentioned in the statute) should be comprehended in it, we must not extend the words of the statute beyond their natural import. Here the legislature enacts, not that no person whatever, but that "no tradesman, artificer, workman, labourer, or other person whatsoever shall do any work, &c." The words "other person whatsoever," must, according to the general rule, that preceding particular words control subsequent general words, be construed to mean persons ejusdem generis with those previously mentioned. All the persons previously mentioned exercise an ordinary calling. The statute, therefore, in substance enacts, that persons having an ordinary calling, shall not do any worldly labour, business, or work of their ordinary calling. I think, therefore, that the *prohibitory clause must be confined in construction to worldly labour, work, or business of their ordinary calling. Unless, indeed, it be perfectly clear that it extends to worldly business, that must be its construction, because this is a penal enactment for every contract which is void within the first part of the clause, subjects

parties making it to a penalty. It must, therefore, be construed strictly. It seems to me, that the hiring of a servant by a farmer, although servants may be useful or even necessary for carrying on his ordinary calling, is not a part of it. If a farmer sold his corn, or his servant ploughed his land, those would be parts of their ordinary callings. I think the making of a contract with a person who is to assist another in his ordinary calling, does not come within the meaning of the words "worldly labour or business, or work of his ordinary calling," so as to subject the parties to the contract to a penalty, or so as to avoid the contract.

LITLEDALE, J. The words "of their ordinary calling," extend not only to the word "work," which immediately precedes it, but to the two preceding words "labour and business." The word "worldly" also extends to the three substantives, "labour, business, or work." This is consistent with the context of this clause. It begins with mentioning tradesmen, artificers, labourers, or other persons. That evidently implies that they were persons who had an ordinary calling. If it had intended that no person should do any work on a *Sunday*, it would have used different language. The words *other persons*, mean persons ejusdem generis with those before mentioned, but who, perhaps, *603] might not strictly be included in those words. The act of *parliament seems to me to be confined to persons having an ordinary calling; and if that be so, then it prohibits such persons from doing any worldly labour, business, or work of *their* ordinary calling on a *Sunday*. If it embraced every description of worldly labour, business, or work, the consequence would be, that almost every person in every rank of life would incur the penalty. The subsequent provision, that no person shall expose any wares, &c. shows that this statute was intended to be confined to persons exercising their ordinary calling on a *Sunday*. The hiring of a servant is no more a part of the ordinary calling of a farmer, than it is of any other person who requires the assistance of servants. For these reasons, I am of opinion that this was a valid hiring, and that the pauper gained a settlement by service under it.

Order of sessions confirmed.

REX v. The Inhabitants of Cottingham.

The sum paid by the purchaser of a copyhold estate to his attorney for the surrender, is no part of the consideration for the purchase within the meaning of the statute 9 G. 1, c. 7, s. 5

UPON an appeal against an order of two justices, whereby *W. Hardy* junior and his wife were removed from the township of *Bishop Burton*, in the East Riding of the county of *York*, to the township of *Cottingham*, in the said riding; the sessions confirmed the order, subject to the opinion of this Court on the following case:

The pauper, *W. Hardy*, had acquired no settlement in his own right, but followed that of *W. Hardy*, his father, and the only question at the sessions was, *604] whether *Cottingham* or *Bishop Burton* was the last place of *settlement of the father. It was admitted that the father had acquired a settlement in *Cottingham*, but it was insisted that he had afterwards acquired a settlement in *Bishop Burton* by the purchase of a cottage situate in that parish. In 1813 the father agreed with one *Page* (who then resided at *Feversham* in *Kent*) for the purchase of a copyhold cottage situate at *Bishop Burton*. It was agreed that *Hardy*, the father, should pay 22*l.*, and all the expenses attending the sale. Upon these terms the purchase was made. On the 22d *July* 1813, the cottage

was surrendered to the father; in the year 1814 he was duly admitted according to the custom of the manor, and he has ever since continued to reside there. The amount paid by the father relative to this purchase was as follows: To *E. Page* 22*l.*, the purchase-money; a fine to the lord of the manor 10*s.*; 1*l.* 13*s.* to the steward for his admission copy; 3*l.* 6*s.* to his (Hartley's) attorney for instructions for surrender of the cottage from *Page* and his mother; 1*l.* 1*s.* for drawing and engrossing power of attorney from the steward of the manor of *Bishop Burton* to one *Tappenden*, to take *Page's* surrender; 13*s.* 6*d.* for drawing and engrossing surrender; and other fees, amounting in the whole to 33*l.* 15*s.* 6*d.* The question for the opinion of this Court was, Whether *Hartley* the father, gained a settlement in *Bishop Burton* by reason of this purchase of the cottage, and a residence therein of forty days?

Archbold in support of the order of sessions. The statute 9 *G.* 1, c. 7, enacts, that no person shall be deemed to acquire a settlement in any parish, in virtue of any purchase of any estate in such parish, whereof the consideration for such purchase doth not amount to *the sum of 30*l.* bonâ fide paid. Now here the sum paid to the vendor was only 22*l.*, and, consequently, [no settlement was gained.

Coltman and *Patteson* contra. The statute says that 30*l.* shall be paid to the purchaser, not that it shall be paid to the seller; and this is said to be sufficient in *Nolan's Poor Laws*, vol. 2, p. 110, (4th edition), and *St. I. Walden v. Kempton* (a) is there cited as an authority to show that a copyhold tenement, the price of which, together with the fines and fees paid to the lord, amounted to 30*l.*, conferred a settlement. In *Graham v. Sime* (b) it was held that a covenant to surrender a copyhold to a purchaser, and to make and execute all acts, deeds, &c., for the perfect surrendering and assuring the premises, and the costs and charges of the seller, was not broken by non-payment of the fine to the lord on the admission of the purchaser. [*Littledale, J.* There the fine was perfected by the admittance of the tenant, and the fine was not due until after the admittance. The case therefore is not in point.] In *Rez v. Scammonden* (c), the expense of levying a fine in the Common Pleas, which was necessary to complete the title, and which ought, therefore, to have fallen on the vendor, if the purchaser had not expressly agreed to pay it, was held by the sessions to be part of the consideration for the purchase. The judgment of this Court proceeded upon another ground, but no fault was found with the decision of the sessions in that respect.

BAYLEY, J. This case admits of no doubt. The question is, What was the consideration for the *purchase bonâ fide paid, within the meaning of the act of parliament? I think that the sum given to the seller for the purchase, and the sums paid to other persons whose concurrence was necessary to make the sale valid and effectual, was the consideration for the purchase. The fine paid to the lord, and the fees paid to the steward, in my opinion, form part of that consideration. But the sums paid to the vendor, to the lord, and the steward, do not amount to 30*l.* The expenses of the surrender paid by the purchaser to his own attorney, were no part of the consideration for the purchase. The cases cited are distinguishable from the present. In *St. I. Walden v. Kempton* (d) the purchaser paid 30*l.*, for he paid the expenses of levying a fine which it was necessary for the seller to levy in order to complete the title, and which he ought to have paid for if the purchaser had not agreed to pay. In *St Paul's Walden v. Kempton* (e), 30*l.* was paid, including the fine to the lord, and the fee to the steward.

LITTEDALE, J. I think the consideration for the purchase was the sums paid to the purchaser, and to the lord. The lord has an interest in the land, and the fine may be considered as paid to him for the purchase of part of his interest.

(a) *Foley*, 138. 4 *Burn.* 610.(b) 1 *East*, 632.(c) 3 *T. R.* 474.(d) 3 *T. R.* 474. 2 *Bott.* 510. 4 *Burn.* 640.(e) 2 *Bott.* 504.

in it. I doubt whether the fee to the steward can be considered as part of the consideration for the purchase. The steward has no interest in the land. But it is unnecessary to decide that, because the money paid to the seller, the lord, and the steward, does not amount to 30*l*.

Order of sessions confirmed.

*607]

**REX v. The Inhabitants of Ringstead.*

The being charged with, and paying parochial taxes, did not before the stat. 6 *G.* 4, *c.* 57, *s.* 2, confer any settlement until the party charged with, and paying the same, had resided within the parish forty days after he had been so charged, and since that statute passed, no person can acquire a settlement by reason of renting or paying parochial taxes for any tenement, unless it be of a certain description; and, therefore, where a pauper had rented a tenement (insufficient to confer a settlement under the 6 *G.* 4), and in respect thereof had been rated and paid parochial taxes, but had not resided thereon after such rating and payment forty days before the passing of the 6 *G.* 4, it was held, that he did not thereby acquire any settlement.

Upon appeal against an order of two justices, dated the 17th of *March* 1827, whereby *Elizabeth*, the wife of *J. Sanders*, and their four children, were removed from the parish of *Kimbollon*, in the county of *Huntingdon*, to the parish of *Ringstead*, in the county of *Northampton*, the sessions confirmed the order, subject to the opinion of this Court on the following case:

The pauper's husband, who had absconded previous to the order of removal, hired a tenement after *Lady-day* 1825 in the parish of *Ringstead*, of the annual value of 10*l.* and upwards, from *Lady-day* 1825 to *Lady-day* 1826, and went to settle upon it on the 4th day of *May* 1825, being upwards of forty days before the passing of the 6 *G.* 4, *c.* 57, (22d day of *June* 1825.) A rate was made for the relief of the poor, which was allowed on the 27th of *May* 1825, and was paid a few days afterwards, being less than forty days before the passing of the said statute, (and the requisites mentioned in the 59 *G.* 3, *c.* 50, were not complied with, so that no settlement by renting the tenement could be gained under that statute.) On the 2d of *March* 1825 a church-rate was made at a parish meeting for the parish of *Ringstead*, and the pauper's husband coming into the parish on the 4th of *May* 1825, his name was inserted in the church-rate by the church-warden, and the rate was afterwards paid by the pauper's husband. The question was, Whether a settlement was gained by either of such ratings or payments?

*608] **Nolan* in support of the order of sessions. It was decided in *Rex v. St. Pancras* (a), that since the statute 35 *G.* 3, *c.* 101, a settlement might be gained by being rated and paying parochial rates in respect of a tenement above the annual value of 10*l.* But the statute 6 *G.* 4, *c.* 57 (which took effect on the 22d of *June* 1825), enacts that no person shall gain a settlement by paying parochial rates in respect of a tenement, unless certain other things therein mentioned be done. It must be admitted, that under that statute no settlement was gained. Here, however, the pauper on the 22d of *June* 1825 had been charged with and paid parochial taxes, although he had not then resided forty days after he had been rated and paid such taxes. The statute 3 & 4 *W.* & *M.* *c.* 11, *s.* 6, does not require that in order to gain a settlement by being charged with and paying parochial rates, there should be forty days' residence. The rating is an adoption by the parish of the party rated as one of the parishioners. As

(a) 5 *B.* & *C.* 123.

soon, therefore, as they have rated him, and he has paid the rate, he is an inhabitant.

Campbell and Flanagan contra. The pauper had not been assessed paid the poor-rate forty days before the 22d of *June* 1825; and it does not appear that he had paid the church-rate forty days before the 6 *G. 4.* passed. In order to gain a settlement, by being charged with, and paying parochial taxes, it is necessary that a party should reside in the parish forty days after he has been charged with and paid the rate. The 1 *Jac. 2, c. 17, s. 3*, enacted that the forty days' continuance of a person in a parish (intended by the act *13 & 14 *Car. 2*, to make a settlement) should be accounted from the time of his delivery of a notice in writing of the place of his abode to one of the parish officers. The statute 3 & 4 *W. & M. c. 11, s. 3*, enacts, that the forty days' continuance intended by the said acts to make a settlement should be accounted from the publication of a notice in writing in the manner therein mentioned. Then section 6, provides, "that if any person, who shall come to inhabit in any town or parish, shall, for himself, and on his own account, or by any public or annual office or charge in the said town or parish, or shall be charged with, and pay his share towards the public taxes or levies of the said town or parish, then he shall be adjudged and deemed to have a legal settlement in the same, though no such notice in writing be delivered and published as is hereby before required." The being charged with and paying parochial taxes, substituted for the notice required to be given to the parish officers, is published. And as a party could not gain a settlement until he had resided in the parish forty days after the giving and publication of the notice, it follows that a party cannot gain a settlement by being charged with and paying parochial taxes, until he has resided in the parish forty days after he has been charged with and paid such taxes. This is consistent with the view taken of the subject by Mr. *Nolan* in his *Poor Laws*, vol. ii. p. 133.

BAYLEY, J. I think that in order to gain a settlement in this case by the payment of taxes the pauper ought to have resided in the parish forty days after he had been rated and paid the taxes. By the statute 1 *Jac. 2, c. 3*, the forty days' continuance of a person in a parish (intended by the 13 & 14 *Car. 2* to make a settlement) is to *be accounted from the time of his delivery of a notice in writing, of the house of his abode, to one of the parish officers, and by section 3 of the 3 *W. & M. c. 11*, from the publication of such notice in the manner therein mentioned. It is clear, therefore, that in order to gain a settlement, it was necessary that a party should continue in a parish forty days after the giving and publication of the notice to the parish officers. But section 6 of the latter statute provides, "that if any person who shall come to inhabit in any parish shall be charged with and pay his share towards the public taxes of the parish, then he shall be adjudged and deemed to have a legal settlement in the same, though no such notice in writing be delivered and published as is hereby before required." By this clause, the legislature, therefore, evidently considered the being charged with and paying parochial taxes equivalent to the giving and publishing of the notice in writing required in other cases. It was necessary, therefore, to reside forty days in a parish after the giving and publication of notice, it follows that, in order to gain a settlement by the payment of having been charged with and paid parochial taxes, a party ought to have resided forty days after he has been so charged with and paid such taxes; and he did not do so, then on the 22d day of *June* 1825 the pauper had not resided forty days after the making of the poor-rate, and it does not appear that he resided forty days after payment of the church-rate, for it is not stated when that rate was paid. It is not shown, therefore, that he had gained any settlement by the payment of having been charged with and paid parochial taxes on the 22d of *June* 1825; and the statute 6 *G. 4, c. 57*, has prevented the gaining of a settlement after that time unless the tenement has all the qualities there described, which in this case it had not.

*LITLEDALE, J. The statute 3 & 4 W. & M. c. 11, s. 6, confers a settlement on any inhabitant who has been charged with and paid his share towards the parochial taxes. The settlement, however, is not acquired until the taxes are actually paid. Before that time the parish need not take any notice of the party. The payment of the taxes with which the party is charged is by the statute made equivalent to the notice otherwise required to be given to the parish officers. Now, as a person could not gain a settlement until he had continued forty days in the parish after such notice had been given and published, I think it follows as a necessary consequence, that no settlement could be gained by the pauper in this case until he had continued in the parish forty days after he had paid the taxes with which he was charged. It does not appear that he had paid any taxes on the 22d of June 1825; consequently it is not shown that at that time he had acquired any settlement, and the stat. 6 G. 4, c. 57, prevented his gaining any settlement after that period. The order of sessions must be confirmed.

Order of sessions confirmed.

REX v. The Inhabitants of Holy Trinity, in the Town of Kingston-upon-Hull.

Parol evidence of the fact of tenancy is admissible, although the tenant hold under a written agreement.

UPON appeal against an order of two justices, whereby *William Thomas*, his wife, and children, were removed from the township of *Eccleshall Bierlaw*, in the West Riding of the county of *York*, to the township of **Hull*, in the East Riding of the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case:

The respondents having proved that the pauper had gained a settlement in the appellant parish, the appellant's counsel, upon the cross-examination of the pauper, a brickmaker, was proceeding to show that he had, in the year 1818 or 1814, acquired a settlement at *Whitgift* subsequently to that established by the respondents, by the occupation of a tenement, and to prove what was the rent paid for the same, whereupon the respondents' counsel interposed, and asked the pauper whether the contract under which he had held the tenement was not in writing, and on his admitting that it was, they objected that parol testimony could not be received. The appellant's counsel contended, that they had nothing to do with the agreement, that all they proposed to prove was the fact of the occupation and the annual value of the tenement, which they were at liberty to prove by the cross-examination of the pauper, without reference to the agreement; but the court of quarter sessions being of opinion that the contract must be proved, and that such parol evidence could not be received, confirmed the order, subject to the opinion of this Court.

Blackburne in support of the order of sessions. The object of this examination was to prove a settlement in another parish. The coming to settle on a tenement in the statute 13 & 14 Car. 2, means by renting a tenement, or holding in the character of tenant, *Rex v. Bowness(a)*, *Rex v. St. John's, Glastonbury(b)*. The *taking in this case must be proved by the contract between the parties, and it was not sufficient for the witness to occupy, unless he occupied as tenant, for he might be in as servant or as owner. It is a different question, whether payment of rent may be proved by parol, but the agreement must be

(a) 4 M. & S. 210.

(b) 1 B. & A. 48.

looked to to show the terms of the holding. In *Brewer v. Palmer* (a) was an action for use and occupation, the premises having been demised by agreement in writing, it was holden that it must be produced. So it is shown that a settlement has been gained, *Rez v. Castle Morton* (b). [J. There the Court only held that they could not receive parol evidence of a written agreement which was void.] Here the defendant occupied land which he might occupy by wrong, and not in the character of tenant.

Cotman contra. If it had been necessary to prove the terms on which a pauper held the tenement, the evidence would have been insufficient; and if a case had arisen subsequently to the statute 59 G. 3, c. 50; but it was immaterial for what time the tenement was taken, or at what rent. It was necessary to prove that the pauper occupied as tenant; that fact may be proved from the acts of the parties, or from the payment of rent, or the mere occupation. *Rez v. Netherseal* (c), *Rez v. Fritwell* (d). Though the fact of an instrument cannot be proved by parol evidence, its general character may be. This distinction is noticed by *Chambre, J.*, in *Bucher v. Jarratt* (e): the existence of a certificate was allowed to be proved by the production of the registry from which it was copied, though no notice had been given to produce the certificate itself. So here it was competent to prove the situation of the pauper with respect to the premises, whether he was a servant, owner, or tenant, provided that could be done without going into particulars of the instrument. In *Davis v. Reynolds* (f) it was held that goods consigned to A. upon their arrival were landed on the defendant; the plaintiff in trover might prove his title by parol, although the bill of lading which had been indorsed to him could not be received in evidence for want of a stamp.

BAYLEY, J. The general rule is, that the contents of a written instrument cannot be proved without producing it. But, although there may be a written instrument between a landlord and tenant, defining the terms of the tenancy, the fact of tenancy may be proved by parol, without proving the terms of the instrument. It was unnecessary in this case to prove by the written instrument, either the fact of tenancy or the value of the premises.

LITLEDALE, J. Payment of rent as rent is evidence of tenancy, and may be proved without producing the written instrument.

The case ordered to go back to the sessions to hear the evidence.

(a) 3 Esp. 213.
(d) 7 T. R. 197.

(b) 3 B. & A. 588.
(e) 3 B. & P. 143.

(c) 4 T. R. 258.
(f) 1 Stark. N. P. C.

*REX v. The Inhabitants of Cottingham.

The wife of an Irishman who has no settlement in England, may, if deserted by her husband, be removed to her maiden settlement.

UPON an appeal against an order of two justices, whereby *Anne*, the wife of *Patrick O'Hara*, and her four children, were removed from the parish of *Holy Trinity*, in the town and county of *Kingston-upon-Hull*, to the parish of *Cottingham*, in the East Riding of the county of *York*, the Court confirmed the order, subject to the opinion of this Court on the facts of the case:

Anne O'Hara's maiden settlement was in *Cottingham*, and she had no subsequent settlement. It was admitted that the settlement of her

child *Henry*, who was born a bastard, was also in that parish. *Patrick O'Hara*, a native of *Ireland*, was married to the said *Anne* on the 28th of *April* 1819, and the three youngest children were the issue of such marriage: he had no settlement in *England*. Sometime in the year 1819, after the marriage, and whilst *Patrick O'Hara* and his wife resided at *Hull*, *Anne* and her eldest son became chargeable to *Hull*, and were thereupon (with the consent of the husband) removed to *Cottingham*, the place of her maiden settlement, and the order of removal upon that occasion stated her to be the wife of *Patrick O'Hara*, an Irishman, who had no settlement in *England*, and the said *P. O'Hara* had consented to her removal. This order was not appealed against, and the appellant parish granted relief to *Anne* and her said child for a short time. *616] In the early part of 1827, **P. O'Hara* having left *Hull*, and it not being known what had become of him, the wife and family again became chargeable to the parish of the *Holy Trinity*, who, as above stated, removed them to *Cottingham*. The sessions thought that they might be removed to the place of the wife's maiden settlement, and confirmed the order, subject to the opinion of this Court.

Coltman in support of the order of sessions. If the husband in this case had been an *Englishman*, and had no settlement, and he had run away and lived separate from his wife, it is quite clear that she might have been removed to her maiden settlement whenever she became chargeable, *St. Botolph's, Bishopsgate*, v. *St. John's, Wapping* (a), *Rex v. Westerham* (b), and *Rex v. Harlerton* (c). In *Rex v. Norton* (d), indeed, it appears to have been held that the maiden settlement of a woman deserted by her husband, an *Irishman*, who had no settlement in *England*, during coverture was suspended, and she could not be removed thither; but that case was overruled in *St. Botolph's, Bishopsgate*, v. *St. John's, Wapping*. There it was held that the settlement was suspended so long only as the wife continued under the power and protection of her husband, and was maintained and supported by him; and the wife, who had been deserted by her husband, who was an *Irishman*, was held to be removable to her maiden settlement. Besides, by the consent of the husband, the wife may at any time be removed to the place of her maiden settlement, *Rex v. Eltham* (e). Now the desertion of the wife by the *husband is *617] equivalent to consent on his part. Then the statute 59 G. 3, c. 12, s. 33, does not apply to this case. It authorizes the removal of any person born in *Scotland* or *Ireland*, together with his wife and children, either to *Ireland* or *Scotland*. But here the husband of the pauper was absent, and therefore incapable of being passed to *Ireland*. This, therefore, is not a case provided for by the act.

Archbold and *Patteson* contra. The maiden settlement of the wife was suspended during her coverture, and therefore she was not removable to *Cottingham*. The circumstance of the husband having deserted the wife makes no difference. If it did, his desertion for any period, however short, would revive her maiden settlement. *Rex v. Eltham* (f) was decided before the passing of the 59 G. 3, c. 12, which has altered the law in this respect. For by that statute the whole family of the husband may be passed either to *Ireland* or *Scotland*; and in *Rex v. Leeds* (g) it was held that the wife of a *Scotchman* who had been settled in *England* before her marriage, and her children who were born there, but had not acquired a subsequent settlement, must, if chargeable, be sent along with the husband to *Scotland*, and could not be removed to the maiden settlement of the wife even with her husband's consent.

BATLEY, J. This is a very plain case. Before the statute 59 G. 3, c. 12, passed, it was clearly established by a series of authorities from the case of *St.*

(a) 4 *Burn's J.* 289.(d) 4 *Burn's J.* 315.(g) 4 *B. & A.* 498.(b) 4 *Burn's J.* 315.(e) 5 *East*, 113.(c) 13 *East*, 311.(f) 5 *East*, 113.

John's, Wapping, v. St. Botolph's, Bishopsgate (a), to *Rex v. *Hartberton* (b), that where a woman, who had a settlement, married, and was deserted by her husband, who had no settlement, the maiden settlement wife was thereby revived, and she might be removed thither. Here the husband at the time when the order of removal was made had deserted his wife, and did not know where he was. According to the authorities she was removable to *Cottingham*, unless the law in this respect has been altered by the 59 G. 3, c. 12, s. 33. The mischief recited in the thirty-third section of that statute is, that poor persons born in *Scotland* or *Ireland* frequently become chargeable to parishes in *England*, and cannot be removed unless they have committed some act of vagrancy, and have been adjudged to be rogues and vagabonds, and it then authorizes and requires two magistrates, upon the complaint of the parish officers that any person born in *Scotland* or *Ireland* has become chargeable to such parish by himself or his family, to cause such person to be brought before them, and to examine him touching the place of his birth or last legal settlement, and if it shall be found that the person so brought before them was born in *Scotland* or *Ireland*, &c., and has not gained any settlement in *England*, then the justices are empowered, by a pass under their seals, to cause such person and his wife, &c. to be removed to the place of his birth in the manner therein mentioned. The object of the legislature, therefore, was to relieve parishes from the necessity of maintaining as casual poor persons born in *Scotland* or *Ireland*; and with that view it authorizes their removal to the place of their *birth, together with their wives, &c. The statute does not authorize the removal of the wife alone to the place of the birth of the husband; and the husband having quitted the parish could not be removed to *Ireland*, and that being so, the wife could not be removed without him. This is a consequence, therefore, not within the act of parliament, and the law applicable to this case remains as it was before the passing of the act. In *Rex v. Heaton Norris* the same construction was put upon this statute. In that case, a *Cheltenham* prisoner, born in *Scotland*, left his wife and family at *Heaton Norris* when he came to do town duty, and in his absence the wife and family were removed to the wife's maiden settlement. On appeal, the sessions stated a case, in which the only question they put was, whether under the 59 G. 3, c. 12, s. 33, the removal ought to have been to *Scotland*. The Judges thought not. In *Leeds* it was only decided that where the husband (who was born in *Scotland*) and his wife were living together, the wife must be sent along with him to *Scotland*. The law applicable to this case remains the same as it was before the 59 G. 3, c. 12; it follows, therefore, that the wife and children were removable to the place of her maiden settlement. No mischief will result from this decision, for during the absence of the husband the family will be maintained by the parish which is bound to maintain them, and upon his return the parish may pass him and his family to *Ireland*. The order of sessions is therefore, be confirmed.

Order of sessions confirmed.

(a) *Burr. S. C.* 367.

(b) 13 *East*, 311.

(c) *Easter term*, 1821.

*REX v. The Inhabitants of Denio.

It was proved by a pauper, that he had been bound apprentice twenty-three years ago to *A. B.*; that indentures were signed and sealed, and that he served seven years, and that *A. B.* had the indentures; that when the apprenticeship expired, the pauper asked *A. B.* for the indentures, and he said the parish officers had them: Held, that the declarations of *A. B.*, who might have been called as a witness, were not admissible in evidence, and that parol evidence of the contents was not admissible.

Upon appeal against an order of two justices, whereby *William Roberts*, his wife and children, were removed from the parish of *Rhodogeidio*, in the county of *Carnarvon*, to the parish of *Denio*, in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case:

The pauper, being a poor boy belonging to the parish of *Llanbelig*, was bound by the overseers of the poor of that parish as apprentice to one *J. Connell*, a hatter, residing at *Prollhely*, in the parish of *Denio*, about twenty-three years ago, by an indenture for seven years; on which the pauper said he believed there was a stamp, and that it was signed and sealed; and there were no justices present at the time of the signing and sealing of the indenture, nor did the pauper recollect being at any other time before any justice respecting it; and there was no evidence that the assent of two justices had been given, or that the parish officers were parties to the indenture. The pauper also said, that the indenture was then kept by *Connell*, the master, and that he the pauper never saw it afterwards; that he served in *Denio*, under the indenture of apprenticeship, for the whole term of seven years; that when the apprenticeship expired, he asked his master, *Connell* (who was then a rated inhabitant of the parish of *Denio*, but did not reside or pay taxes there when the appeal was tried) for the indenture, who said that he had not got it, but that it was with the overseers of *Llanbelig*. No other witnesses were called, nor any further evidence given respecting it, except that the present parish officers of *Llanbelig* proved at the *621] trial *that they had searched among the papers belonging to that parish for the indenture, and that it could not be found; and that all the parish books and papers about that date were missing. The order of removal was confirmed, subject to the opinion of this Court as to whether the declarations of *Connell* were properly received in evidence; and whether, according to the foregoing facts, the loss of the indenture was sufficiently proved or accounted for to let in parol evidence of its contents.

Nolan in support of the order of sessions. Diligent search was made for the indenture in the place where it was likely to be found. There was no proof that more than one indenture had been executed. The declaration of the master that the overseers of *Llanbelig* had got the indenture was admissible, because being at that time a rated inhabitant, it was against his interest to make that declaration. *Rex v. Morton (a)* is in point. There only one part of the indenture had been executed, and both the pauper and master were dead at the trial. On enquiry made from the pauper shortly before his death, he said the indenture had been given up to him after the expiration of the apprenticeship, and that he had burnt it. And enquiry had also been made of the daughter and executrix of the master, who said that she knew nothing about it, and no further search was made. The Court held the proof to be sufficient to let in parol evidence of the contents of the indenture. If the declaration of the executrix were admissible in that case, the declaration of the master was admissible in this.

Patteson, contra, was stopped by the Court.

*BAYLEY, J. The decision in that case did not proceed on the ground that the declaration of the executrix of the master was admissible; but if the declaration of the pauper were admissible so as to show a possession of the indentures by him, it showed also that further search or enquiry was necessary, because he stated that it had been given up to him, and that he burnt it. In this case *Connell*, the master, was living, and might have been called as a witness to prove either that he had delivered his copy of the indenture to the parish officers or had destroyed it, or that there were originally two parts and the parish officers had one. His declarations clearly were not admissible in evidence. There was not sufficient evidence to show that a bona fide diligent search was made for the instrument where it was likely to be found, so as to let in parol evidence of the contents. In *Rex v. Castleton* (a) there were two parts of an indenture of apprenticeship, one which was proved to have been destroyed, and the other had been delivered to Miss *Taylor* of *Bomford* to whom the apprentice had been assigned. Evidence was given that apprenticeship had been made to Miss *Taylor*, who had ceased to reside at *Bomford*; the part delivered to her, and that she had said that she could not find it, did not know where it was; but Miss *Taylor*, though still living, was called as a witness. The Court held that the part so delivered had not sufficiently accounted for; it had been traced into the hands of Miss *Taylor* but no further evidence had been given to show what had become of it. This case is precisely in point. The order of sessions must therefore be quashed.

Order of sessions quashed.

(a) 6 T. R. 224.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,
IN HILARY TERM,

IN THE EIGHTH AND NINTH YEARS OF THE REIGN OF GEORGE IV.

MEMORANDUM.

In the course of this term Sir *James Scarlett* resigned the office of Attorney-General, and was succeeded by Sir *C. Wetherell*.

TUCKER and another, Assignees of HICKMAN, a Bankrupt, v.
BARROW. Jan. 23.

Where a party examined before commissioners of bankrupt, admitted that he had received a sum of money on account of the bankrupt after an act of bankruptcy, but not that it was a subsisting debt: Held, that this was not evidence sufficient to support a count on an account stated with the assignees.

Query, whether an admission obtained by such compulsory examination can be used as evidence in such an action?

ASSUMPSIT for money had and received to the use of *Hickman* before the bankruptcy, and on an account stated with him before his bankruptcy, money *624] *had and received to the use of the assignees after the bankruptcy, and on an account stated with them as assignees. At the trial before Lord *Tenterden*, C. J., at the *Guildhall* sittings after last *Michaelmas* term, the plaintiffs having failed as to the first three counts, in support of the last gave in evidence the examination of the defendant taken on the 5th of *July* 1826, before the commissioners under the commission against *Hickman*. The examination was as follows: "Have you received any monies on account of the bankrupt?—Answer, Yes; it appears by the auctioneer's account that I have received 75*l.* 9*s.* on account of the bankrupt.—When was that sum received?—About the 10th of *February* last." It appeared also by other questions that the bankrupt was rendered to the custody of the Marshal in two actions, on the 26th of *January* preceding, and that the defendant then knew him to be in insolvent circumstances. No question was put as to the manner in which the money, so received on account of the bankrupt, had been disposed of. The act of bankruptcy on which the commission issued was lying in prison twenty-one days from the render before

mentioned. The Lord Chief Justice thought this evidence did not prove an account stated, and directed a nonsuit.

Pollock now moved for a rule nisi to set aside the nonsuit, and cited *Knox v. Michel* (a) and *Highmore v. Primrose* (b).

BAYLEY, J. The present case is clearly distinguishable from those which have been cited. In each of *them there was an admission of a subsisting debt, and that was evidence of an account stated. Here the defendant merely admitted that at a certain time he received a sum of money, and not that it was a subsisting debt payable to the assignees. I think, therefore, that the nonsuit was right.

HOLROYD, J., concurred.

LITLEDALE, J. I am of the same opinion; and further, I am disposed to say that an admission obtained under a compulsory examination is not evidence of an account stated. The defendant never accounted with the plaintiffs, but under compulsion, made a disclosure to the commissioners.

Rule refused.

(a) 13 *East*, 249.

(b) 5 *M. & S.* 65.

TURNER v. POWER. Jan. 24.

Where a parol agreement was made between A. and B., that the former should let, and the latter take, certain premises, upon the terms and conditions contained in a lease of the same premises granted by A. to C.: Held, that in an action by A. against B. for non-repair, the lease could not be read in evidence, unless duly stamped.

ASSUMPSIT on a special agreement for rent of certain premises, and for repairing them. Plea, the general issue. At the trial before Lord Tenterden, C. J., at the *London* sittings after last *Michaelmas* term, it appeared that West had been tenant to the plaintiff of the premises in question; and in 1824, the plaintiff and defendant agreed by parol, that the latter should be tenant of the premises upon the terms and conditions contained in a written agreement between the plaintiff and West. This document was produced and was stamped as an agreement; it was in effect a lease to West; whereupon it was objected, for the *defendant, that it could not be read in evidence, as it was not having a lease stamp. The Lord Chief Justice being of that opinion, directed a nonsuit.

Gurney now moved for a new trial, and contended that as the written instrument was not signed by either the plaintiff or defendant as an agreement to bind them, it did not require any stamp. Their agreement was merely a parol agreement, and this document was referred to in order to settle the terms of the parol agreement. The case, then, was similar to that of *Drant v. Brown*, where an agreement was made by parol to abide by the terms of a written document, and that was received in evidence without a stamp.

Per Curiam. The document referred to in that case was merely a proposition and not an agreement. The document here produced was a lease, and the statute provides that no lease, where the rent exceeds 20*l.*, and is under 100*l.*, in this case, shall be received in evidence without a stamp of 1*l.* 10*s.* The evidence was, therefore, properly rejected, and there is no ground for setting aside the nonsuit.

Rule refused.

(a) 3 *B. & C.* 665.

*BENNETT v. WOMACK. Jan. 25.

A party contracted for an assignment of a lease of a public-house, which was described as holden at a certain *net rent, upon usual and common covenants*. The lease contained a covenant by the tenant to pay land-tax, sewers-rate, and all other taxes, and a proviso for re-entry, if any business but that of a victualler should be carried on in the house, and it was proved that a considerable majority of public-house leases contained such a proviso: Held, that the covenant to pay land-tax, &c. was a common covenant in a lease, reserving a net rent; and that the proviso for re-entry must, with reference to a lease of a public-house, also be considered usual and common.

ASSUMPSIT on an agreement to purchase the lease of a public-house, which in the agreement was described as held by the plaintiff at a certain net annual rent, under common and usual covenants. Plea, the general issue. At the trial before Lord Tenterden, C. J., at the *London* sittings after last *Michaelmas* term, it appeared that the defendant had entered into the agreement set out in the declaration, but the lease contained a covenant by the tenant to pay the land-tax, sewers-rate, and all taxes, besides the rent specified, and a proviso for re-entry by the landlord if any business but that of a victualler should be carried on in the house; and these the defendant's counsel contended were not common and usual covenants, wherefore he was not bound to take the lease. The Lord Chief Justice thought that the stipulation for a net annual rent answered the objection as to the land-tax and sewers-rate; and evidence being given that the proviso for re-entry was inserted in at least six out of ten leases of public-houses, his Lordship thought it must, with reference to the lease in question, be considered as common and usual, and directed the jury to find a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit.

F. Kelly now moved accordingly, and contended that a covenant to pay the land-tax and sewers-rate was not a common covenant, for that the former was *628] always considered a landlord's tax, and under the statute of *sewers the rate is sometimes imposed on the landlord, sometimes on the tenant, and sometimes on both. Neither was the proviso against carrying on any business in the premises, except that of a victualler, a common stipulation. The fact of such a proviso being frequently introduced into such leases makes no difference. In *Henderson v. Hay* (a), the assignee of a lease of a public-house agreed for a new lease "upon common and usual covenants." The lessor afterwards insisted upon a covenant not to assign without his licence, but Lord Thurlow decreed a specific performance without such covenant, observing that although it might be very usual to introduce it, that would not make it a common covenant. This was confirmed by Lord Eldon, after much consideration, in *Church v. Brown* (b), where his Lordship said, "the safest rule of property is, that a person shall be taken to grant the interest in an estate which he proposes to convey, or the lease he proposes to make, and that nothing which flows out of that interest as an incident, is to be done away by loose expressions, to be construed by facts more loose." Now one of the rights which the defendant would take as incident to his interest for a term of years, would be the right to carry on any lawful trade on the premises. (c)

LORD TENTERDEN, C. J. I am of opinion that there is not any weight in the objection taken to the covenant to pay the land-tax and sewers-rate. When a *629] party stipulates to receive a net rent, that means a rent clear of all deductions to which it would otherwise be liable; the covenant to pay land-tax and sewers-rate, must, therefore, be an usual covenant in a lease reserving a certain net rent. The remaining question turns upon the proviso for re-entry. Now that which is usual in leases of one description of property,

(a) 3 Br. Ch. Ca. 632.

(b) 1 Ves. 258.

(c) See many cases on this subject collected in a note to *Henderson v. Hay*, 3 Br. C. C. by Eden.

may not be so in leases of another, and I therefore think we are bound to take into consideration that this was a lease of a public-house. Evidence was given that of such leases at least six in ten contained a similar proviso; and an attempt was made to answer that by conflicting evidence, it must be taken that such a proviso was usual and common in leases of public-houses. And if there was nothing in this lease more than the party contracting for the purchase must be presumed to have expected to find there, the existence of the proviso furnished him with no valid ground for refusing to complete his contract.

BAYLEY, J. I entirely agree upon both points. Where a tenant agrees to give a net rent, covenants to secure that are usual and common. Now a covenant to pay sewers-rate is merely a covenant to secure a net rent to the landlord. With respect to the other objection, it must be remembered that this was a bargain for an assignment of a lease, not for the original grant of a lease. The defendant was told that it contained none but usual and common covenants, and I think that it was made out by evidence, that of such leases six in ten contained the proviso in question.

HOLROYD and LITTTLEDALE, Js., concurred.

Rule refused.

***REX v. The Mayor, Aldermen, and Capital Burgesses of the Borough of Doncaster. Jan. 25.**

By custom, in a corporate town, all persons having served an apprenticeship for seven years to a free burgess carrying on trade there, were entitled to be admitted to the office of free burgess: Held, that a person who had served under articles of clerkship to an attorney, a free burgess of the borough, and residing within the same, was not entitled to be admitted to his freedom.

A RULE nisi had been obtained for a mandamus to the mayor, aldermen, and capital burgesses of the borough of *Doncaster*, commanding them to admit and swear *J. Buckland* into the place and office of a freeman or burgess of the borough, on the ground that he had been bound by an indenture of apprenticeship, or articles of clerkship, to be the apprentice or clerk of an attorney (who was a freeman or free burgess of the borough, residing within the same), for seven years, to learn the business of an attorney, and that he served such attorney for that period within the borough, and that by usage, every person who had served an apprenticeship to any trade or profession, was entitled to be admitted a free burgess. It appeared by the affidavits, in answer to the rule, that the corporation was created by charter, by which it was granted that the burgesses, tenants, residents, and inhabitants, should be free burgesses, and have a guild merchant; that there were guilds of tailors, butchers, weavers, coopers, wainers, gloves, woollen weavers, of fullers and dyers, tanners, skippers, joiners, drapers, fellmongers, and hat-makers, and that persons admitted to the freedom by reason of apprenticeship, had always served a person in some trade. There was no instance of any person having been admitted to the office of free burgess by reason of having served seven years as an apprentice or clerk to an attorney; and there were several instances of persons having been refused to be admitted as free burgesses, on the ground that they had not served apprenticeship to a trade.

The *Solicitor-General* now showed cause; and contended, first, that an articulated clerk to an attorney was not an apprentice within the ordinary meaning of that term; and, secondly, that at all events the occupation of an attorney was a profession, and not a trade, and, consequently, that the party had no right to be admitted to his freedom.

The *Attorney-General* admitted that he could not support the rule.

Lord TENTERDEN, C. J. A person who serves an attorney under articles of clerkship, can hardly be said to be an apprentice within the popular meaning of that term. Here, however, the right to be admitted a free burgess by reason of having served an apprenticeship, is confined to such persons as have served an apprenticeship to a trade. An attorney exercises a profession, and not a trade. This rule must, therefore, be discharged.

Rule discharged.

*632]

*Ex parte HORNE. Jan. 26.

An act for making a navigable canal, provided that the shares were to be deemed personal estate, and to be transmissible as such. The canal passed through parishes in the diocese of Worcester, and other parishes in the diocese of *Lichfield* and *Coventry*. The transfers of shares in the canal were filed at the public office of the company in the diocese of *Lichfield* and *Coventry*, where the dividends were also paid and books of account kept: Held, that for the purposes of probate, the right of a shareholder to a share of the profits, being personal property, might be considered as locally situate in the diocese of *Lichfield* and *Coventry*, and that a probate granted by the Consistorial Court of the Bishop of that diocese was sufficient.

MARRYAT obtained a rule nisi for a mandamus to the Company of Proprietors of the *Worcester and Birmingham Canal Navigation*, and their clerk, to make in a book kept for that purpose, an entry of the probate of *William Horne*, deceased, granted by the Consistorial Court of the Lord Bishop of *Lichfield* and *Coventry*, and the name and place of abode of *Ann Horne*, as the owner, proprietor, or person entitled to one share in the profits of the said navigation belonging to the said *William Horne* at the time of his death.

By an act of the 31 G. 3, entitled "An act for making a canal from *Birmingham* to communicate with the *Severn*, near *Worcester*," certain persons were incorporated, and were empowered to raise a competent sum of money for making the canal, not exceeding 180,000*l.*, which said sum was to be divided into 1800 equal shares, and the "*said shares were to be deemed personal estate, and transmissible as such, and not in the nature of real estate.*" By a subsequent act (48 G. 3, c. 49), the original deeds of bargain and sale or transfer of any shares in the navigation were required to be filed with and kept for the use of the company, and the company were authorized and required to nominate a clerk, who should, in a proper book provided for that purpose, enter and keep a true and perfect account of the names and places of abode of the several proprietors of the
*633] said navigation, and of the several persons who should from *time to time become owners and proprietors, or entitled to any share or shares therein.

The transfers of shares in the canal have been filed and kept by the clerk appointed for that purpose at the office in *Birmingham*, where, also, the dividends have been and are paid, the books of account kept, and the general business transacted. The canal passes through several parishes in the diocese of Worcester, through the parish of *Edgbaston*, a peculiar of the dean and chapter of *Lichfield*, and through the parish of *Birmingham*, which is in the diocese of *Lichfield* and *Coventry*, and the rates and duties for tonnage and wharfrage are collected at different places in each of the said dioceses. *William Horne* died at *Birmingham* in March 1819, possessed of a 100*l.* share, the transfer of which had been regularly filed in the company's office at *Birmingham*; by his will he gave all his personal estate to his wife *Ann Horne*, and appointed her sole executrix, and she proved the will in the Consistory

Court of the bishop of *Lichfield and Coventry*; the company refused to pay the dividends upon this share, and to register the probate, and enter her name and abode as a proprietor, on the ground that the probate of the Consistory Court was not sufficient, but that she ought to have taken out a prerogative probate.

Holroyd showed cause. The canal extends through several different dioceses, and the interest of the testator, if it has any locality, must be considered as being in each diocese through which the canal passes, and there should be a probate in each diocese, or a prerogative probate. An annuity issuing out of land is bona notabilia where the land lies, *Com. Dig., Administration*. *This is an interest of the same description; but if it has no defined locality, then a prerogative probate is necessary. In the case of stock and money in the funds, it was said by the Lord Chief Baron, in *The King v. Capper*, that it has no defined locality, and for the purpose of probate or administration is within the province of *Canterbury*. In the case of *Smith v. Stafford* there was a prerogative probate, and that is sufficient.

Marryat, Parke, and Whateley, contra. The interest of the testator is distinct from that of the body corporate, of which he was a member, as the interest of one private individual is from that of another. The body corporate has lands in different dioceses; the individual members have no interest in the lands; all that each proprietor is entitled to under the private act of parliament 31 G. 3, c. 59, is, "the value and net distribution of a certain part of the profits and advantages that should arise and accrue by virtue of the several sums of money raised under that act." These net profits are ascertained at the head office; and until that is done, the proprietor has no claim: they are payable there, and the share is transferred there only, and the deed by which the testator acquired his title remains there, and was there at the time of his death. This is like the case of stock transferable at the Bank of *England*, where a *London* probate is deemed sufficient. In *Smith v. Stafford* (c), the canal extended into two provinces, and the prerogative probate in one province, with the head office was situate, was deemed sufficient.

**Per Curiam*. The right to the share of the profits is personal property, which may be considered as locally situated in *Birmingham* for the purposes of probate.

Rule absolute.

(a) 5 Price, 217.

(b) 2 Wils. Ch. Ca. 166.

GREENSLADE v. DOWER and COLEMAN. Jan. 26.

Where A. and B. agreed to take a farm, and pay C., the former occupier, for certain articles by bills at three months, and C. afterwards, without the knowledge or consent of A. and B. took from B. bills for the amount, payable at six and twelve months, accepted by himself in his own name and A.'s: Held, that the latter could not be sued on the bills.

ASSUMPSIT against the defendants as acceptors of several bills of exchange payable at six and twelve months, drawn by one *Willoughby*, and indorsed by him to the plaintiff. Plea, non assumpsit. At the trial before Lord *Tenterden*, C. J., at the *Westminster* sittings, after last *Michaelmas* term, it appeared that *Willoughby*, in October 1824, was the occupier of a farm in *Surrey*, under an agreement for a lease from Lord *King*. On the 10th of October in that year an agreement was entered into between *Willoughby* and the defendant *Coleman*.

that he should take the farm upon the terms of *Willoughby's* agreement with the landlord, and pay for fixtures, household furniture, crops, stock, &c., at a valuation. On the 11th, a written agreement to that effect was prepared and signed by *Willoughby* and *Coleman*; on the next day, *Dover* also signed it. According to this agreement, the amount of the fixtures and furniture was to be paid for on the 25th of *October*, the price of the crops and stock by bills at three months. A few days after this agreement was signed, *Coleman* was taken very ill, and so continued, wholly unable to attend to business for several months. In consequence of this, *Willoughby*, at the request of *Dover*, continued to manage the farm until the 9th of **December* 1824, when *Dover* *636] entered into a new agreement with *Willoughby*, to pay part of the sum at which the articles specified in the former agreement were valued, in cash, and the remainder by bills at six and twelve months. In pursuance of this agreement, the bills in question were drawn by *Willoughby*, accepted by *Dover* for himself and *Coleman*, and deposited in the hands of the auctioneer employed to make the valuation, to be kept by him until the valuation was formally made out, and possession of the farm given up. On the 11th of *January* 1825 this was done; *Dover* took possession of the farm, and the bills were handed over to *Willoughby*. In *April* 1825, *Coleman*, having recovered from his illness, went to reside on the farm, and was then for the first time informed by the auctioneer that the amount had been paid by *Dover*, partly in cash and partly by bills, but the periods at which the bills were made payable were not mentioned. *Coleman* replied, that *Dover* ought not to have given any bills, as he had received 1200*l.* to make the payment, which sum greatly exceeded the amount of the valuation. It further appeared that *Dover* and *Coleman* were jointly interested in the farm. For the defendant *Coleman* it was objected, that *Dover* had not any authority to accept the bills in question in their joint names. The Lord Chief Justice thought the objection fatal, and directed a nonsuit.

Brougham now moved for a rule nisi for a new trial. It was clear upon the evidence that *Dover* and *Coleman* were partners in the farm. *Coleman*, it is true, originally made an agreement, and signed the written contract for the farm, but on the following day this was also signed by *Dover*, and it was not *637] disputed that the *latter was to have an interest in the concern. If then they were partners, the acceptance of one bound both, the bills being given for a debt due from both. It may be said that the power of one partner to bind a firm by his acceptance, applies only to trading partnerships; but there is no authority for that, and it would be a very inconvenient limitation of the implied power given by one partner to another. Besides, even when *Coleman* was informed that bills had been given, he did not deny his liability, or make any communication upon the subject to *Willoughby*, but continued to occupy the farm jointly with *Dover* as before. His conduct, therefore, amounted to a recognition of the authority.

Lord TENTERDEN, C. J. The agreement signed by *Coleman* was, that the amount of the valuation should be paid partly in cash and partly by bills at a certain date; and the only question is, Whether *Coleman* ever authorized *Dover* to pay by bills at a longer date? *Willoughby* knew the terms of the original agreement, and as he with that information took bills not drawn according to those terms, he took them at his own peril. No express authority was given, and in the month of *April*, when *Coleman* was told that some bills had been given, but the particulars of which were not even then mentioned, he replied, that none ought to have been given, for *Dover* had been supplied with cash sufficient to pay the whole sum. This, certainly, was nothing like a ratification of *Dover's* act; and I think that the mere joint occupation of the farm cannot operate by relation, so as to render these bills binding upon *Coleman*, they having been given contrary to the terms of the original contract, and without his assent. The *nonsuit, therefore, appears to have proceeded upon *638] a correct view of the case, and ought not to be disturbed.

BAYLEY, J. I should have thought the case more free from difficulty, had *Coleman*, immediately on being informed that the bills had been given, communicated to *Willoughby* that *Dower* acted without authority; but, upon the whole, I think that the nonsuit was right. The question is not, Whether *Willoughby* shall lose his money, for he may still sue both the defendants, provided he has done nothing to destroy his original right of action against them; but the question is, Whether an action can be maintained on these bills? In order to decide that, we must see whether *Dower* had any authority to bind *Coleman* express or by operation of law, resulting from the situation of the parties. If several persons are in trade together, a bill accepted by one in the names of the partnership, and in the course of their trading, binds them all. But there is a great difference between such a bill, and one drawn for the purpose of founding the partnership. Originally each partner would have to bring in his proportion of the capital, and it would be very unjust to let the acceptance of one for the capital bind all the others: no authority of that nature can be implied, nor does it arise by operation of law, the debt not being a partnership debt. Then was there any express authority in the present case? The contrary appeared. The authority given was to accept bills payable at three months; those in question were accepted at six and twelve. We should facilitate the practising of frauds by means of collusion between creditors, and one of several joint debtors, if we held that this was a transaction within the authority given.

*HOLROYD, J. I am of opinion that the nonsuit was right. *Dower* had no authority in law to accept these bills for the original purchase of the stock on the farm. The transaction was not a matter of trade, and did not warrant the acceptance without express authority. [*639]

LITTLEDALE, J., concurred.

Rule refused.

MULLETT v. HUCHISON. Jan. 28,

In an action for not returning bills deposited with defendant, the following unstamped memorandum, signed by defendant, was held to be admissible in evidence: "I have in my hands three bills which amount to 120*l.* 10*s.* 6*d.*, which I have to get discounted, or return on demand."

ASSUMPSIT in consideration that the plaintiff, at the request of the defendant, would indorse and deliver to the defendant three bills of exchange (therein particularly described) to be got discounted by him, defendant, for the plaintiff, for reward and interest to the defendant in that behalf; he, the defendant, undertook and promised the plaintiff to get the said bills discounted for the plaintiff, or else to return the same on demand to the plaintiff. Averment, that the bills were delivered to the defendant, but that he did not get them discounted, nor return the same when requested by the plaintiff. Plea, non assumpsit. At the trial before Lord Tenterden, C. J., at the London sittings after last Michaelmas term, the following unstamped memorandum in writing, signed by the defendant, and addressed to the plaintiff, was offered in evidence on behalf of the plaintiff: "I have in my hands three bills which amount to 120*l.* 10*s.* 6*d.*, which I have to get discounted, or return on demand." It was objected, that this paper was not admissible in evidence for want of a stamp, but the Lord Chief Justice overruled the objection, and the plaintiff had a verdict. [*640]

F. Kelly now moved for a new trial. This paper "was evidence of a contract," and therefore required a stamp by the 55 G. 3, c. 184, Sched. Pt. 1.

Tomkins v. Ashby (a) only showed that it did not require a receipt stamp. The same point is now pending before the Court in *Langdon v. Wilson* (b).

*641] *Lord TENTERDEN, C. J. I am of opinion that this paper did not require any stamp. If *Huchison* had bound himself absolutely by it to get the bills discounted, it might then have required a stamp, because in that case it would be evidence of a contract by him to do something which he otherwise would not be bound to do. But by this instrument he binds himself only to return the bills on demand. He therefore makes no other contract than that which the law implies in every case of a mere deposit of bills.

BAYLEY, J. This instrument contains a mere acknowledgment by *Huchison*, *642] that he holds the bills for *a particular purpose. *Tomkins v. Ashby* (c) is in point. There an unstamped paper containing an acknowledgment by the defendant, that the plaintiff had deposited money in his hands, was held to be receivable in evidence.

HOLROYD and LITLEDALE, Js., concurred.

Rule refused.

(a) 6 B. & C. 541.

(b) This case has since been disposed of. It was as follows:—

Assumpsit, in consideration that the plaintiff would retain and employ defendant as his attorney, and would deliver to the defendant a certain bill of exchange, drawn by *W. Patterson* upon, and accepted by, *Thomas Harrison*, for the payment of 300*l.* at six months after the date thereof, and indorsed by one *Sir Paul Bagshot* to the plaintiff, in order that he, the defendant, might recover the amount of the said bill from the respective parties liable to pay the same to the plaintiff, or make such other arrangement for the benefit of the plaintiff as might appear to him, the defendant, in his professional capacity, reasonable and proper, defendant undertook, &c. to do and perform his duty as such attorney, and to use and employ reasonable and proper care and diligence in and about the endeavouring to recover the amount of the bill, and to re-deliver the bill to the plaintiff. Averment of the delivery of the bill to the defendant. Breach, that he did not use reasonable diligence to recover the amount, nor make any arrangement for the benefit of the plaintiff, nor re-deliver the same. The declaration also contained a count charging the defendant as indorser of the bill. At the trial before Lord Tenterden, C. J., at the *Middlesex* sittings after last *Trinity* term, the plaintiff gave in evidence the following letter, signed by the defendant, and addressed by him to the plaintiff:—"I have this day received a bill of exchange for 300*l.*, drawn by one *Patterson* upon *Thomas Harrison*, bearing my indorsement and the indorsement of *Sir Paul Bagshot*, which I hold, as your attorney, to recover the value of from the respective parties, or to make such other arrangement for your benefit as may appear to me, in my professional capacity, reasonable and proper. 15th Nov. 1825." It was contended that this letter was not receivable in evidence for want of a stamp; but the Lord Chief Justice overruled the objection, and a verdict was found for the plaintiff on the count on the bill. A rule nisi for a new trial was obtained by *Campbell* in last *Michaelmas* term, upon the ground that this paper was not admissible in evidence for want of a stamp; and that, without it, there was not evidence that the defendant had notice of the dishonour, so as to entitle the plaintiff to recover on the count on the bill.

Sir *J. Scarlett* and *Comyn* now showed cause. This paper did not require a stamp; it was a mere acknowledgment of the purpose for which the defendant received the bill, and contained, on his part, no other contract than that which the law will imply. *Watkins v. Hewlett* (1 *Brod. & Bing.* 1) shows that it did not require an agreement stamp, and *Tomkins v. Ashby* (6 B. & C. 541), that it did not require a receipt stamp. They also cited *Chadwick v. Sills* (1 *Ryan & Moody*, 15).

Campbell and *Patterson* contra. This instrument, though signed only by one of the parties, is evidence of a contract. It would have proved the contract set out in the first count of the declaration; and, therefore, required a stamp.

Lord TENTERDEN, C. J. I am clearly of opinion that this paper was not evidence of a contract within the meaning of the 55 G. 3, c. 184, Sched. Pt. 1. It was a mere acknowledgment of the duty which the party took upon himself to perform.

Rule discharged.

(c) 6 B. & C. 541.

BAYLEY, J. I should have thought the case more free from difficulty, *Coleman*, immediately on being informed that the bills had been given, communicated to *Willoughby* that *Dower* acted without authority; but, upon whole, I think that the nonsuit was right. The question is not, Whether *Willoughby* shall lose his money, for he may still sue both the defendants, provided he has done nothing to destroy his original right of action against them; the question is, Whether an action can be maintained on these bills? In order to decide that, we must see whether *Dower* had any authority to bind *Coleman* express or by operation of law, resulting from the situation of the parties. If several persons are in trade together, a bill accepted by one in the name of the partnership, and in the course of their trading, binds them all. But there is a great difference between such a bill, and one drawn for the purpose of forming the partnership. Originally each partner would have to bring in his proportion of the capital, and it would be very unjust to let the acceptance of one for the capital bind all the others: no authority of that nature can be implied, nor does it arise by operation of law, the debt not being a partnership debt. Then was there any express authority in the present case? The contrary appeared. The authority given was to accept bills payable at six or twelve months; those in question were accepted at six and twelve. We should forbid the practising of frauds by means of collusion between creditors, and among several joint debtors, if we held that this was a transaction within the authority given.

*HOLROYD, J. I am of opinion that the nonsuit was right. *Dower* had no authority in law to accept these bills for the original purchase of the stock on the farm. The transaction was not a matter of trade, and did not warrant the acceptance without express authority.

LITLEDALE, J., concurred.

Rule refused.

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In an action for not returning bills deposited with defendant, the following unstamped memorandum, signed by defendant, was held to be admissible in evidence: "I have in my hands three bills which amount to 120*l.* 10*s.* 6*d.*, which I have to get discounted, and to return on demand."

ASSUMPSIT in consideration that the plaintiff, at the request of the defendant, would indorse and deliver to the defendant three bills of exchange (therein particularly described) to be got discounted by him, defendant, for the plaintiff's reward and interest to the defendant in that behalf; he, the defendant, undertook and promised the plaintiff to get the said bills discounted for the plaintiff, or to return the same on demand to the plaintiff. Averment, that the bills were delivered to the defendant, but that he did not get them discounted, nor return the same when requested by the plaintiff. Plea, non assumpsit. At the trial before Lord Tenterden, C. J., at the *London* sittings after last Michaelmas, the following unstamped memorandum in writing, signed by the defendant and addressed to the plaintiff, was offered in evidence on behalf of the plaintiff: "I have in my hands three bills which amount to 120*l.* 10*s.* 6*d.*, which I have to get discounted, or return on demand." It was objected, that this paper was not admissible in evidence for want of a stamp, but the Lord Chief Justice overruled the objection, and the plaintiff had a verdict.

F. Kelly now moved for a new trial. This paper "was evidence of a contract," and therefore required a stamp by the 55 G. 3, c. 184, Sched. F.

Tomkins v. Ashby (a) only showed that it did not require a receipt stamp. The same point is now pending before the Court in *Langdon v. Wilson* (b).

*641] *Lord TENTERDEN, C. J. I am of opinion that this paper did not require any stamp. If *Huchison* had bound himself absolutely by it to get the bills discounted, it might then have required a stamp, because in that case it would be evidence of a contract by him to do something which he otherwise would not be bound to do. But by this instrument he binds himself only to return the bills on demand. He therefore makes no other contract than that which the law implies in every case of a mere deposit of bills.

BATLEY, J. This instrument contains a mere acknowledgment by *Huchison*, *642] that he holds the bills for a particular purpose. *Tomkins v. Ashby* (c) is in point. There an unstamped paper containing an acknowledgment by the defendant, that the plaintiff had deposited money in his hands, was held to be receivable in evidence.

HOLROYD and LITTEDALE, Js., concurred.

Rule refused.

(a) 6 B. & C. 541.

(b) This case has since been disposed of. It was as follows:—

Assumpsit, in consideration that the plaintiff would retain and employ defendant as his attorney, and would deliver to the defendant a certain bill of exchange, drawn by *W. Patterson* upon, and accepted by, *Thomas Harrison*, for the payment of 300*l.* at six months after the date thereof, and indorsed by one *Sir Paul Bagshot* to the plaintiff, in order that he, the defendant, might recover the amount of the said bill from the respective parties liable to pay the same to the plaintiff, or make such other arrangement for the benefit of the plaintiff as might appear to him, the defendant, in his professional capacity, reasonable and proper, defendant undertook, &c. to do and perform his duty as such attorney, and to use and employ reasonable and proper care and diligence in and about the endeavouring to recover the amount of the bill, and to re-deliver the bill to the plaintiff. Averment of the delivery of the bill to the defendant. Breach, that he did not use reasonable diligence to recover the amount, nor make any arrangement for the benefit of the plaintiff, nor re-deliver the same. The declaration also contained a count charging the defendant as indorser of the bill. At the trial before Lord Tenterden, C. J., at the *Middlesex* sittings after last *Trinity* term, the plaintiff gave in evidence the following letter, signed by the defendant, and addressed by him to the plaintiff:—"I have this day received a bill of exchange for 300*l.*, drawn by one *Patterson* upon *Thomas Harrison*, bearing my indorsement and the indorsement of *Sir Paul Bagshot*, which I hold, as your attorney, to recover the value of from the respective parties, or to make such other arrangement for your benefit as may appear to me, in my professional capacity, reasonable and proper. 15th Nov. 1825." It was contended that this letter was not receivable in evidence for want of a stamp; but the Lord Chief Justice overruled the objection, and a verdict was found for the plaintiff on the count on the bill. A rule nisi for a new trial was obtained by *Campbell* in last *Michaelmas* term, upon the ground that this paper was not admissible in evidence for want of a stamp; and that, without it, there was not evidence that the defendant had notice of the dishonour, so as to entitle the plaintiff to recover on the count on the bill.

Sir J. Scarlett and *Comyn* now showed cause. This paper did not require a stamp; it was a mere acknowledgment of the purpose for which the defendant received the bill, and contained, on his part, no other contract than that which the law will imply. *Watkins v. Hewlett* (1 *Brod. & Bing.* 1) shows that it did not require an agreement stamp, and *Tomkins v. Ashby* (6 B. & C. 541), that it did not require a receipt stamp. They also cited *Chadwick v. Sills* (1 *Ryan & Moody*, 15).

Campbell and *Patterson* contra. This instrument, though signed only by one of the parties, is evidence of a contract. It would have proved the contract set out in the first count of the declaration; and, therefore, required a stamp.

Lord TENTERDEN, C. J. I am clearly of opinion that this paper was not evidence of a contract within the meaning of the 55 G. 3, c. 184, Sched. Pt. 1. It was a mere acknowledgment of the duty which the party took upon himself to perform.

Rule discharged.

(c) 6 B. & C. 541.

RULE OF COURT.

Hilary Term, 8th and 9th Geo. 4.

WHEREAS great expense is often unnecessarily incurred in making murrer books, from setting forth those parts of the pleadings to which demurrers do not apply. IT IS THEREFORE ORDERED, that from and at the end of this term, when there shall be a demurrer to part only of the declaration or other subsequent pleadings, those parts only of the declaration and pleadings to which such demurrer relates shall be copied into the demurrer books; any other parts shall be copied, the Master shall not allow the costs thereof to be taxed, either as between party and party, or as between attorney and client.

BY THE COURT.

*DOE on the demise of JOHN BYWATER v. CHARLES JOHN BRANDLING, W. B. C. STANDRIDGE, and J. DIXON.

In construing acts of parliament, the Court must take into consideration not only the language of the preamble, or of any particular clause, but of the whole act; and if in the enacting clauses expressions are found of more extensive import than in the preamble, the Court will give effect to those more extensive expressions; if, upon a view of the whole act, it appears to have been the intention of the legislature that they should have effect.

Upon this ground, where a lease of certain waggon-ways was granted to A. B. by the authority of an act of parliament, in which, as well as in the lease, there was a proviso for re-entry, in case he neglected in any one year to bring a certain quantity of coals for the use of the inhabitants of L., and sell them there at a certain price; and by a subsequent act, the preamble of which recited that the price was inadequate, and the inhabitants of L. would sustain great inconvenience if A. B. ceased to supply the coals, it was enacted, first, that the former act, confirming the lease (except such parts as were thereby altered or repealed), should continue; then, that A. B. might sell the coals brought to and deposited at C., or at any other place near thereto, to be used as a repository for coals instead thereof, at a certain increased price; and another section enacted that if A. B. neglected to bring the stipulated quantity of coals to C., or to such place near thereto, to be used as a repository for coals instead thereof, and sell them at the price fixed by that act, his interest in the waggon-ways should cease: Held, that although the preamble did not recite an intention to give A. B. liberty to change the place used as a repository for coals, and although it was not expressly enacted that he might do so, yet that the intention of the legislature to give him that privilege was manifest, and that he might do so without forfeiting his interest in the waggon-ways.

EJECTMENT to recover certain messuages, lands, and premises in the parishes of Leeds and Hunslet, in the West Riding of the county of York. At the assizes before Bayley, J., at the York Spring assizes 1826, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case:

Elizabeth Bywater being seised in fee of an estate near Leeds, in the county of York, of which the premises in question formed part, by indenture dated the 1st of August 1758, and expressed to be made by virtue and in pursuance of an act of parliament under the authority and direction of an act of parliament of the 31 G. 2, bearing date the 24th of March 1757, the said *Elizabeth Bywater* of the one part, and one *Charles Brandling* since deceased, of the other part, in consideration of the yearly rent and covenants thereafter reserved and contained, on the part and behalf of *C. Brandling*, his executors, administrators, and assigns, to be paid and performed, granted, demised, and leased to *C. Brandling*, his executors, &c. of closes or parcels of land in the indenture described, and which were the premises sought to be recovered in this action; and also a certain stable or helm

mentroned, and also full and free liberty, power, and authority to him *C. Brandling*, his executors, &c. to make, lay, and place such waggon-way or road, waggon-ways or roads as were then commonly made use of for and about the coal-mines and coal-works in the counties of *Durham* and *Northumberland*, and such branches from the same in, upon, over, and through the said parcels of ground thereby leased, or any part or parts thereof, as should be proper and necessary for the carriage and conveyance of coals from the coal-mines or coal-works of him *C. Brandling*, within the manor of *Middleton* or elsewhere, to *Casson Close*, near *Leeds Bridge*; which said place called *Casson Close*, was and is mentioned in the said act of parliament of the 31 G. 2, as a coal-yard, or repository for coals to be brought from the said coal-mines or coal-works for the purposes in the said act mentioned; and also full and free liberty, power, and authority for him *C. Brandling*, his executors, &c. by and with workmen, servants, horses, and carriages, to break, cut, dig, and remove the soil of any part or parts of the said closes or parcels of ground, and to carry, convey, fix, lay, and place wood, timber, iron rails, &c. and other materials unto, in, and upon the said closes or parcels of ground, or any part or parts thereof; and

*645] also to cut and make any trench or trenches, bridge or *bridges, and to do all other acts and things necessary or convenient, as well for the making, laying, and placing the said waggon-way or ways, and branches, as for the repairing and keeping the same in good order from time to time, as occasion should require; and also full liberty, power, and authority for him *C. Brandling*, his executors, &c. and his and their servants, agents, and workmen, and other persons by him and them employed, to go, pass, and repass in, upon, and along the waggon-way or ways, and branches so to be made as aforesaid, with horses or other beasts of burthen, or draught waggons and other carriages laden or unladen: habendum the same unto *C. Brandling*, his executors, &c. from the 1st day of *May* 1758, for and during the term of sixty years, fully to be complete and ended, and for such further term or longer time as the said coal-works, collieries, or coal-mines then belonging to him *C. Brandling*, or any other coal-works, collieries, or coal-mines whereof or wherein he, his executors or administrators, should during such term of years be seised, possessed, or interested, within the manor of *Middleton*, or elsewhere, should continue to be used and wrought; yielding and paying therefore yearly and every year during the term thereby granted for the said waggon-way or ways, and the liberty and privilege of making, using, and continuing the same, the yearly rent of 2*l.*, and for the rest of the closes, lands, and grounds the sum of 11*l.* The lease contained the following proviso: "Provided also, that in case *C. Brandling*, his heirs, or assigns, shall cease and leave off to work the said collieries or coal-works, or the same shall by means of fire or water, or by any other inevitable

*646] *accident, fail or become incapable to be wrought, or in case *C. Brandling*, or any other owner or proprietor thereof for the time being, shall refuse or neglect in any one year to bring or cause to be brought to the repository or coal-yard aforesaid, such quantity of coals (unless prevented by fire, water, or other inevitable accident), or to sell and dispose thereof at such rates and prices, and for such purposes as in and by the said act of parliament is in that behalf mentioned, provided, and appointed; then and in any of the said cases, it shall be lawful for the said *E. Bywater*, her heirs, &c. to enter into and upon the premises hereby leased, and then and also the estate, right, title, and privilege of him *C. Brandling*, his executors, &c. of and in the same, shall in that case and from thenceforth cease, determine, and be void." The lease also contained a covenant by the lessee for the payment of the rents, and covenants by the lessor, for quiet enjoyment on payment of the rent and performance of the covenants, conditions, and agreements which by the tenor, purport, and true intent and meaning of the said act of parliament, and the said indenture, were to be kept on the part of the lessee. The land demised consisted of four acres, or thereabouts. *E. Bywater* died seised in fee of the reversion of the demised

premises in 1760, and by her will (after a devise of an estate for life to her uncle *John Bywater*), devised the reversion to her cousin *C. Bywater*, who survived the testatrix, and died seised in fee of the reversion, having will devised the reversion to his brother, *J. Bywater*, for life, and from and after the decease of his said brother *John*, to the heirs of the body of his said brother *John*, lawfully to be begotten. *J. Bywater*, the *devisee, survived his brother, *C. Bywater*, and died in 1824, and the lessor of the plaintiff is his eldest son.

C. Brandling, the lessee, entered into, and was possessed of the defendant's premises under the lease of 1758, and *C. J. Brandling* (one of the defendants) on the day of the demise, laid in the ejectment, and, also, at the time of the commencement of this action, had succeeded his father as the owner and proprietor of the collieries or coal-works mentioned in the lease, and, together with the other defendants, as his under-tenants, was in possession of the premises demised. The term of sixty years mentioned in the lease expired on the 1st of *May* 1818. No coals whatever have been brought to the repository or coal-yard in *Casson Close*, mentioned in the said proviso, since *December* 1814. *Casson Close* ever since has been, and is now, disused as a repository for coals; the collieries have been ever since, and still are, regularly used and wrought, and no accident either from fire or water, nor any other inevitable accident, has prevented the coals procured from the collieries from being brought to the repository or coal-yard in *Casson Close*; but Mr. *Brandling*, in 1816, determined to surrender his contract with the proprietors of *Casson Close* by surrendering his title to the lease thereof for a valuable consideration. Up to *December* 1814, *Brandling* delivered at the repository in *Casson Close* the quantity of coals mentioned in the various acts of parliament of 31 G. 2, 19 G. 3, cc. 11, 86, 33, and 43 G. 3, c. 12 (a), *and sold them there according to the directions

(a) The 31 G. 2, entitled "An act for establishing agreements made between *Charles Brandling*, Esq. and other persons, proprietors of land, for laying down a waggon-way for the better supplying the town and neighbourhood of *Leeds*, in the county of *York*, with coals," began by reciting, that

Charles Brandling, Esq. lord of the manor of *Middleton*, in the county of *York*, owner and proprietor of divers coal-works, mines, veins, and seams of coals lying and being within the said manor of *Middleton* and places adjacent; and had proposed and was to engage and undertake to furnish and supply the inhabitants of the town of *Leeds* with a certain quantity of coals at a certain price, for the term of sixty years, to commence on the 2d day of *January* 1758, and for such further term or longer time as the said mines, veins, and seams of coals should continue to be used and wrought; and at his own charge and expense to carry and convey, or cause to be carried and conveyed from his said coal-works and every year, 20,000 dozen, or 240,000 corves of coals at the least; and to lay down and deposit such coals, or cause the same to be laid up and deposited upon a certain field of land, place called *Casson Close*, near the great bridge at *Leeds*, in order to be there sold and delivered at the rate or price aforesaid, unto the inhabitants of the said town of *Leeds*, and such other persons as should purchase the same; that it was necessary to have a road from the coal-works to *Casson Close*, in, over, and through divers fields, lands, and grounds in the parish of *Leeds*, which belonged to and were the estate and property of divers persons, the several owners and occupiers whereof had consented and agreed that the said *Charles Brandling*, his executors, &c. should and might make such railroad over their land as some of the owners and proprietors of the lands and grounds so to be used and employed for the said waggon-way and purposes thereinbefore mentioned, might happen to have a limited and not an absolute interest and property therein, and might be under other obligations to assure to the said *Charles Brandling* and his assigns the enjoyment of the powers, liberties, and privileges necessary to render the said agreement effectual for the purposes aforesaid, without the aid and authority of an act of parliament; it was therefore enacted, that it should be lawful for the said *C. Brandling*, his executors, &c. at any time or times after the 1st *May* 1758, to make, lay, and place such waggon-way or road as should be so made, and such branches, &c. as should be proper or necessary for the carriage and conveyance of coals with horses, &c. from any of the said coal-mines or coal-works of his said *C. Brandling*, to the said repository or coal-yard in *Casson Close* aforesaid, as to the said *C. Brandling*, his executors, administrators, or assigns should think fit and convenient; that he the said *C. Brandling*, his executors, &c. should and might have, hold, use, exercise, and enjoy the said waggon-way or ways and branches, and all and every the powers, liberties, privileges, and premises thereby given and granted to and vested in him as aforesaid

of those acts. In December 1816 he discontinued the staitn in *Casson Close*, and made a new repository for coals at a *place adjoining *Casson Close*,
 *649] and has ever since used that place as a repository for coals, instead of

the said 1st day of *May*, for and during the term of sixty years from thence next ensuing, and fully to be complete and ended; and for such further term or longer time as the said coal-works, collieries, or coal-mines then belonging to him *C. Brandling*, or any other coal-works, collieries, or coal-mines whereof or wherein he, his executors or administrators, should during the said term of years or longer time be seised, possessed, or interested within the said manor of *Middleton* or elsewhere, should continue to be used and wrought, he *Brandling* paying the stipulated rent. By another clause, the several owners and proprietors of the lands and grounds in and upon which such waggon-way or ways should be made, were authorized and required by indenture or indentures under their respective hands and seals, to grant, lease, or demise such of the several fields, lands, wastes, and other grounds so belonging to them respectively; or the liberty and privileges of making, laying, placing, and continuing such waggon-way or ways in, upon, and over the same respectively, unto him *C. Brandling*, his executors, &c. for the said term of sixty years so commencing as aforesaid; and for such further term or longer time as such coal-works, collieries, or coal-mines within the said manor of *Middleton* or elsewhere as aforesaid, should continue to be used and wrought. The act, then, after declaring that the indentures should be enrolled in the register office at *Wakefield*, in *Yorkshire*, enacted, that the said grants, leases, and demises so made as aforesaid, should be as good, valid, and effectual in law, to all intents and purposes, as if the persons making the same were respectively seised in fee-simple of and in the lands and grounds thereof respectively to be granted, leased, or demised.

By another clause it was provided, that in case *C. Brandling*, his heirs or assigns, should cease or leave off to work the said collieries or coal-works aforesaid, or the same should fail, or become incapable to be wrought, by fire, water, or other inevitable accident; or in case the said *C. Brandling* or other owner for the time being should refuse or neglect in any one year, to bring or cause to be brought to the repository or coal-yard aforesaid, the quantity of dozens of corves of coal thereinbefore mentioned, unless prevented by fire, water, or other inevitable accident; or should refuse to sell the same when brought down to the said coal-yard for the use of the inhabitants of *Leeds*, at the rates or price before mentioned, as by them respectively should be required, then in either of the said cases it should be lawful for the owners and proprietors of the several lands and grounds belonging to them respectively, which should be used for the purpose of such waggon-way or ways as aforesaid, to enter into and upon the several lands and grounds belonging to them respectively, which should be used and employed for the purpose of such waggon-way or ways as aforesaid; and then also all the estate, right, interest, and privilege of him the said *C. Brandling*, his executors, administrators, or assigns, of and in the same, should in that case and from thenceforth cease, determine, and be void.

The 19 G. 3, c. 11, entitled "An act for rendering more beneficial an act made in the 31st year of G. 2, entitled 'An act,' (setting out the title), required the owner of the colliery to bring 480,000 corves of coals to *Casson Close* in the year, and empowered him to sell the coals, which should be deposited in or upon the said repository at *Casson Close* aforesaid, unto the inhabitants of *Leeds*, or to such other persons as should purchase the same, at the rate and price of 5½d. per corf, anything in the recited act, or in any of the leases granted in pursuance thereof, to the contrary notwithstanding; and contained a proviso for re-entry, similar to that in the former act.

This act contained a clause authorizing the owner of the collieries to deliver 1000 dozen of corves of coals quarterly at any convenient place near or adjoining to the said waggon-way within the borough of *Leeds*, between the said coal-mines and the said repository in *Casson Close* aforesaid, and they were to be accounted as part of the said 40,000 dozens or 480,000 corves, which the owner of the mines was to bring down, or cause to be brought down, to the said repository in *Casson Close* aforesaid, and exposed to sale there.

The 33 G. 3 authorized the owner of the coal-works in *Middleton* to sell and dispose of his coals, which should be deposited in or upon the said repository at *Casson Close* aforesaid, to the inhabitants of *Leeds*, at the price of 13s. 1d. for each and every waggon of coals, such waggon containing 24 corves, anything in the said recited acts, or in any of the leases or agreements granted in pursuance thereof, to the contrary notwithstanding, and enacted that the right and interest of *C. Brandling*, his heirs, &c. in the said leases, should not cease and determine, but that he and they should continue to have the same interest therein, although the coals were sold at 13s. 1d. a waggon-load as aforesaid; and it contained a clause of re-entry, adapted to the alteration of price. It also (s. 7) authorized the lessee or owner of the mines to deliver, if required by any inhabitant of *Leeds*, at any convenient place or places near or adjoining to the said waggon-way within the parish of *Leeds*, between the said coal-works and the said repository in *Casson Close* aforesaid, any number of dozens of coals, not exceeding twelve waggons or 288 corves of coals in each day.

The 43 G. 3, c. 12, after reciting the former acts, proceeded as follows: "And whereas the inhabitants of the said town and parish of *Leeds* are very well satisfied and convinced,

Casson Close, and has supplied at the new repository, and has *sold there the quantity of coals prescribed by the statute of the 43 G. 3, c. 12. The new repository is about half-way between *Casson Close* and the

that on account of the advanced price of labour, and of the materials used in and about said coal-works, and in the working thereof, and that as *C. J. Brandling*, Esq., the owner of the said coal-works, has been at a very great expense in making fresh winning the said coal-works, and in making and laying additional waggon-ways therefrom, of 13s. 1d. for each and every waggon of coals containing twenty-four corves, each being in weight about 210 pounds, and in measure 7680 cubical inches, allowed demanded and taken by the last recited act, is not an adequate and sufficient price demanded and taken for the said coals so brought down, and delivered at the said repository at *Casson Close*; and that the said price is much lower than the price demanded and at all other coal-works in the neighbourhood: And whereas, if on account of the price of the said coals, the said *C. J. Brandling* should discontinue and give up the waggon-way or repository, it would materially injure the manufacturers of the said and parish of *Leeds*, and be a cause of great distress to the inhabitants in general; whereas the said *C. J. Brandling* cannot, without the aid and authority of parliament, deliver his said coals at the said repository in the borough of *Leeds* at a higher price than 6½d. a corf: May it therefore please your Majesty, that it may be enacted; it enacted, that the said recited acts, and all and every the rates, clauses, powers, agreements, penalties, forfeitures, rules, remedies, directions, payments, provisions, articles, matters, things whatsoever therein contained (except such parts of the same as may relate exemptions from stamp duties, and as are hereby varied, altered, or repealed), shall the same are hereby declared to be in full force and effect from and after the passing act, during the continuance of the time or term granted by the said recited acts, purpose of carrying the said recited acts and this present act into execution, as fully, lawfully and amply as if the same were repeated and re-enacted in the body of this present act.

Sect. 2 enacts, "That it shall and may be lawful to and for the said *C. J. Brandling*, his executors, administrators, or assigns, or any owner or owners, proprietor or proprietors of the said coal-works in *Middleton*, to sell and dispose of his and their coals which be deposited and laid up in or upon the said repository at *Casson Close* aforesaid, or other place near thereto, to be used as a repository for coals instead thereof, unto the tenants of the said town and parish of *Leeds*, at the rate and price of 16s. for each and every waggon of coals, such waggon containing twenty-four corves, each corf containing in weight about 210 pounds, and in measure 7680 cubical inches, anything in the said recited acts in any of the leases or agreements granted in pursuance thereof, to the contrary notwithstanding; and that the right and interest of *C. J. Brandling*, his heirs, &c. in the said leases or agreements shall not cease and determine, but that he and they shall continue to have the same interest therein, although the said coals are sold at the said sum or price of 16s. a waggon-load as aforesaid."

The third section prohibited the sale of coals brought down to or deposited in the repository at *Casson Close* aforesaid, or in any other place near thereto, to be used as a repository for coals instead thereof, to any person but an inhabitant of *Leeds*.

The fourth section required Mr. *Brandling*, or other owner of the coal-works, to lay down to the said repository in *Casson Close*, or to some other place near thereto, to be used as a repository for coals instead thereof, six days in every week, eighty waggons, or not less than ten waggons should be laid down at the said repository, or at some place near thereto, to be used as a repository for coals instead thereof.

The sixth section enacted, that if Mr. *Brandling*, or other owner of the coal-works, should refuse or neglect to bring, or cause to be brought down to the said repository at *Casson Close*, or to such other place near thereto, to be used as a repository for coals instead thereof, the aforesaid daily number of waggons or corves of coals from the coal-works or manor of *Middleton*, unless hindered by fire, water, or other unavoidable accident, or refuse to sell the said coals when so brought down to the said repository, or to some other place near thereto, to be used as a repository for coals instead thereof, or should neglect to lay down, or cause to be laid down, at the said repository, or at such other place near thereto, to be used as a repository for coals instead thereof, ten waggons or corves of coals, the inhabitants of *Leeds*, at 16s. per waggon, then, and in every such case, it should be lawful for the owners or proprietors of the several lands and grounds in, through, or over which any waggon-way or ways was or were laid or made for leading of coals from the said coal-works, and for each and every of them, to enter into and upon the several lands and grounds belonging to them respectively, which should be used for the purpose of such waggon-way or ways as aforesaid, and then, also, all the estate, right, interest, and privilege of Mr. *J. Brandling*, his heirs, &c. of and in the same, should, in that case, and from thenceforth, cease, determine, and be void."

Sect. 19 authorizes justices at quarter sessions to fix and ascertain the rates and to be demanded and taken for leading and carrying away coals from the said repository from any other place near thereto, to be used as a repository for coals instead thereof, in all and every part and parts of the said town and parish of *Leeds*.

*651] mises *in question, and upwards of 100 yards nearer the collieries, and further from the town than the old one was. Mr. *Branding* continued to pay the rent reserved *by the lease of 1758 to *John Bywater*, the father of the present lessor of the plaintiff, till November 1823, and, *652] since that time, to the lessor of the plaintiff, who, upon *its being tendered, has refused to receive it. The lessor of the plaintiff gave to the defendant *C. J. Branding* a notice to quit, which expired before the commencement of this ejectment, but he and the other defendants continue to hold, claiming under the lease of 1758 as a valid and continuing lease.

Brougham for the plaintiff. First, the lease is void at common law for all the term beyond sixty years; for a lease for years must have a certain beginning and end, *Co. Litt.* 45 b.; *Bac. Abr. Lease* (L); *Com. Dig., Estate* (G 10). (This point was conceded on the part of the defendant.) That being so, the validity of *the lease, for any term beyond sixty years, must *654] depend upon the acts of parliament; it is a mere creature of the legislature. Now the first act, 31 G. 2, contains a proviso that in case the owner or proprietor of the collieries shall refuse or neglect in any one year to bring, or cause to be brought to the repository or coal-yard aforesaid (viz. *Casson Close*) the specified quantity of coals, or refuse to sell the same at the stipulated prices to the inhabitants of *Leeds*, it shall be lawful for the owner of the lands used for the purpose of the waggon-way to re-enter, and then the estate, right, and interest of *C. Branding* in the same shall end and determine. It is clear, therefore, that if the condition, for the breach of which the lessors by the said proviso are entitled to re-enter, has not been altered by the subsequent acts, the lease has determined, because the lessee has for one year neglected to bring, or cause to be brought, to the repository at *Casson Close* the specified quantity of coals. By the subsequent acts of the 19 G. 3, c. 11, and 33 G. 3, c. 86, the condition is altered as to the price; the lessee is authorized to receive a higher price for his coals, and each of those acts contains a provision that the right and interest of the said owner of the collieries, &c., in the said lease shall not cease and determine, but that he shall continue to have the same interest therein, *although the coals are sold at the increased price*, and the provisos for re-entry in those acts respectively are adapted to the alteration of price. But those acts do not authorize the lessee to deposit the coals at any other place than *Casson Close*; and, consequently, the depositing them at any other would be a breach of the condition contained in the original act, and *655] *would operate as a forfeiture of the lease. The only question is, Whether the legislature has by the last act, 43 G. 3, c. 12, authorized the lessee to change the place of deposit, and enlarged in that respect the condition, for the breach of which the lease was to become void. All these acts having been passed to regulate the rights, first, of the owners of the land over which the waggon-ways were to pass; secondly, of the inhabitants of *Leeds*; and, thirdly, of Mr. *Branding*, the lessee of the waggon-ways, they ought to be construed as one act, and the last act, the 43 G. 3, must be read as if all the clauses in the former acts were repeated in it, and it ought to be construed, as between these parties, in the same manner as a private conveyance, according to the intention of the parties. The preamble recites the titles of the three former acts, and that the inhabitants of *Leeds* were satisfied that the price allowed to be demanded was not an adequate price for the coals brought down and delivered at the said repository at *Casson Close*, and that if, on account of the then inadequate price of the coals, Mr. *Branding* should discontinue and give up the said waggon-way or repository, it would be a cause of great distress to the inhabitants in general, and that Mr. *Branding* could not without the authority of parliament, sell and deliver his said coals at the said repository in *Leeds*, at any higher price than 6½d. a corf." Now in this recital *Casson Close* is again mentioned as the repository, but it is not mentioned that any inconvenience had arisen from its being the repository, or that there was any

intention of changing it. The only inconvenience to be remedied by the act, as far as it can be collected from this recital, *was the inadequate price [*656 paid for the coals. The first section then enacts, "that the said recited acts, and all and every the rates, clauses, powers, agreements, and forfeitures, therein contained, shall be, and the same are hereby declared to be in full force and effect, as fully, largely, and amply as if the same were repeated and re-enacted in the body of this present act." The clauses in the former acts which rendered the lease void, if the lessee did not deposit the coals at *Casson Close*, must be considered as incorporated in this act. The first section, therefore, so far from showing any intention to relieve the lessee from the condition of depositing the coals at *Casson Close*, shows the contrary, because it incorporates the old condition. The second section then authorizes the lessee to sell and dispose of the coals deposited upon the said repository at *Casson Close*, or at any other place near thereto, to be used as a repository for coals instead thereof, at a price higher than that allowed by the former acts, and then enacts that the right and interest of the lessee in the leases shall not cease and determine, but shall continue, although the coals are sold at the increased price. This clause in express terms relieves the lessee from that part of the condition which requires him to sell the coals at the price allowed by the former acts, but it does not relieve him from the other part of the condition, which requires the coals to be deposited at *Casson Close*. The condition, therefore, as far as respects the place of deposit, continues in force. There has been a breach of it, and the lease has been thereby forfeited. Besides, if, as between these parties, this act is to be construed as a private conveyance, the clause *relieving the [*657 lessee from a condition, being introduced for his benefit, ought to be construed most strongly against him.

The *Solicitor-General* for the defendant. Although the act of the 43 G. 3 might have been expressed in much clearer terms than it has been, still there is sufficient to lead to the conclusion that it was the intention of the legislature that the leases which had been made under the first act, should not be avoided by breach of the condition contained in that act, but that a new condition should be substituted in the place of the former. It must be conceded, that the lessee having neglected to deposit his coals at *Casson Close* for one year, has committed a breach of the condition contained in the first act, and that if that condition has not been altered by the subsequent acts, the lease has thereby become forfeited. The acts of the 19 G. 3, and 33 G. 3, have altered the condition contained in the first act as far as respects the price allowed to be taken for the coals. They have even altered the condition partially in respect of the place of deposit, for the lessee is authorized to deliver a specified quantity at a place between the mines and the repository at *Casson Close*. It is not disputed that this was a valid and subsisting lease at the time of the passing of the act of the 43 G. 3, and the question is, Whether that act has not relieved the lessee from that part of the condition which required him to deliver his coals at *Casson Close*. It is entitled an act for amending and enlarging the powers of the several former acts, and it recites those acts, and also, among other things, that if on account of the then inadequate price of the said coals, *C. Brandling* should discontinue *or give up the waggon-way or repository, it would [*658 materially injure the manufacturers of *Leeds*, and be a cause of great distress to the inhabitants in general. If the construction contended for on the other side were to prevail, it will be in the power of the owners of the lands over which the waggon-way passes, to make it impossible for the owner of the collieries to carry his coals to *Leeds*, and the inhabitants of that town will be subjected to the inconvenience which it was the intention of the legislature to prevent. Such a construction of the act would therefore contravene the manifest and declared intention of the legislature. But then the first enactment of the 43 G. 3 is decisive of the question; it is, "that the said recited acts, and all and every the clauses, &c. &c. therein contained shall be in full force and effect,

as fully, largely, and amply as if the same were repeated and re-enacted in the body of this present act." The act, therefore, of the 43 G. 3, is to be interpreted as if it had originally conferred on the owner of the lands over which the coals were to be carried, the power of granting leases, and as if in one clause it had required that the leases should be subject to a condition that the lessee should deliver the coals at *Casson Close*, and in another clause, that it should be subject to a condition that he should deliver the coals at *Casson Close*, or some other place near thereto. Then, in order to ascertain the meaning of the legislature, it would be necessary to consider together not only the two clauses, the one containing the restrained condition, the other the enlarged condition, but the whole of the act, and it ought to be construed so as to effect the principal object of the legislature, which was to secure to the inhabitants of *Leeds* a regular supply of coals, and *with that view it would be necessary to give effect to the larger condition, and to consider that as virtually incorporated in the lease. If the words "any other place near thereto," which are in the enacting clauses of the statute, had been in the preamble also, the construction of the act would not have admitted of any doubt, but those words in the enacting clauses cannot be rejected because they do not occur in the preamble, for it is a general rule in the construction of acts of parliament, that particular words in a preamble shall not restrain or control larger words in the enacting clauses. *Casson Close* is mentioned in the subsequent clauses of the act twenty times, and wherever it occurs, it is always followed by the words "or other place near thereto." The sixth section enacts, "that if Mr. B., or other owner of the coals, shall refuse or neglect to bring, or cause to be brought to *Casson Close*, or some other place near thereto, to be used as a repository for coals instead thereof, the quantity of coals specified (and after mentioning other acts), then and in every such case it shall be lawful for the proprietors of the lands through which the waggon-way is made, to enter." By that clause the legislature have substituted a new condition in lieu of the old one, and this new condition must be considered as incorporated in the lease. The 43 G. 3 contains a clause by which the magistrates are authorized to fix the rate of carrying coals not only from *Casson Close*, but from other places near to the said repository. That shows clearly that it was the intention of the legislature to make a provision perfectly collateral to the interest of the lessor and lessee, namely, for the interest of third persons. The argument on the other side is founded on the supposition that *Casson Close* was *named in the first act of parliament as a repository for coals for the benefit of the lessors, but in fact it was so named for the benefit of the inhabitants of *Leeds*. It is wholly immaterial to the lessors whether the place of repository were *Casson Close* or any other place near to it. If the alteration of the place of repository had been prejudicial to the lessors, that would have been stated in the case. It was the manifest intention of the legislature, the state of the circumstances being the same, that there should be a right of way in order that there might be a supply of coals for the inhabitants of *Leeds*, and such a construction ought to be put upon the statute as will effectuate that intention.

Lord TENTERDEN, C. J. The question in this case depends entirely on the construction of a particular act of parliament. In construing acts of parliament we are to look not only at the language of the preamble, or of any particular clause, but at the language of the whole act. And if we find in the preamble, or in any particular clause, an expression not so large and extensive in its import as those used in other parts of the act, and upon a view of the whole act we can collect, from the more large and extensive expressions used in other parts, the real intention of the legislature, it is our duty to give effect to the larger expressions, notwithstanding the phrases of less extensive import in the preamble, or in any particular clause. The lease in question is entirely the creature of the acts of parliament. At the time of passing the first act the legislature had before them (as appears by the preamble), first, the inhabitants

intention of changing it. The only inconvenience to be remedied by the act, as far as it can be collected from this recital, *was the inadequate price paid for the coals. The first section then enacts, "that the said recited acts, and all and every the rates, clauses, powers, agreements, and forfeitures therein contained, shall be, and the same are hereby declared to be in full force and effect, as fully, largely, and amply as if the same were repeated and enacted in the body of this present act." The clauses in the former acts which rendered the lease void, if the lessee did not deposit the coals at *Casson Close*, must be considered as incorporated in this act. The first section, therefore, far from showing any intention to relieve the lessee from the condition of depositing the coals at *Casson Close*, shows the contrary, because it incorporates the old condition. The second section then authorizes the lessee to sell or dispose of the coals deposited upon the said repository at *Casson Close*, or at any other place near thereto, to be used as a repository for coals instead thereof, at a price higher than that allowed by the former acts, and then enacts that the right and interest of the lessee in the leases shall not cease and determine, shall continue, although the coals are sold at the increased price. This clause in express terms relieves the lessee from that part of the condition which required him to sell the coals at the price allowed by the former acts, but it does not relieve him from the other part of the condition, which requires the coals to be deposited at *Casson Close*. The condition, therefore, as far as respects the place of deposit, continues in force. There has been a breach of it, and the lease has been thereby forfeited. Besides, if, as between these parties, this act is to be construed as a private conveyance, the clause *relieving the lessee from a condition, being introduced for his benefit, ought to be construed most strongly against him.

The *Solicitor-General* for the defendant. Although the act of the 43 G. 3 might have been expressed in much clearer terms than it has been, still it is sufficient to lead to the conclusion that it was the intention of the legislature that the leases which had been made under the first act, should not be avoided by breach of the condition contained in that act, but that a new condition should be substituted in the place of the former. It must be conceded, that the lessee having neglected to deposit his coals at *Casson Close* for one year, had committed a breach of the condition contained in the first act, and that if the condition has not been altered by the subsequent acts, the lease has thereby become forfeited. The acts of the 19 G. 3, and 33 G. 3, have altered the condition contained in the first act as far as respects the price allowed to be paid for the coals. They have even altered the condition partially in respect of the place of deposit, for the lessee is authorized to deliver a specified quantity of coals at any place between the mines and the repository at *Casson Close*. It is not disputed that this was a valid and subsisting lease at the time of the passing of the act of the 43 G. 3, and the question is, Whether that act has not relieved the lessee from that part of the condition which required him to deliver his coals at *Casson Close*. It is entitled an act for amending and enlarging the powers of the several former acts, and it recites those acts, and also, among other things, that if on account of the then inadequate price of the said coals, *C. Brandling* should discontinue *or give up the waggon-way or repository, it would thereby materially injure the manufacturers of *Leeds*, and be a cause of great distress to the inhabitants in general. If the construction contended for on the other side were to prevail, it will be in the power of the owners of the lease over which the waggon-way passes, to make it impossible for the owner of the collieries to carry his coals to *Leeds*, and the inhabitants of that town will be subjected to the inconvenience which it was the intention of the legislature to prevent. Such a construction of the act would therefore contravene the manifest and declared intention of the legislature. But then the first enactment of the 43 G. 3 is decisive of the question; it is, "that the said recited acts, and every the clauses, &c. therein contained shall be in full force and effect."

as fully, largely, and amply as if the same were repeated and re-enacted in the body of this present act." The act, therefore, of the 43 G. 3, is to be interpreted as if it had originally conferred on the owner of the lands over which the coals were to be carried, the power of granting leases, and as if in one clause it had required that the leases should be subject to a condition that the lessee should deliver the coals at *Casson Close*, and in another clause, that it should be subject to a condition that he should deliver the coals at *Casson Close*, or *some other place near thereto*. Then, in order to ascertain the meaning of the legislature, it would be necessary to consider together not only the two clauses, the one containing the restrained condition, the other the enlarged condition, but the whole of the act, and it ought to be construed so as to effect the principal object of the legislature, which was to secure to the inhabitants of *Leeds* a regular supply of coals, and *with that view it would be necessary to give effect to the larger condition, and to consider that as virtually incorporated in the lease. If the words "any other place near thereto," which are in the enacting clauses of the statute, had been in the preamble also, the construction of the act would not have admitted of any doubt, but those words in the enacting clauses cannot be rejected because they do not occur in the preamble, for it is a general rule in the construction of acts of parliament, that particular words in a preamble shall not restrain or control larger words in the enacting clauses. *Casson Close* is mentioned in the subsequent clauses of the act twenty times, and wherever it occurs, it is always followed by the words "or other place near thereto." The sixth section enacts, "that if Mr. B., or other owner of the coals, shall refuse or neglect to bring, or cause to be brought to *Casson Close*, or some other place near thereto, to be used as a repository for coals instead thereof, the quantity of coals specified (and after mentioning other acts), then and in every such case it shall be lawful for the proprietors of the lands through which the waggon-way is made, to enter." By that clause the legislature have substituted a new condition in lieu of the old one, and this new condition must be considered as incorporated in the lease. The 43 G. 3 contains a clause by which the magistrates are authorized to fix the rate of carrying coals not only from *Casson Close*, but from other places near to the said repository. That shows clearly that it was the intention of the legislature to make a provision perfectly collateral to the interest of the lessor and lessee, namely, for the interest of third persons. The argument on the other side is founded on the supposition that *Casson Close* was named in the first act of parliament as a repository for coals for the benefit of the lessors, but in fact it was so named for the benefit of the inhabitants of *Leeds*. It is wholly immaterial to the lessors whether the place of repository were *Casson Close* or any other place near to it. If the alteration of the place of repository had been prejudicial to the lessors, that would have been stated in the case. It was the manifest intention of the legislature, the state of the circumstances being the same, that there should be a right of way in order that there might be a supply of coals for the inhabitants of *Leeds*, and such a construction ought to be put upon the statute as will effectuate that intention.

Lord TENTERDEN, C. J. The question in this case depends entirely on the construction of a particular act of parliament. In construing acts of parliament we are to look not only at the language of the preamble, or of any particular clause, but at the language of the whole act. And if we find in the preamble, or in any particular clause, an expression not so large and extensive in its import as those used in other parts of the act, and upon a view of the whole act we can collect, from the more large and extensive expressions used in other parts, the real intention of the legislature, it is our duty to give effect to the larger expressions, notwithstanding the phrases of less extensive import in the preamble, or in any particular clause. The lease in question is entirely the creature of the acts of parliament. At the time of passing the first act the legislature had before them (as appears by the preamble), first, the inhabitants

of *Leeds*, who were anxious to obtain a supply of coals at a moderate price; secondly, Mr. **Brandling*, the owner of certain coal-mines, who was willing to supply them with a quantity of coals at that price, but who could not afford to supply them at that price unless he could have a particular line of road by which he might carry the coals to the town of *Leeds*, and, thirdly, the owners of certain lands lying between the mines and the town of *Leeds*. The owners of those lands (before they came before the legislature) had made certain agreements to grant to Mr. *Brandling* leases either of the lands over which his coals were to be conveyed, or of a right of way over the lands, for a term of sixty years, and for such further term as the mines might be worked for the supply of the town of *Leeds*. The legislature having called the parties before them, passed an act to carry their agreements into effect. The act, after reciting what was intended, enacts, in the first place, that Mr. *Brandling* may convey his coals over the lands and grounds of the persons who agreed with him for that purpose. The legislature, therefore, gave him a liberty to do this (independently of any liberty granted to him by any lease), on condition that he should convey a fixed quantity every year, and should sell them at a specified price. The clause under which the lease was granted authorizes the owners of the land, by indentures under their respective seals, to grant, lease, or demise such of the several lands, wastes, and grounds so belonging to them respectively, or the liberty and privileges of making, laying, placing, and continuing such waggon-way, in, upon, and over the lands respectively, unto him, *Brandling*, his executors, &c., for the said term of sixty years, commencing as aforesaid, and by another clause it is enacted that the leases shall *be as valid and effectual as if the persons making the same were respectively seised in fee-simple. There is a proviso that in the case *Brandling* shall refuse or neglect to bring to the repository or coal-pit aforesaid, the quantity of coals required by the act, and shall refuse to sell the same at the specified price, the owners and proprietors of the lands over which the way is made, may re-enter, and that the lessee's interest shall cease, the lease be void, and the mine, and be void. So that if the leases had contained no clause of re-entry, the cesser of the terms, the owners of the lands (if Mr. *Brandling* had not conveyed the proper quantity of coals, or laid them at the proper place) would have had a right by authority of the act of parliament, independently of any provision in the lease, to put an end to the leases, and resume their rights. It was afterwards found that the quantity of coals supplied was not equal to that which the inhabitants of *Leeds* required, and that the price allowed by the former act was not an adequate remuneration to Mr. *Brandling*, and it being, therefore, apprehended that if he (as he might lawfully do) discontinued to convey his coals to *Leeds*, it would be a great inconvenience to the inhabitants, the act of the 19 G. 3. was passed; that act requires him to convey a larger quantity of coals than he was bound to do by the first act, and authorizes him to receive for them, when brought to *Casson Close*, a higher price. It also enables him to dispose of 1000 dozen of coals (a portion of the entire quantity required to be conveyed) at a price short of the repository at *Casson Close*; and it contains a new power of re-entrance adapted to the alteration made as to the quantity and price, and enacts that the liberty and interest of *Brandling* in the leases, shall not cease and determine, but *he shall continue to have the same interest, although the coals are sold at the higher prices. The 33 G. 3. contains a similar clause, adapted to the alteration of price allowed by that act. Then the preamble to the 4 G. 3. after reciting the several former acts, and that the inhabitants of *Leeds* were willing to pay a higher price for the coals, enacts, "that the said recited acts, and all and every the rates, clauses, powers, agreements, forfeitures, &c., matters and things therein contained, shall be, and the same are hereby declared to be, in full force and effect from and after the passing of this act, during the continuance of the time or term granted by the said recited acts for the purpose of carrying the said recited acts, and this present act, into execution, as if

largely, and amply as if the same were repeated and re-enacted in the body of this present act." The clause contained in the former acts, by which the lessor is authorized to re-enter, unless the coals were delivered at *Casson Close*, would have remained in full force, if there had been nothing in this act to the contrary; but by the second section it is enacted "that *Brandling* may sell and dispose of the coals which may be deposited at *Casson Close*, or at any other place near thereto, which may be used as a repository for coals instead thereof, to the inhabitants of *Leeds*, at the price of 16s. per waggon-load, any thing in the said recited acts, or in any of them, or in any of the leases or agreements granted in pursuance thereof, to the contrary notwithstanding; and that the right and interest of *Brandling*, his heirs, &c., in the said leases or agreements shall not cease and determine, but that he and they shall continue to have the same interest therein, although the said coals are sold at the said sum or price of 16s. *664] a waggon-load *as aforesaid*." This clause appears to have been transcribed by the person who drew the act from the former acts, but he did not attend to the alteration introduced by the act 43 G. 3. The words "as aforesaid," however, show, that the new repository was to be in the place of *Casson Close*; for the said coals which Mr. *Brandling* is allowed to sell at 16s. a waggon, are coals deposited at *Casson Close*, or some other place near thereto, to be used as a repository *instead thereof*. *Casson Close* is mentioned frequently in other parts of the act as a repository, and wherever it is so mentioned it is invariably followed by the words "*or any other place near thereto, to be used as a repository for coals instead thereof*." In the clause of re-entry in this latter act, the new place of deposit is carefully introduced throughout. It is clear, therefore, that, under the act of parliament, there could be no re-entry on the ground that the coals were deposited at the new place of deposit substituted for *Casson Close*; and if that be so, can the lessor be allowed to re-enter for breach of the covenant contained in the lease? The lease is the creature of the legislature, and under its control. The clause of re-entry contained in it, was unnecessary, for the legislature had in the first instance provided for re-entry in the very event in which it is provided for by the lease, and they have continued to provide for it, with the necessary variations, from that time. A clause of re-entry was properly introduced into the intermediate acts, by which the owner of the mines was allowed to raise the price of his coals, and such a clause was necessary in this act, not merely by reason of the alteration of price, but, also, of the alteration of place at which the coals were *665] to be deposited. Taking the whole of these acts of parliament together, it seems to me perfectly clear that the legislature did intend by the last act to control, not merely the clause of forfeiture which had occurred in the former acts, but the clause of forfeiture contained in the lease; otherwise this absurdity would follow, that a proviso for re-entry contained in a lease granted in pursuance of an act of parliament, corresponding with the proviso for re-entry contained in that act of parliament, would be efficient after the act of parliament had ceased to be in force. It appears to me impossible to put on this act a construction which will produce such a consequence. I am, therefore, of opinion that this lease has not been forfeited, and that judgment must be entered for the defendant.

BAYLEY, J. I have entertained in this case very considerable doubts during the course of the argument, and those doubts were not removed until a late period. It is incumbent on persons who obtain acts of parliament of this description, to express the object they have in view in plain and distinct terms. The recital in the 43 G. 3 imports that the only inconvenience to be remedied by that act was the inadequate price then allowed to the owner of the collieries for his coals. If it had been the object of the legislature to allow him in future to deposit the coals at any other place than *Casson Close*, I should have expected that intention to have been disclosed either in the preamble or in some enacting clause, and in terms much more distinct than it is specified in the second

of *Leeds*, who were anxious to obtain a supply of coals at a moderate price; secondly, Mr. *Brandling*, the owner of certain coal-mines, who was willing to supply them with a quantity of coals at that price, but who could not afford to supply them at that price unless he could have a particular line of road by which he might carry the coals to the town of *Leeds*, and, thirdly, the owners of certain lands lying between the mines and the town of *Leeds*. The owners of those lands (before they came before the legislature) had made certain agreements to grant to Mr. *Brandling* leases either of the lands over which his coals were to be conveyed, or of a right of way over the lands, for a term of sixty years, and for such further term as the mines might be worked for the supply of the town of *Leeds*. The legislature having a bill brought before them, passed an act to carry their agreements into effect. The act, after reciting what was intended, enacts, in the first place, that Mr. *Brandling* may convey his coals over the lands and grounds of the persons who had agreed with him for that purpose. The legislature, therefore, gave him the liberty to do this (independently of any liberty granted to him by any lease) on the condition that he should convey a fixed quantity every year, and should pay them at a specified price. The clause under which the lease was granted authorizes the owners of the land, by indentures under their respective seals, to grant, lease, or demise such of the several lands, wastes, and grounds so belonging to them respectively, or the liberty and privileges of mining, laying, placing, and continuing such waggon-way, in, upon, and over the lands respectively, unto him, *Brandling*, his executors, &c., for the said term of sixty years, commencing as aforesaid, and by another clause it is enacted that the leases shall be as valid and effectual as if the persons making the leases were respectively seised in fee-simple. There is a proviso that in the case *Brandling* shall refuse or neglect to bring to the repository or coals aforesaid, the quantity of coals required by the act, and shall refuse to sell the same at the specified price, the owners and proprietors of the lands over which the way is made, may re-enter, and that the lessee's interest shall cease, and be void. So that if the leases had contained no clause of re-entry, the cesser of the terms, the owners of the lands (if Mr. *Brandling* had not conveyed the proper quantity of coals, or laid them at the proper place) would have had a right by authority of the act of parliament, independently of any proviso in the lease, to put an end to the leases, and resume their rights. It was afterwards found that the quantity of coals supplied was not equal to that which the inhabitants of *Leeds* required, and that the price allowed by the former act was not an adequate remuneration to Mr. *Brandling*, and it being, therefore, apprehended that if he (as he might lawfully do) discontinued to convey his coals to the town it would be a great inconvenience to the inhabitants, the act of the 19th of George 3. passed; that act requires him to convey a larger quantity of coals than he was bound to do by the first act, and authorizes him to receive for them, when he conveys more than 1000 dozers of coals, a higher price. It also enables him to dispose of 1000 dozers of coals (a portion of the entire quantity required to be conveyed) at a price short of the repository at *Casson Close*; and it contains a new power of re-entry adapted to the alteration made as to the quantity and price, and enacts that the liberty and interest of *Brandling* in the leases, shall not cease and determine, but that he shall continue to have the same interest, although the coals are sold at the higher prices. The 33d of George 3. contains a similar clause, adapted to the alteration of price allowed by that act. Then the preamble to the 33d of George 3. after reciting the several former acts, and that the inhabitants of *Leeds* were willing to pay a higher price for the coals, enacts, "that the said recited acts, and all and every the rates, clauses, powers, agreements, forfeitures, &c. matters and things therein contained, shall be, and the same are hereby declared to be, in full force and effect from and after the passing of this act, during the continuance of the time or term granted by the said recited acts for the purpose of carrying the said recited acts, and this present act, into execution, as

largely, and amply as if the same were repeated and re-enacted in the body of this present act." The clause contained in the former acts, by which the lessor is authorized to re-enter, unless the coals were delivered at *Casson Close*, would have remained in full force, if there had been nothing in this act to the contrary; but by the second section it is enacted "that *Brandling* may sell and dispose of the coals which may be deposited at *Casson Close*, or at any other place near thereto, which may be used as a repository for coals instead thereof, to the inhabitants of *Leeds*, at the price of 16s. per waggon-load, any thing in the said recited acts, or in any of them, or in any of the leases or agreements granted in pursuance thereof, to the contrary notwithstanding; and that the right and interest of *Brandling*, his heirs, &c., in the said leases or agreements shall not cease and determine, but that he and they shall continue to have the same interest therein, although the said coals are sold at the said sum or price of 16s. *664] a waggon-load *as aforesaid*." This clause appears to have been transcribed by the person who drew the act from the former acts, but he did not attend to the alteration introduced by the act 43 G. 3. The words "as aforesaid," however, show, that the new repository was to be in the place of *Casson Close*; for the said coals which Mr. *Brandling* is allowed to sell at 16s. a waggon, are coals deposited at *Casson Close*, or some other place near thereto, to be used as a repository *instead thereof*. *Casson Close* is mentioned frequently in other parts of the act as a repository, and wherever it is so mentioned it is invariably followed by the words "*or any other place near thereto, to be used as a repository for coals instead thereof*." In the clause of re-entry in this latter act, the new place of deposit is carefully introduced throughout. It is clear, therefore, that, under the act of parliament, there could be no re-entry on the ground that the coals were deposited at the new place of deposit substituted for *Casson Close*; and if that be so, can the lessor be allowed to re-enter for breach of the covenant contained in the lease? The lease is the creature of the legislature, and under its control. The clause of re-entry contained in it, was unnecessary, for the legislature had in the first instance provided for re-entry in the very event in which it is provided for by the lease, and they have continued to provide for it, with the necessary variations, from that time. A clause of re-entry was properly introduced into the intermediate acts, by which the owner of the mines was allowed to raise the price of his coals, and such a clause was necessary in this act, not merely by reason of the alteration of price, but, also, of the alteration of place at which the coals were *665] to be deposited. Taking the whole of these acts of *parliament* together, it seems to me perfectly clear that the legislature did intend by the last act to control, not merely the clause of forfeiture which had occurred in the former acts, but the clause of forfeiture contained in the lease; otherwise this absurdity would follow, that a proviso for re-entry contained in a lease granted in pursuance of an act of parliament, corresponding with the proviso for re-entry contained in that act of parliament, would be efficient after the act of parliament had ceased to be in force. It appears to me impossible to put on this act a construction which will produce such a consequence. I am, therefore, of opinion that this lease has not been forfeited, and that judgment must be entered for the defendant.

BAYLEY, J. I have entertained in this case very considerable doubts during the course of the argument, and those doubts were not removed until a late period. It is incumbent on persons who obtain acts of parliament of this description, to express the object they have in view in plain and distinct terms. The recital in the 43 G. 3 imports that the only inconvenience to be remedied by that act was the inadequate price then allowed to the owner of the collieries for his coals. If it had been the object of the legislature to allow him in future to deposit the coals at any other place than *Casson Close*, I should have expected that intention to have been disclosed either in the preamble or in some enacting clause, and in terms much more distinct than it is specified in the second

section. I should have expected an enactment that the lessee's interest lease should continue, not merely, although the coals were sold at the price, but although the coals should *be deposited at *Casson Close*, or at some place near thereto. I should also have expected some other restriction on the lessee, as to the place to be substituted, than its contiguous *Casson Close*. For though the substituted repository may be near to *Casson Close*, the alteration may subject the inhabitants of *Leeds* to great inconvenience. It seems to me, when once this clause had passed, the inhabitants could have been protected only by the proviso in the lease, giving to the lord the power of continuing *Casson Close* as the repository, not for the sake of his own interest (for to him it would be quite immaterial), but for the sake of protecting the interests of the inhabitants of *Leeds*. And if the proviso in the lease had been unconnected with the first act of parliament; if it had not been a mere creature of that act, and liable therefore to be varied by subsequent acts of parliament, I should have been of opinion that the representatives of the lessor would have had a right to insist that the lessee had no power of his own authority, without the consent of the lessor, to vary the proviso, and therefore that it could not be varied by a clause in a private act of parliament except by very plain and unambiguous language, and that the language used in this act was not sufficient for that purpose. But the short ground upon which my opinion has been formed in this case is this: This lease has been made in pursuance of the act of parliament, and contains a proviso for re-entry, framed in the very language of the act of parliament. So long as that act continued to be the only act in force, the proviso in the lease could have no operation whatever, for the lessor would have had, under the first act of parliament, exactly the same power of re-entry as he would have by the proviso in the lease. *The proviso in this lease, which is made under the powers of the act of parliament, is not a distinct and independent proviso, but dependent upon and co-extensive with the proviso in that act of parliament, and liable virtually to be repealed or controlled by a subsequent act of parliament. Now the 19 G. 3 varies the quantity of coals required to be delivered. It does not leave the proviso contained in the 21 G. 2 in force as to the quantity which had been required to be delivered by that act, but it contains one entire proviso applicable to the whole quantity to be delivered in future, and then when an additional alteration is made by the 33 G. 3, which is an enactment not framed in the usual language of a proviso, but correcting in every particular with the terms of the proviso contained in the 21 G. 2, the 31 G. 2. It gives to the lessor a right of re-entry, not merely if he neglects to deliver the additional quantity required by that act, but if he neglects to deliver the entire quantity of coals required to be delivered. Then the 33 G. 3 contains an additional proviso, and the question is, Whether that proviso, not, to all intents and purposes, obliterated the proviso in the 31 G. 2? The proviso is, "that it shall be lawful for Mr. *Brandling*, or any owner of the works, to sell and dispose of his coals which shall be deposited in the repository at *Casson Close* aforesaid, or at any other place near thereto to be used as a repository for coals instead thereof." I have looked through the several provisions in the act of the 43 G. 3, and it seems to me, that if it was the contemplation of the legislature to have one repository only, so that if *Casson Close* was to be the repository, it was to be considered as such not merely for the 20,000 dozens of corves, but for the 50,000 *which were required to be deposited under the last act; and if, on the other hand, there was to be a new repository, it was to be a new repository for the whole quantity. There is a proviso applicable to the whole quantity. By that proviso the lessor may re-enter only "in case the quantity has not been delivered at *Casson Close*, or at some other place near thereto, to be used as a repository instead thereof." I am therefore inclined to think that there ought to be judgment for the defendant. If our opinion is wrong, the plaintiff may bring another action upon the facts upon the record, and submit the case to the decision of a court of law.

HOLROYD, J. I am of the same opinion. I think that it was intended by the second section of the 43 G. 3, that if in a particular event there was to be a substitution of another place, instead of *Casson Close*, near thereto, it should be for the whole quantity of coals to be delivered; and that, notwithstanding the proviso for re-entry in the lease, this section does allow a substitution, though by the provisions for re-entry in the former acts of parliament, and in the lease, such a substitution would have been a forfeiture of the lease. This section permits such a substitution, any thing in the *former acts or in the lease* to the contrary notwithstanding; and enacts, "that the right and interest of the lessee in the lease shall not determine, but that he shall continue to have the same interest therein, although the coals are sold at the price of 16s. a waggon-load as aforesaid." The words "as aforesaid" show that the latter part of the section applies to coals deposited "at *Casson Close*, or any other place near thereto," *669] substituted as a repository instead of *Casson Close*. It seems, *therefore, to allow of a substitution of a higher price for a smaller one, in consequence of an additional quantity of coals being required, and likewise a substitution of one place for another, supposing the place substituted to be allowed by this clause of the act. I therefore think that the defendant is entitled to the judgment of the Court.

LITLEDALE, J. I have not been present during the whole of the argument, but I was present at the former one (a), and having heard the opinion of my Lord and learned Brothers, I shall only say that I entirely concur with them that the judgment ought to be given for the defendant.

Judgment for the defendant.

(a) The case was previously argued before three of the Judges of this Court during their sittings in banc after *Michaelmas* term.

REX v. GOURLAY.

A commitment of an insane person, under the 39 & 40 G. 3, c. 94, s. 3, is not a commitment in execution, and is not, therefore, to be construed with the same strictness; and, therefore, a warrant stating that *A. B.* had been discovered and apprehended under circumstances that denoted a derangement of mind, and a purpose of committing some crime, for which, if committed, he would be liable to be indicted, to wit, an assault, and that the said *A. B.* being brought before the justice, he committed him, was held to be sufficient, although it did not state the name of the person whom the prisoner intended to assault; and it did not appear that the committing magistrate received any evidence on oath.

THE prisoner was committed to the house of correction for the county of *Middlesex*, by the following warrant, signed by a magistrate of *Middlesex*:—
 "Whereas *Robert Gourlay* hath been discovered and apprehended under circumstances that denote a derangement of mind, and a purpose of committing a crime *670] (that is to say) an assault and breach of the peace, *for which, if committed, he would be liable to be indicted; and the said *Robert Gourlay* being brought before me, one of the justices of the peace for the said county, and it appearing to me that I ought to issue a warrant for committing him as a dangerous person suspected to be insane, these are therefore to command you and each of you to receive into your custody the body of the said *Robert Gourlay*, herewith sent, as a dangerous person, suspected to be insane, and him safely to keep in your custody, until he shall be bailed as directed by the statute in that case made and provided, or until he shall be discharged by due course of law;

and for so doing this shall be your sufficient warrant." The prisoner now brought into Court by virtue of a habeas corpus,

Campbell moved that he might be discharged out of custody, because the warrant did not disclose, with sufficient certainty, the cause of commitment. He cited *Dr. Groenvelt's* case (a), to show that the cause of commitment ought to be certain; to the end that the party may know for what he suffers, and he may regain his liberty; and he contended that this was in the nature of a commitment in execution, for the party might be confined for an indefinite time. A commitment in execution by a magistrate, must state that the party has been convicted. Merely setting forth that he was charged on oath with the offence, is insufficient, *Rex v. Cooper* (b). So a commitment in execution of a rogue and vagabond under the statute 23 G. 3, c. 38, should state that the defendant was apprehended with the implements of housebreaking *upon him at the time of apprehension, *Rex v. Brown* (c). This commitment does not show that the magistrate heard any evidence on oath, nor does it disclose the name of the party whom the prisoner intended to assault. It merely follows the words of the act of parliament; but that is not sufficient. By the bankrupt law the commissioners may commit the bankrupt or other persons examined before them, for not answering lawful questions to their satisfaction. But such examinations connected with the cause of commitment, must be stated in the warrant of commitment, so as to present on the face of the return authorized by the act, and immediately to the consideration of the Court the propriety of the detention.

Lord TENTERDEN, C. J. The statute 39 & 40 G. 3, c. 94, s. 3, under which this commitment took place, enacts as follows:—"And for the better prevention of crimes being committed by persons insane, if any person shall be discovered or apprehended under circumstances that denote a derangement of mind, and a disposition to commit some crime, for which, if committed, he would be liable to indictment; and any justice before whom such person may be brought, shall be authorized to issue a warrant for committing such person as a dangerous person, so that he may be insane; such cause of commitment being plainly expressed in the warrant. The person so committed shall not be bailed, except by two justices, one of whom shall be the justice who issued such warrant, or by the quarter sessions, or by two of the judges or lord chancellor, lord keeper or commissioners of the great seal. The commitment authorized by this *act of parliament is very peculiar. It is not a commitment for safe-custody, in order that the party may afterwards be brought to trial. Nor is it a commitment in execution; but it is a commitment for safe custody, in order to secure the party and prevent his escape, which is the chief to his Majesty's subjects. That being the object, I think the warrant ought not to receive the same strict construction as a warrant in execution. It has been contended, that the warrant ought to have stated the name of the person whom the prisoner showed a purpose of assaulting. In many cases this might be impossible; as for instance in the case of a man in a high state of excitement, running through a street with a knife or a sword in his hand, intending to murder any person he may meet with; or with a firebrand in his hand, intending to set fire to any house. If, therefore, we required the name of the person to be named in this as in other cases, we might render the provisions of the statute parliamentary nugatory. Then it is said, that there was no evidence before the magistrate. But the magistrate states as a positive fact, that the party was discovered and apprehended under circumstances which bring within the operation of the act of parliament. I think that is sufficient to be observed, too, that this statute requires a greater degree of caution to be used in taking bail than is required in ordinary cases; for it must be taken by two justices (one of them being the committing justice), or the quarter sessions, or a judge. This shows an anxiety on the part of the legislature that a person who has been once detained under this statute should not be permitted

(a) 1 *Ld. Raym.* 213.(b) 6 *T. R.* 509.(c) 8 *T. R.* 26.

perly to go at large. Upon the whole, I think that the warrant not being a warrant of commitment in execution is sufficiently certain, and that the prisoner must be remanded.

*673]

Ex parte CHARLES BAXTER. Feb. 7.

Where a party, brought before commissioners of bankrupt, and examined by them with a view to ascertain whether the bankruptcy had been concerted between him and the bankrupt, and how the stock of the latter had been disposed of, was asked with what intention he believed the bankrupt had come to him on a certain day before the docket was struck; to which he answered, that he did not know the bankrupt's intention, and did not know what to say as to his belief: Held, that the question was not material, and that, therefore, although the answer might not be satisfactory, the commissioners had not authority to commit the party.

ARCHBOLD had obtained a writ of habeas corpus, directed to the keeper of *Newgate*, commanding him to bring up the body of *Charles Baxter*, for the purpose of being discharged out of custody. The warrant of commitment, on being returned, stated that a commission dated the 29th of *November* 1827, had duly issued against *William Baxter*, under which he had been declared a bankrupt; and that *Charles Baxter*, the brother of the bankrupt, was duly summoned to appear, and did appear before the commissioners to be examined. It then set out his examination in form, by which it appeared that he had struck a docket against *William Baxter*, that about a week before the docket was struck against *William Baxter*, he, *Charles Baxter*, had written to *Gissing*, the shopman of his brother, and desired him, *Gissing*, to take his master's stock, which was done. He was then asked, whether his brother had seen him at *Ipswich*, or elsewhere, between the time of his writing the letter to *Gissing*, and the day when he absconded? To which he answered, that he did not recollect, but that he would not swear that he had not seen him in that interval, that he could not possibly say whether he had seen him between those times, but he believed he did see him at *Ipswich*, that he thought he was at *Ipswich* with his own attorney, *Mr. Marston*, who was, also, witness's attorney, and who lived at *Norwich*, and that that was after he had written the letter to *Gissing*, and *674] before the bankrupt absconded. The *warrant then set out the following questions and answers: Q. Why did you not state this at first? A. I did not recollect it.—Q. You are requested to consider that last answer, as it is suspected you intended to withhold that fact; did you not recollect from the first that he had been over to you at *Ipswich*? A. I thought you meant by himself.—Q. Now state what passed in that interview between you? A. Mr. *Marston* came over to strike the docket.—The question was repeated. A. Nothing of importance passed between myself and my brother.—Q. State what did pass relative to his circumstances, whether important or not important, in your view of it, state the whole truth? A. I have stated that the attorney came over to strike the docket.—Q. You are requested to state what passed between you and your brother, relative to his circumstances? A. Nothing.—Q. You have before said nothing important; what did pass? A. I now mean to say that nothing at all passed.—Q. For what purpose did your brother then come over to you? I suppose to drive Mr. *Marston*, the attorney, to *Ipswich*, where I lived.—Q. Do you not know that your brother did go from *Norwich* to *Ipswich*, with Mr. *Marston*, to you, for the purpose of getting you to strike a docket? A. Mr. *Marston* would have done as well alone.—Q. Have you any other answer to give to that question?—A. No.—Q. It is pointed out to you that you have not answered it; have you any other to give? A. No.—Q. You are requested

carefully to consider, as it is a question easily to be answered? A. I can no other answer; my brother might have had business at *Ipswich*, although with me.—The question was repeated. A. I have no other answer to give. The question was again repeated. A. If he *did, it is unknown to me.—Q. Do you not believe that your brother went with *Marston* from *Norwich* to yourself at *Ipswich* to get you to strike a docket? A. I do not know whether he did or not; I do not know his intention in coming.—Q. You are asked as to your knowledge, but your belief? A. I would have answered the question long ago.—Q. Answer it now as to your belief? A. I do not know what to say.—Q. Is that the only answer you mean to give? A. Yes.—Q. Having had time for reflection, have you any addition to make to your examination? A. No.—The answers not being satisfactory to the commissioners, they issued the warrant in question. The prisoner now being brought before the Court,

Sir James Scarlett and *Archbold* contended, that he ought to be discharged, because it appeared, by the warrant of commitment, that he was committed to custody for giving an unsatisfactory answer to an immaterial question. The statute 6 G. 4, c. 16, s. 33, the commissioners are authorized to swear before them any person known or suspected to have any of the estate of the bankrupt in his possession, or who is supposed to be indebted to the bankrupt, or any person whom the commissioners believe capable of giving information concerning any act of bankruptcy committed by him, or any information material to the full disclosure of the dealings of the bankrupt. Section 34 authorizes the commissioners to examine such person on oath concerning the person, trade, dealings, or estate of such bankrupt, or any act of bankruptcy by such bankrupt committed, and if any person shall refuse to answer any lawful questions put to him by the commissioners, *touching any of the matters aforesaid, or shall not fully answer, to the satisfaction of the said commissioners, any such lawful questions, they may commit him. The commissioners, therefore, are authorized to commit, if there be an unsatisfactory answer to a lawful question. The questions, to be lawful, must be touching the person, trade, dealings, or estate of the bankrupt. Here the question was as to the belief which the prisoner entertained as to the intention of his brother. His belief as to such intention could not have any relation to the estate of the bankrupt.

C. Law and *E. Knight* contra. The question was material, considering with reference to the preceding examination. The statement of the belief which the intent was material, because the grounds of that belief would have been material to the next question. That would have led to questions as to the conversation which passed between them, and that was very material; for the state of the bankrupt's affairs, and how, and in what manner he had disposed of his estate, would be the probable topics of conversation between the parties to the commission.

Cur. adv. vult.

The judgment of the Court was now delivered by

Lord TENTERDEN, C. J. We have met and considered of this case, and it was argued before us yesterday. It is impossible to read the whole of the examination, without seeing that the party brought before the commissioners was most unwilling to make that full and fair disclosure, touching the subject-matter of their enquiry, which he was required to do. But although *this is apparent upon all the questions and answers taken together, still we must enquire whether the final question, whereupon the party was committed, was of a nature to warrant that proceeding. The question was respecting the intention of his brother, the bankrupt, in coming to *Ipswich*. And before we decide as to the sufficiency or insufficiency of the answer, we should see whether this question was material to the duty which the commissioners had in charge. Their object being to ascertain the real state of the affairs of the bankrupt at that time, whether the bankruptcy had been concerted between the

brothers, and the manner in which his stock had been disposed of, they might have put various other questions to bring them to the same conclusion, and such as the witness might have been more reasonably expected to answer, than a direct question as to intention of a third person in doing a certain act. The answer, in fact, given was, that he did not know whether his brother did or did not come with the alleged intention, that he did not know his intention in coming; and then, on his being pressed to answer as to his belief, he answered, he did not know what to say. It is not surprising that the commissioners should think this unsatisfactory, their object being to obtain a full disclosure of all that the witness knew, and not merely to rest upon an examination taken as between party and party. We cannot, however, say that he refused to answer a material question so as to justify his detention in custody; and the consequence is, that we are bound to discharge him.

Prisoner discharged.

*678] *REX v. The Justices of the West Riding of Yorkshire. Feb. 7.

By a local act certain trustees of roads were authorized to make an order for stopping up part of certain old highways, and a right of appeal was given to any person or persons who might be aggrieved by the making of any such order: Held, that in a notice of appeal against an order of the trustees for stopping up a highway, it was necessary to state that the party intending to appeal was aggrieved by the order.

At the Midsummer sessions for the West Riding of Yorkshire, *John Hutchinsson* and seven other persons entered an appeal against the confirmation of an order made by certain trustees of roads (appointed by a local act of parliament) for stopping up, as useless and unnecessary, part of a public highway leading from the village of *Padsey*, in the West Riding of the county of *York*, through the township of *Furnley*, towards the village of *Gildersome* in the said riding. The appeal was given by the following clause: "Be it enacted, that it shall be lawful for any person or persons who may be aggrieved by the making of any order, hereby authorized for stopping up and discontinuing the respective parts of the said several old highways or roads, or any of them, to appeal against the same at any quarter sessions for the said riding, which shall be held within three calendar months next after the making of the said order, upon giving a notice in writing of such appeal duly signed by him, her, or them, to the clerk to the trustees for the time being, at least fourteen clear days before such quarter sessions, and the justices assembled at such quarter sessions are hereby authorized, upon due proof before them upon oath by the appellant or appellants of such notice having been regularly given by him, her, or them as aforesaid, to hear and determine the said appeal." In the notice it was stated that the undersigned (the appellants) being inhabitants of the townships of *Padsey* and *Gildersome*, in the West Riding of *Yorkshire*, intended to appeal against the confirmation

*679] of an order, &c.; but *it was not stated that the parties intending to appeal were aggrieved by the order. The court of quarter sessions held the notice to be insufficient, and refused to hear the appeal. A rule nisi for a mandamus, commanding the justices to cause continuances to be entered, and to hear and determine the merits of the appeal at the next quarter sessions, had been obtained upon an affidavit, by which it appeared that the appellants were aggrieved by the order.

The *Solicitor-General* and *Alderson* on a former day in this term showed cause. *Rex v. The Justices of Essex (a)* is an authority to show, that in a notice

(a) 5 B. & C. 431.

of appeal against an order for stopping up a footway under the 55 G. the appellant must be stated to be a party aggrieved. Here, the local the right of appeal to the party aggrieved; the former case is, therefore in point.

Sir *James Scarlett* and *Blackburne* contra. It appears now, upon that the appellants were parties aggrieved by the order. In that case differs from *The King v. The Justices of Essex*. But one objection present application is to have that decision reviewed. The general understanding in the profession before that decision was, that although it was necessary for a party appealing to show, at the trial of the appeal, that he was aggrieved, it was not necessary to state that in the notice. The act of parliament requires the grounds of the appeal to be stated in the notice, but merely requires the appellant should give a notice in writing of such appeal. It does not require any precise form for the notice, *and it need not, therefore, state in what manner the parties are aggrieved; and it must be wholly useless to state the fact generally, that they are aggrieved; but here, it appears, upon the notice, that the appellants were inhabitants of *Padsey*. Now, the giving up of a road leading from *Padsey* to *Gildersome*, must *prima facie* be to the inhabitants of *Padsey*.

Lord TENTERDEN, C. J. I certainly cannot distinguish this case from that of *The King v. The Justices of Essex* (a); but if we came to a wrong decision in that case, we ought now to correct it. We will, therefore, consider the case before we deliver our judgment.

Cur. ad.

Lord TENTERDEN, C. J., now delivered the judgment of the Court.

The objection to the notice of appeal in this case was, that it did not state that the parties appealing were aggrieved by the order, and in support of that objection *The King v. The Justices of Essex* was relied on. We have considered that decision, and if it had been founded on mistake we should have been ready now to correct it. But, after the best consideration, we think that if the question had now arisen for the first time, we should have been ready to decide, that the party appealing against an order for stopping up a footway on the face of his notice, show that he is injured. By the appeal clause of the act of parliament, it is lawful for any person aggrieved by the making of an order for stopping up a road, to appeal against the same, upon giving notice in writing of *such* appeal, fourteen days before the sessions. We think the meaning of that is, that the *party appealing must give notice that he has sustained an injury by the making of the order. The rule for a man who has sustained an injury, must, therefore, be discharged.

Rule discharged.

(a) 5 B. & C. 431.

(a) The following case, being of a similar nature, is introduced here, although it was not until *Trinity* term:

REX v. The Justices of Somersetshire.

A notice of appeal against overseer's accounts, merely stating that the party intended to try his appeal against the accounts on the grounds and for the reasons therein set forth, and then specifying the items against which he intended to appeal, and stating which he intended to make to each item, was held to be sufficient, although it was not stated that the party intending to appeal was a rated inhabitant of the parish.

On the 28th of *June* 1827, *Thomas Pulman* gave the following notice of his intention to try, at the *July* sessions for the county of *Somerset*, his appeal against the accounts of the churchwardens and overseers of *St. Decuman's*, in that county; the appeal having been entered and respited at the *April* sessions:—"I do hereby give you and each of you notice that at the next general quarter sessions of the peace to be holden for the said county of *Somerset*, I intend to try my appeal against the accounts made up by you or some or one of you as churchwardens and overseers, or as such overseers as aforesaid, for the year ending the 25th of *March* 1827."

Mark last, and by you or one of you sworn to, and allowed by, &c. two justices, on the 4th of April instant; and which said appeal was entered and respited at the last general quarter sessions held for the said county, on the grounds and for the reasons hereinafter set forth, that is to say." The items in the accounts, against which he intended to appeal, were then specified, as well as the several objections which he intended to make to each item; and those objections were, that the charges were unlawful, and ought not to be allowed in the accounts; but it was not stated that he was a party aggrieved, and the justices upon that ground refused to hear the appeal. A rule nisi having been obtained for a mandamus, commanding the justices to cause continuances to the next sessions to be entered, and to hear and determine the merits of the appeal,

Sir James Scarlett, Cabbell, and Beers showed cause. This case must be governed by *The King v. The Justices of Essex* (5 B. & C. 431), and *Rex v. The Justices of the West Riding of Yorkshire*. The 43 *Eliz.* c. 2, s. 6, gives the right of appeal "to any person or persons who shall find themselves grieved with any sess or tax, or other act done by the churchwardens and other persons." That statute, therefore, only gives the right of appeal to a party aggrieved. The 17 *G. 2*, c. 38, s. 4, gives the right of appeal against any rate or assessment either to any person who shall find himself aggrieved, or to any person having any material objection to the rate, upon the grounds therein specified; or in the case of overseers' accounts to any person having any material objection to the said accounts, upon giving reasonable notice. In order to entitle a party to appeal under this statute, he must either be a person aggrieved by a rate, or a party having an objection to the rate or accounts. It must have been the intention of the legislature to give a right of appeal, not to every person who was capable of pointing out objections to the accounts of the overseers, but to those only who had an interest that the parish funds should be properly applied. In *Rex v. Cottingham* (6 *T. R.* 20), an inclosure act directed that the public roads to be set out by the commissioners should be repaired in such manner as other public roads are by law to be repaired; and that the private roads should be repaired by such person or persons as they should award. The words, *person or persons*, were held to be confined to those persons who had an interest in the inclosure. So, though the highway act directs that every justice may make presentment, upon information upon oath to him given by any surveyor of the highways; yet the words, *any surveyor*, have been held to be confined to the surveyor of the district, *Rex v. Fylingdales*, (7 B. & C. 438.) Then, if the right of appeal is confined to those persons who have any interest in the proper application of the parish funds, it is necessary for a party intending to appeal to show, by his notice, that he is a person who has such an interest. He may show this either by stating that he is a rated inhabitant of the parish, or that he finds himself aggrieved in consequence of such a sum being charged in the accounts. But in this case, he merely states that he intends to appeal, on the ground that particular charges are unlawful, and ought not to be allowed. If that were sufficient, a mere stranger, who had no interest in the funds of the parish, but who was capable of pointing out objections, might appeal. The 41 *G. 3*, c. 23, s. 4, requires that all notices of appeal against rates or overseers' accounts shall be specified in writing, and it makes no alteration as to the persons entitled to appeal.

Lord TENTERDEN, C. J. I think the rule for the mandamus ought to be made absolute. It has been contended, that the principle of the decision upon the highway act is applicable to this case, and, therefore, that the notice of appeal was insufficient, because it was not therein alleged that the appellant was a party aggrieved. But the language of the act of parliament, which gives the right of appeal in this case, is very different from the language used in the act which gave the right of appeal in the former case. The statute 55 *G. 3*, c. 68, s. 3 (which relates to the highways), gave the right of appeal against an order for stopping up a highway to any party aggrieved; and as the stopping up or diverting of a highway might in some degree be considered to aggrieve all his majesty's subjects, we thought that (as the statute had not given the right of appeal to all persons, but to those persons only who had sustained an injury) the legislature intended to confer that privilege upon those persons only who had sustained some special and particular injury; and, therefore, that it was necessary to allege on the face of the notice, that the party intending to appeal was aggrieved; but the language of the 17 *G. 2*, c. 38, s. 4, which gives the right of appeal against overseers' accounts, is very different. It is in the alternative, and gives a right of appeal to a party aggrieved by a rate, or to a person having any material objection to it on particular grounds, or to a person having any material objection to the overseer's accounts. The fourth section of that statute enacts, "that in case any person or persons shall find him, her, or themselves aggrieved by any rate or assessment, made for the relief of the poor," so far the statute gives the appeal to "the party aggrieved;" but then those words are dropped, and it goes on: "Or shall have any material objection to any person or persons being put on or left out of such rate or assessment, or to the sum charged on any persons therein; or shall have any material objection to such account as aforesaid, &c. it shall be lawful for such person in any of the cases aforesaid to appeal." This statute, therefore, gives the right of appeal in the case of overseers' accounts, to any person having a material objection to those accounts. The statute 41 *G. 3*, c. 23, makes no alteration in the law as to the persons entitled to appeal, but merely requires that all notices shall be in writing, and shall specify the grounds of objection. Now, in this case the person giving the

notice of appeal, says in his notice, I have material objections to your accounts then proceeds to specify those objections, according to the provisions of the 41 G. has, therefore, brought himself within the description of persons entitled to appeal 17 G. 2, c. 38, s. 4. If it should turn out that he is a mere stranger, the court of sessions may refuse to hear him. The rule for a mandamus must, therefore, be made absolute.

Rule absolute.

Taunton, Jeremy, and Rogers, were to have argued in support of the rule.

MOUNSEY v. WATSON. Feb. 7.

An attorney suing by latitat, and not by attachment of privilege, loses his right to change the venue in *Middlesex*.

THE plaintiff in this case was an attorney, but sued by latitat and not by attachment of privilege. The venue being laid in *Middlesex*, the defendant changed it to *Cumberland*, on the common affidavit that the cause of action arose there. A rule nisi was obtained to bring back the venue, on the ground that the plaintiff, being an attorney, had a right to retain it in *Middlesex*.

Alderson showed cause, and contended, that unless the plaintiff sued by attachment of privilege, an attorney he could not insist upon that privilege; *Hetherington v. Lovett*.

*The *Solicitor-General*, contra, contended, that the plaintiff did not waive his privilege to lay the venue in *Middlesex*, by waiving that mode of suing by attachment of privilege.

Per Curiam. Where an attorney sues as a common person, and not as an officer of the court, the proceedings must be governed by the ordinary rules of practice. The rule for bringing back the venue must, therefore, stand charged.

Rule discharged.

(a) 2 Str. 837.

TILL and another, Assignees of BRETT, a Bankrupt, v. WILSON. Feb. 7.

A second commission issued against a trader, before a former commission has been made absolute, is a nullity; and where a bankrupt obtained his certificate under a second commission issued under such circumstances: Held, that he was not entitled to be discharged out of custody, although the debt for which he was detained was contracted before the date of that commission.

THIS was an action of assumpsit for goods sold and delivered by *Brett* before his bankruptcy. The defendant obtained a rule to show cause why he should not be discharged out of custody in this action, on the ground that he had obtained his certificate under a commission of bankruptcy issued against him for the debt for which the action was brought had been incurred. It appeared from the affidavits, that in 1816, *Wilson* became bankrupt, a commission was issued against him, and assignees chosen, but the defendant never obtained a certificate under that commission. In 1816 he commenced trade again, and in 1823 contracted the debt in question.

and, in 1827, a second commission was awarded and issued against *Wilson*, under which he obtained his certificate.

The *Solicitor-General* and *Chitty* showed cause. The second commission having issued against the bankrupt *before he got his certificate under the first (that having been in legal operation), is wholly void. The statute 6 G. 4, c. 16, leaves the law as to this question unaltered. Section 2 enacts, "that all persons, who either for themselves, or as agents or factors for others, seek their livelihood by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities, shall be deemed *traders*, and liable to become bankrupts." Now, before that statute, it had been held that, as all the property of the bankrupt vested by the assignment in the assignees under the first commission, he was incapable of trading, and that the subsequently acquired property being affected by the assignment, and vesting in his assignees, there was nothing to pass under a second commission, and, therefore, it was inoperative. Ex parte *Proudfoot* (a), *Martin* v. *O'Hara* (b), Ex parte *Bold* (c), Ex parte *Crew* (d), Ex parte *Bullen* (e), Ex parte *Martin* (f), Ex parte *Thompson* (g), Ex parte *Brown* (h). The case of *Troughton* v. *Gilley* (i) may be relied on in support of the rule, but in that case there was no second commission. There the bankrupt bought his own stock in trade of his assignees, and sureties joined in a security to them for the consideration, and the bankrupt continued to trade for four years afterwards, and then died without having obtained his certificate, having contracted fresh debts subsequently to his bankruptcy. Lord *Camden* held that the subsequent creditors had an equity on the subsequently acquired goods in the hands of the *administrator of the bankrupt, and directed the residue to be paid over to the assignees. But the authority of that case was called in question by Lord *Eldon* in Ex parte *Martin* (k). In *Warner* v. *Barber* (l), there were two commissions, but the first was never acted upon or superseded; and it was held, that such commission, not being in legal operation, did not invalidate a second commission. But no property passes under a commission without an assignment. The commission is a mere authority. It is true that formerly it was the practice to sue out joint commissions against two persons, and afterwards a separate commission against each. But since in Ex parte *Baudier* (m), Lord *Hardwicke* allowed two distinct accounts to be kept, one of the joint and the other of the separate estate, the practice has been discontinued. If the assignees, indeed, allow the bankrupt to trade, he may sue on contracts made personally with himself. But that is because the party who has contracted with and is sued by the bankrupt, is estopped from saying that he was incapable of contracting, *Clark* v. *Calvert* (n); the assignees may at any time claim the property of the bankrupt, for all the property embarked in his trade, as well as the profits of that trade, belongs to them. If the second commission were not void, the effect of section 127 of the 6 G. 4, c. 16, might be, that a bankrupt would be better off where he did not obtain his certificate, than where he did. For that section enacts, "that if any person who shall have been so discharged by such certificate as aforesaid, &c. shall become bankrupt, and have obtained, or shall hereafter obtain such certificate, unless his estate shall produce *sufficient to pay 15s. in the pound, such certificate shall only protect his person from arrest and imprisonment, but his future estate and effects shall vest in his assignees." This clause does not apply to a case where a bankrupt has not obtained his certificate under the first commission; consequently a bankrupt who has not obtained such certificate under the first commission, but who obtains it under the second, though he does not pay 15s. in the pound, may acquire subsequent property.

(a) 1 Atk. 251.

(d) 16 Ves. 236.

(g) 1 Rose, 285.

(k) 15 Ves. 116.

(m) 3 Moore, 96.

(b) Cowp. 823.

(e) 1 Rose, 134.

(h) 1 Ves. & B. 60.

(l) 8 Taunt. 176.

(c) C. B. L. 12.

(f) 15 Ves. 114.

(i) Amb. 630.

(n) 1 Atk. 98.

But in the case of a bankrupt who has obtained his certificate under both commissions, and who does not pay 15s. in the pound under the second, all his effects will vest in his assignees.

Parke contrâ. There are, undoubtedly, several dicta in the reports of in the courts of equity, that a second commission taken out against a party has not obtained his certificate under the first is void. But it will be found most of them are founded upon the authority of Lord *Hardwicke*, who in the case of *Ex parte Proudfoot* (a), said that a second commission was void. The ground was, that the bankrupt's property was vested in his first assignees, and there was nothing for the second commission to operate upon; but when the case was decided, it was considered that an uncertificated bankrupt could in some cases acquire any property. It has since, however, been fully settled that a bankrupt has a special property in goods acquired by himself after bankruptcy, and he may maintain trover for them against strangers, *Webb v. Fox* (b). The opinion of Lord *Hardwicke* may therefore have proceeded upon a wrong impression as to the law in this respect. At all events, an uncertificated bankrupt has some interest which would pass to his assignees under a second commission; for he has an equitable interest in the surplus of his estate administered under the first commission, which remains after payment of debts. A second commission may, therefore, issue, and be supported, at least, until it is avoided by a supersedeas. In *Butts v. Bilke* (c), considered by Lord Chief Baron *Thomson* as a question of great difficulty, whether a second commission was void, or merely voidable; but the point was not decided. Admitting, however, that a second commission is absolutely void at law, on the ground that an uncertificated bankrupt cannot acquire property, cannot be a trader, it is void only in the same way, and to the same extent, as a commission against a person not being a trader, could be; but under a commission, a bankrupt who has obtained his certificate, is entitled to the benefit of it; and in any action which is brought against him, the certificate is conclusive evidence of all the requisites to support the commission. If his certificate is pleaded, no enquiry can be entered into, at *Nisi Prius*, or in any other court of law, whether the bankrupt was a trader, or whether an act of bankruptcy was committed, *Bateson v. Hartsinck* (d). This case was decided by the 5 G. 2, c. 30, s. 7. But the 6 G. 4, c. 16, s. 126, has a similar clause which makes the certificate conclusive evidence. The invalidity, therefore, of a commission under which the certificate is obtained, cannot deprive a bankrupt of the benefit of such a certificate. If the commission itself is superseded, the certificate falls of course. The case of *Martin v. O'Hara* (e) may be supported on the ground of the commission being fraudulent. At all events, the argument founded upon the 5 G. 2, s. 30, that the certificate is conclusive evidence, does not appear to have been offered to the attention of the Court. [*Bayley, J.* In *Ex parte Hodgkinson* (f) a third commission was held valid, although the bankrupt had not paid 15s. in the pound under the second.]

Cur. adv.

The judgment of the Court was now delivered by Lord TENTERDEN, C. J. This was an application on behalf of the defendant to be discharged out of custody on the ground that he had obtained his certificate under a commission of bankruptcy awarded and issued against him, and that the debt for which he is in custody might have been proved under that commission. The answer given was, that the certificate was obtained under a second commission against the defendant, a former one having been awarded and disposed of; and the case of *Martin v. O'Hara* (g) was cited in support

(a) 1 Atk. 253.

(d) 4 Esp. 43.

(g) Cowp. 823.

(b) 7 T. R. 391.

(e) Cowp. 823.

(c) 4 Price, 240.

(f) 2 Ross, 172.

objection, where the Court refused to enter an exoneration on a bail-piece, on account of the defendant's having obtained his certificate under a second commission, it having been refused under the first. It is true that in that case the second commission was a mere trick and contrivance to cheat the creditors, and that the plaintiff was a creditor before the issuing of the first commission. Here there is not any evidence of that nature, but, on the other hand, there is not any evidence that the assignees under the first commission or the creditors ever assented to the subsequent trading. In addition to the case of *Martin v. O'Hara*, *690] several cases were quoted in which Lord Chancellor Eldon expressed an opinion that a second commission issued under such circumstances is altogether void. On the other hand, the case of *Webb v. Fox* (a) was cited, but that merely decided that an uncertificated bankrupt might maintain trover against a stranger for goods acquired after his bankruptcy, because he had a right to them as against all persons except his assignees. Reference was also made to the case of *Butts v. Bilke* (b), in which the Court of Exchequer expressed a doubt as to the absolute nullity of the second commission. They seem to have thought that the Lord Chancellor might supersede the first commission, and that then the second would be in force. We are not called upon to decide what would be the effect of superseding the first commission, it is sufficient for the present case to say that upon the authorities and opinions referred to we are of opinion that the second commission is a nullity, inasmuch as there is nothing upon which it can operate, all the bankrupt's property being vested in the assignees under the first commission. The case mentioned by my Brother Bayley does not militate against this. There three commissions had issued against the bankrupt; he had obtained his certificate under the first and second, but had not under the latter paid a dividend of 15s. in the pound; and on that ground a petition was presented for superseding the third commission. But the Lord Chancellor refused to do so, inasmuch as the statute then in force, which made the future effects liable where a bankrupt had not paid 15s. in the pound under a second commission, did not vest those effects in the assignees. That *691] has since been altered by the 6 G. 4, c. 16, s. 127; and, for the reason assigned, the case is no authority on the present occasion. On these grounds we feel bound to refuse to the party making this application the benefit of his certificate under the second commission.

Rule discharged (c).

(a) 7 T. R. 391.

(b) 4 Price, 240.

(c) See *Deacon's Law of Bankruptcy*, vol. i. p. 127.

REX v. The Justices of Lancashire. Feb. 7.

Where an appeal against an order of removal was dismissed on the ground that the appellant had not given the notice required by the rules of the justices, this Court, thinking it reasonable that the appeal should be heard, granted a mandamus to the justices to enter continuances and hear the appeal.

A RULE had been obtained for a mandamus to the justices to enter continuances, and hear an appeal which had been dismissed for want of sufficient notice. It appeared by the affidavit of *James M'Queen*, attorney, that on the 6th of July 1827 he was instructed by one of the overseers of *Flagg*, in the county of *Derby*, to appeal against an order of removal dated the 28th of June, and he was informed by the overseer that he had received a copy of that order on the 4th. At the next quarter sessions held on the 16th of July, from the distance

of witnesses, and difficulty of access, he had not had sufficient time to enquire, and collect evidence for those sessions, and the appeal was, though lodged and respited to the *October* sessions, which were held on the *October*. On the 8th of *October* he served notices of appeal on the officers of the removing parish. By a rule of the court of quarter sessions in *January* 1816, it was resolved that, for the future, in all cases of appeal to be tried (unless otherwise directed by act of parliament), the appellants give to the respondents fourteen days' notice in writing of such appeals, *of the day of notice, and the day of *holding the sessions* at which the same were to be tried. The attorney thought the fourteen days were to be calculated one day exclusive, the other inclusive. The court of sessions dismissed the appeal, on the ground that the notice was one day late.

Armstrong showed cause, and contended that the justices had power to make rules for the government of the proceedings in their court; that the question was perfectly clear and free from ambiguity, and, therefore, the court well warranted in dismissing the appeal of a party who had not complied with that rule.

Coltman, contra, relied on the case of *Rex v. The Justices of Wiltshire*, where this Court ordered the justices to hear an appeal which had been dismissed for non-compliance with the rule laid down by them as to giving notice.

LORD TENTERDEN, C. J. We think that justice will be most satisfactorily administered by ordering the justices to enter continuances and hear this appeal. They certainly have a discretionary power to make rules for the government of the practice at the sessions, but the case cited shows that this Court, in the exercise of its purposes of justice, will interfere to control that discretion.

Rule absolute.

(a) 10 East, 404.

*FURNELL v. S. SMITH and W. SMITH, Bail of J. STROUDFIELD in a Cause of FURNELL v. STROUDFIELD. Feb. 7.

In order to charge the bail a *ca. sa.* against the original defendant must be in the sheriff's office four days before the return day, exclusive of the day when it is lodged and the return day, and an intervening *Sunday* is not to be reckoned one of the four days.

In this case the *ca. sa.* against the original defendant was lodged in the office of the sheriff of *Middlesex*, on *Friday* the 18th of *January*, returnable on *Wednesday* the 24th day of *January*, after eight days of *Saint Hilary*. The *ca. sa.* remained in the office of the sheriff of *Middlesex* until *Thursday* the 24th day of *January*, the day after the return day; it was then fetched away, and on the same day a *scire facias* was lodged in the office of the sheriff of *Middlesex*, returnable on *Tuesday* next after fourteen days of *Saint Hilary*. A *Sunday* intervened between the lodging of the *ca. sa.* and the return day. A rule nisi had been obtained by *Archbold* for setting aside the proceedings against the bail for irregularity, on the ground that the *ca. sa.* remained in the sheriff's office four entire days before the return day, exclusive of the day when it was lodged, and of the return day and the intervening *Sunday*, and he cited *Howard v. Smith* (a), to show that the *Sunday* was not to be reckoned as one of the four days.

(a) 1 B. & A. 528.

Chitty now showed cause. In *Howard v. Smith* it was assumed that the four days were to be reckoned, exclusive of the day of lodging the ca. sa. and the return day. But the general rule is, that where the law requires an act to be done within a specified number of *days, one day is to be reckoned
*694] exclusive, the other inclusive.

The Court having directed the Master to ascertain what the practice was, he certified the practice to be, that to charge the bail the ca. sa. must remain in the office four entire days before the return day, exclusive of the day when it is lodged, and of the return day.

Lord TENTERDEN, C. J. That being the practice, this rule must be made absolute; for the case of *Howard v. Smith* shows, that the intervening *Sunday* is not to be reckoned as one of those days.

Rule absolute.

*695]

*REX v. Sir G. CHETWYND, Bart. Feb. 8.

Information for usurping the office of burghess of the borough of *S.* Plea, that the burghesses were a body corporate by prescription as well as by charter, and that the common council, or the major part of them, being duly assembled as such common council for such purpose within the borough, from time to time, and as often as it had seemed fit and convenient to them, had elected so many persons to be burghesses as to them seemed fit. The plea then (after setting out a charter, by which the king granted that there should be a mayor, ten aldermen, and ten capital burghesses, and that they should be the common council for all things touching the government of the borough) stated, that from thenceforth there had been, and still were within the borough, a mayor, ten aldermen, and ten capital burghesses, and an indefinite number of burghesses, and a common council; that ou, &c., the then mayor, and divers, to wit, nine of the aldermen of the borough, being the major part of the aldermen, and nine of the capital burghesses, being the major part of such ten capital burghesses, so granted by the charter, being the major part of the common council of the borough for the time being, duly assembled and met together as such common council, for the purpose of electing a burghess, and being so assembled, it seemed fit to them to elect, and they did elect, the defendant to be a burghess. Replication, that notice of the purpose for which the supposed assembly of the common council was to be held was not at any time before the said assembly was held given to the aldermen or capital burghesses of the borough, or any or either of them: Held, upon demurrer, that the replication was bad, because it assumed, as a general proposition of law, that there could not be any lawful assembly for the purpose of electing a burghess without previous notice of the purpose of the meeting having been given to every member of each select body of the common council; whereas, if all the members of such select body were present at, and concurred in the election, such notice would have been unnecessary.

INFORMATION, in the nature of quo warranto, against the defendant, for usurping the office of a burghess of the borough of *Stafford*. Plea, that the said borough then was, and from time immemorial had been an ancient borough, and that the burghesses of the borough had been and still were a body corporate, in deed, fact, and name, as well by prescription as by divers charters, by various names of incorporation, &c.; and that within the borough, during all the time aforesaid, there had been and still was an indefinite number of burghesses, and also a common council, consisting at different times of different persons and descriptions of persons, and that the common council for the time being, or the major part of them, whereof the mayor of the borough, when there had been a mayor, had been one, or the two bailiffs of the borough, when there had
*696] been such bailiffs, and no mayor thereof, had been two, being duly assembled and met together at such common council for such purpose, within the borough, from time to time, when and as often as it had seemed fit and convenient to them, had elected, sworn, and admitted such and so many person and persons to be a burghess or burghesses, and into the office of a burghess

or burgesses of the borough, as to them from time to time had seemed convenient. The plea then set out a charter of King *James the First*, by after reciting that the borough was an ancient borough, and that the bur of the same borough, from time immemorial, had used and enjoyed divers leges, as well by charter as by reason of divers prescriptions, the king g that there should be a mayor, ten aldermen, and ten capital burgesses, and the mayor, aldermen, and capital burgesses should be called the common cil of the borough, for all things touching the borough, or the rule and gment thereof. It then stated that the charter was accepted, and that fr time of the granting and accepting the charter, the corporation thereby tuted had been and still were a body corporate, by the name of "*The and Burgesses of the Borough of Stafford*, in the County of *Sta* and that from thenceforth there had been and still were, within t rough, one mayor, and divers, to wit, ten aldermen and ten capita gesses, and an indefinite number of burgesses of the borough, and suc mon council thereof as last aforesaid. The plea then stated, that on of March, 1820, the then mayor, and divers, to wit (a), nine of the al *of the said borough, being then and there the major part of such ten aldermen of the said borough so granted by the said letters patent to be within the said borough as aforesaid, and divers, to wit, nine of the capit gesses of the said borough, being then and there the major part of su capital burgesses of the borough so granted by the said letters patent to be the said borough as aforesaid, being then and there the major part of th mon council of the borough for the time being, *duly assembled an together as such common council* within the borough for the purpose of e swearing, and admitting a burgess of the said borough; and being so bled and met together, and so being *the major part of the mayor, alderme capital burgesses* of the said borough, and of such common council, it see and convenient to them to elect, swear, and admit, and they did elect, and admit the defendant to be a burgess, and into the office of a burgess said borough, and he was then and there after such his election by the lationed mayor, aldermen, and capital burgesses, so being the major part same common council, duly sworn, and took the oaths required for the due tion of his office of a burgess of the borough, and took upon himself the o a burgess of the *borough, and from thence until the exhibiting of the information was and still is a burgess of the borough. Replication (b) to the plea, that notice of the purpose for which the supposed assembly o ing of the common council was to be held, was not, at any time before t assembly or meeting was held, given to the aldermen and capital burge the borough, or any or either of them, and that the said assembly or m was held without any notice having been given that the same was to be the purpose of electing a burgess or burgesses. Rejoinder to this repl that the said assembly or meeting was held at the instance of the then

(a) The allegation, as it originally stood, was as follows:—

"The then mayor, and divers, to wit, ten of the aldermen and ten of the capi gesses of the said borough, being then and there the major part of the common coun said borough *for the time being*, duly assembled and met together as such common within the said borough, for the purpose of electing, swearing, and admitting a bu the said borough, and being so assembled and met together, and so being the major such common council, it then and there seemed fit, &c." It was objected, that was bad, because it did not show that a major part of each integral body was presen election, but merely the major part *for the time being*. The defendant had leave to and the plea, when it was amended, was in the terms set forth in the text.

(b) There were several other replications; one of them stated that the mayor, al and capital burgesses alleged to have been assembled on the 6th of *March* 1820, v duly assembled for the purpose of electing, swearing, and admitting a burgess, a cluded to the country; and upon that issue was joined. Another stated that the aldermen, &c. did not duly elect the defendant to be a burgess, and upon that also is joined.

of the borough for the purpose of electing a burgess, heretofore, to wit, on the 6th *March*, 1820, at the then office of the then mayor of and in the said borough, at 11 o'clock in the morning; and that before the holding of the said assembly, &c., notice thereof was given to the then aldermen and capital burgesses of and within the borough, in manner following; that is to say, by the then mayor of the borough on the day next before the same was so held, to wit, on the 5th *March*, 1820, at the borough aforesaid, causing to be delivered to or left at the place of abode of each of the then aldermen and capital burgesses of and within the borough, a certain paper, whereby he was requested to take his *699] seat at the same *mayor's office on the morning then next, at eleven of the clock, and by causing a certain large bell of a certain church within the borough, called *St. Mary's* church, to be twice tolled, divers, to wit, twenty-one times, on the morning of or before the holding of the same assembly or meeting, leaving a reasonable pause between each of the two times of the same being so tolled, being then and there the usual and customary manner of giving notice to the aldermen and capital burgesses of the holding of a common council for the purpose of electing burgesses; and being then and there well known to them to be such customary manner of giving notice. Surrejoinder, that the manner of giving notice of the holding of the common council in that rejoinder mentioned hath been and is the usual and customary, and universal and only manner of giving notice to the aldermen and capital burgesses of and within the said borough of the holding of a common council *for whatever purpose the same hath been or is summoned or held*, or whatever business hath been to be, or hath been transacted or done thereat; and that for fifty years last past such notice of the holding of the common council hath been given to the aldermen and capital burgesses for whatever purpose the said common council hath been summoned or held, and whatever business hath been to be or hath been transacted or done thereat; and that there hath not been and is not any usual or customary manner of giving notice of the holding of a common council for the election of burgesses different or distinct from the said manner of giving notice of the holding of the same, for whatever purpose the same hath been summoned *700] or held, or whatever business hath been to be or hath been *transacted or done thereat. Demurrer and joinder in demurrer. The case was argued in *Michaelmas* term, 1826, by

R. Bayly in support of the demurrer. The plea states a prescription or grant for the common council, duly assembled for such purpose, to elect burgesses; and then alleges, that the common council being duly assembled, did elect the defendant. The replication does not deny the fact, that the common council was duly assembled for the purpose of electing burgesses, but merely alleges that no notice of the purpose for which the common council was to be held, was given to the aldermen or capital burgesses. Neither the prescription nor charter stated in the plea requires any such notice. The replication, therefore, assumes, that by law previous notice of the purpose for which a corporate meeting is to be held, is in all cases necessary. If any case can be put in which the common council could for the purpose of electing burgesses, be duly assembled without notice, the replication is bad. Now, if every member of the common council were present at the time of the election, and concurred in it, notice of the purpose of meeting would be unnecessary, *Rex v. Theodorick* (a), *Rex v. Strangeways* (b), and *Rex v. Waite* (c). In *Rex v. Hughes* (d), to an information in the nature of a quo warranto for usurping the office of mayor of *Monmouth*, the plea was that the defendant was duly elected, according to the *701] governing charter of the borough. Replication, that there were two *candidates; that fifty good votes tendered for the losing candidate, were

(a) 8 East, 543.

(b) Cited in *Rex v. Mayor of Shrewsbury*, *Rep. temp. Hardw.* 151

(c) 1 Barnardiston, 80.

(d) 4 B. & C. 368.

improperly rejected; and that thirty-eight persons who had been unduly and admitted as burgesses, were received as voters for the defendant; and a majority of the legal votes tendered was in favour of the other candidate. On demurrer, it was held that the replication was bad, for that it was only argumentative, and not a direct denial of the validity of the defendant's election. Here the replication is argumentative, for it does not deny that the common council was duly assembled, but merely alleges that no notice of the purpose of the meeting was given; and from that a conclusion is to be drawn, that the common council was not duly assembled. All the facts stated in the plea may be given in evidence upon the issue, that the common council was not duly assembled. The surrejoinder is bad, because the rejoinder states that a proper notice was given, and describes it, and then avers that it was the usual manner of giving notice of holding a common council for the purpose of electing burgesses, and that it was well known to be so. The surrejoinder does not deny that it was the usual manner of giving notice for that purpose, but alleges that it was the usual and only manner of giving notice of the holding of a common council for any purpose; and then alleges, that there was not any usual manner of giving notice of the holding of a common council for electing burgesses, but from the manner of giving notice of the holding of a common council for any other purpose. But the question is, What was the manner of giving notice of the time when it was given, and the common council held for electing the defendant? and, Whether the notice given was the usual notice for holding a common council for the purpose of electing burgesses? and not, Whether the notices like it were given for the holding of a common council for other purposes.

Campbell contra. The replication is good, for the prosecutor is at liberty to deny in the replication any fact upon which the validity of the election depends, the plea, depends. Now, where a select body are to meet and do some particular act, notice must be given to each member, and if the meeting be not on that day, notice of the particular business to be transacted must also be given. *Rex v. The Mayor of Carlisle (a), Rex v. The Mayor of Liverpool (b), Rex v. The Mayor of Doncaster (c), Musgrove v. Nevinnson (d).* And *Hill (e)* is a decisive authority to show that notice of the purpose for which a corporate meeting was held, ought to have been given. If notice be prima facie necessary, it lay on the defendant to show those facts which rendered the notice unnecessary. Now the defendant merely shows by his plea, that divers aldermen and burgesses, being the major part of the common council, were present at the meeting. He does not even show that they all concurred in the election. Assuming the replication to be good, the rejoinder is bad, for it neither denies any fact, nor does it confess and avoid the matter stated in the replication. The surrejoinder is sufficient, because it shows that proper notice was not given of the meeting at which the defendant was elected, was not given.

Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court.

This was an information in the nature of quo warranto, to try by what authority the defendant exercised the office of burgess in the borough of *Stafford*. The plea was sufficient for the present purpose to state that the plea set forth an election of the defendant by the mayor and common council of that borough duly assembled. The plea, as it now stands, appears to be good. The replication stated, in substance, that no notice was given of this assembly, or of the purpose for which it was about to assemble. There is then a rejoinder, and, afterwards, a surrejoinder, and to that there is a demurrer. Now the proper way of raising the question intended to have been raised by the replication, would have been to have denied that the assembly was duly assembled, and that form of replication would have been adopted some years ago; all the facts necessary to a defence

(a) 1 Str. 385.

(b) 2 Burr. 723.

(c) 2 Burr. 738.

(d) 2 Ld. Raym. 1358.

(e) 4 B. & C. 426.

sideration and decision of that question might then have been received in evidence upon the issue joined on such a replication, and might, if necessary, have been put upon the record in the shape of a special verdict. The object of the replication is to bring the question of law immediately before the Court, without resorting to the expense of a trial, and that is a proper object, if it can be legitimately obtained; when it cannot, the practice leads only to perplexity. Now the replication that no notice of the purpose for which this *704] meeting was to *be held was given, assumes as a proposition of law that there cannot be a due assembly of a select, definite body of a corporation (as this is) for the purposes of an election, unless previous notice has been given of the purpose of the intended meeting. If that proposition is not universal, the replication is bad. If there may be, under any circumstances, a good elective assembly of such a body, without notice of the purpose, the replication has not done enough; and we are all of opinion that it is not a general proposition of law that there may not be a good elective assembly of a select body of a corporation, unless notice of the purpose of that meeting has been previously given. The case relied upon in support of the proposition that there cannot be a good elective assembly without previous notice of the purpose for which it is held, was *The King v. Hill (a)*. The difference in the pleadings in that case and the present is, that there the defendant claiming under the election, pleaded specially the form and manner in which the meetings were held, and upon his plea it appeared that they were not well held. Here the plea is good, because it alleges that the elective assembly, at which the election took place, was duly held. That is the distinction between the two cases. It appears to me impossible to say, that there may not be, under some circumstances, a valid elective assembly by a select part of the corporation, without previous notice being given of the object of such assembly. Suppose all the members of each select body to have been present at the time of election, and to have agreed that they would proceed to an election, and that they did proceed, we could not say it would not be a good *705] election. *Suppose a long, uninterrupted, and undisputed usage, upon due warning to every member of the common council, to proceed to the election, although the special purpose of the meeting had not been previously intimated, it would be very difficult, at least, to say that an election so made would not be good: and if there may be any case in which there may be a good election without notice of the purpose of the meeting having been previously given, this replication is not a good one. We are all of opinion, that in the instance before put the election would be valid; and, therefore, the judgment in this case must be for the defendant.

Judgment for the defendant.

(a) 4 B. & C. 426.

HASWELL v. THOROGOOD. Feb. 8.

Where a cause and all matters of difference were referred at Nisi Prius to an arbitrator, and he found that a sum of money was due from the plaintiff to the defendant, and ordered that sum to be paid to the latter, and between the time of making the order of reference, and taxing costs and signing judgment, the plaintiff became bankrupt: Held, that the amount of the taxed costs did not constitute a debt provable under the commission, and that the bankrupt was not discharged as to that debt by his certificate.

By an order of Nisi Prius made in this cause on the 26th May 1825, a verdict was entered for the plaintiff for 500*l.* damages, subject to the award of an
2 D *

arbitrator to whom the cause and all matters in difference between the parties were referred, and he was to order whatever he should think fit to be done by either of them; and the costs of the cause were to abide the event, and the costs of the reference were to be in the discretion of the arbitrator. On the 1st of January 1826, a commission of bankruptcy issued against *Haswell*, the plaintiff, under which he was duly declared a bankrupt. On the 24th January 1826, the arbitrator made his award, and ordered the plaintiff to pay to the defendant 34*l.* 19*s.* 9*d.* on account of a matter in difference between the parties, and he further ordered the plaintiff to pay the costs of the award of the defendant in the reference. The plaintiff obtained his certificate on the 27th November 1826, which was afterwards duly allowed. On the 1st of April 1826, the costs of the cause and of the reference were taxed at 103*l.* 10*s.* and judgment of nonsuit signed. *Hutchinson* had obtained a rule nisi for attachment against the plaintiff for non-payment of the sum of 103*l.* 10*s.* taxed costs of the cause and of the reference.

Chitty now showed cause. The plaintiff is discharged by his certificate for paying the taxed costs of the cause, because the judgment relates back to the time of the trial, and the costs may therefore be proved under the commission. He cited *Hurst v. Mead* (a), *Watts v. Hart* (b), and *Beeston v. White* (c).

LORD TENTERDEN, C. J. The rules deducible from all the cases are set down in Mr. Deacon's *Treatise on the Law of Bankruptcy*; and after stating the rules applicable to cases where the plaintiffs have obtained verdicts, and where the defendants have become bankrupt before judgment, he says, "With respect to the costs upon a judgment of nonsuit, the statute (6 G. 4, c. 16,) is wholly inapplicable, making no provision whatever for the proof of a defendant's costs, where there is a judgment of nonsuit or judgment after verdict. It was, indeed, formerly held, that where the nonsuit was before the bankruptcy of the plaintiff, the debt might be proved, though the judgment was not obtained till afterwards, on the ground that the costs related back to the nonsuit, by virtue of the statute, which the debt might be said to exist before the bankruptcy. But this principle is to be found only in two of the cases which were impugned by Lord Esher in *Ex parte Hill* (d), and which were overruled in *Ex parte Charles* (e). It has since been decided, that where a defendant obtains a verdict, and the plaintiff becomes bankrupt before judgment is signed, the costs cannot be proved under the commission, on the principle that no debt arises in such a case until judgment is signed, *Walker v. Barnes* (f)." That is, in my opinion, a correct statement of the decisions upon the subject. Now, here the plaintiff became bankrupt after the nonsuit, but before judgment was signed. The costs of the cause did not constitute any debt until judgment was signed, for there is no distinction in this respect between a case where a defendant obtains a verdict, and one where the plaintiff is nonsuited. The verdict or nonsuit only entitles the defendant to tax his costs, but no debt arises, and no action can be maintained for them until judgment is signed. The case of *Walker v. Barnes* is a strong authority to show that the amount of these costs could not be proved under the plaintiff's commission; and if that be so, then he is liable to pay them. As to the costs of the reference, there can be no question. They clearly cannot constitute a debt provable under the commission. The rule for the plaintiff's judgment for non-payment of the costs of the cause and of the reference must therefore, be made absolute.

Rule absolute.

(a) 5 T. R. 365.
(d) 11 Ves. 646.

(b) 1 Bos. & P. 134.
(e) 14 East, 197.

(c) 7 Price, 209.
(f) 5 Taunt. 778.

*REX v. HUGHES. Feb. 9.

Where a new charter was granted to an old corporation, the mayor and burgesses of *S.*, whereby it was granted, that there should be certain definite bodies, and an indefinite body of burgesses; and the definite bodies, and a majority of the burgesses, signified their desire to accept the charter either by acting under it, or by a written declaration of their assent: Held, that this was a valid acceptance.

Quære, Whether it was necessary that the charter should be accepted by a majority of the burgesses?

A RULE had been obtained, calling upon *Hughes* to show cause why an information, in the nature of quo warranto, should not be filed against him for usurping the office of mayor of *Stafford*. The affidavits in support of the rule stated the following facts. By a charter of the 12 Jac. 1, it was granted that the borough of *Stafford* should be a free borough, and that the bailiffs and burgesses should thenceforth be a body corporate, by the name of mayor and burgesses of the borough of *Stafford*, in the county of *Stafford*. That there should be one mayor, ten aldermen, and ten chief burgesses, and which should be called the common council of the borough, and the rule of government of the borough was vested in them. This charter was accepted by the corporation, and acted upon by them. The mayor of *Stafford* is the returning officer at the election of members of parliament for *Stafford*. *Hughes* was elected mayor on the 24th of October 1825, and held the office for one whole year, and on the 23d of October 1826, was re-elected, and held the office for a year after such re-election. On the 9th and 10th of June 1826, *Hughes* presided as returning officer at the election of members of parliament for the borough of *Stafford*. An information, in the nature of quo warranto, was filed against him, for taking upon himself the office of mayor by virtue of the election on the 23d of October 1826, whereupon judgment of ouster was given in Easter

*709] term 1827. In the year 1826, six aldermen and five capital *burgesses presented a petition, signed by themselves only, to the king, stating that they were the only remaining aldermen and capital burgesses, and were not sufficient in number to constitute a legal meeting of the corporation for the transaction of business, and the ordinary government of the borough, and praying for a new charter, investing them and the burgesses of the borough with the same powers and privileges as they had before enjoyed under the charter of Jac. 1. By letters patent, 8 G. 4, his majesty granted that the burgesses of *Stafford* should be a body corporate, by the name of mayor and burgesses of the borough of *Stafford*; that there should be one mayor, eleven aldermen, including the mayor, and ten capital burgesses, &c. as in the former charter. By the new charter, *Hughes* was nominated the first mayor, to continue in office until Monday next after the feast of St. Luke 1828, and certain commissioners were named to administer the oaths to him. This charter was not at any time accepted, and on the contrary was rejected by the said burgesses. On the 8th of October 1827, the commissioners attended at the town hall, pursuant to notice, in order to administer the oaths to *Hughes*. A request was made by one *Flint*, on behalf of several burgesses, to have the question of acceptance or rejection of the charter put to the burgesses then present, but the commissioners refused. Almost all the burgesses then present retired into an adjoining room, where the question was put, and carried unanimously, that the charter should be rejected; and there were present on that occasion a majority of the burgesses of the borough. *Hughes* and all the other persons named in the charter as aldermen and chief burgesses, with one exception, *710] took the oaths on that *day. On the 11th of October, *Hughes* acted as mayor, by presiding at an election of a town-serjeant: forty-nine burgesses polled on that day, and then the mayor adjourned the meeting to the 22d, and then again adjourned to the 23d, when the election was finished, 262 bur-

gresses out of 820, the aggregate number, having polled. A meeting of the burgesses was called by *Flint* on the 11th of *October*, when those who were present again voted to reject the charter.

The affidavits in answer stated, that, besides the petition of the aldermen and chief burgesses, 500 burgesses presented another petition, in which they requested that the request in the former might be granted. These petitions were presented in the borough, and a counter-petition was procured by *Flint*, who caused the signatures to it. The first-mentioned petition was referred to the Attorney-General, who appointed several meetings for taking it into consideration, when *Flint* attended with counsel, and the subject of the new charter was fully discussed by counsel on both sides, and the draft of the proposed charter was at last settled and agreed upon by the counsel on both sides, with the exception of the names of the persons who should form the new common council, and as to that it was ultimately agreed that each party should send to his Majesty's privy council a list of the names of the persons proposed, and that the privy council should insert the names of such persons as from the said two lists as to them should seem most proper. The petition was acted upon, the lists sent in, and the new charter was granted, bearing date *September* 6, 1827. The new charter was similar to the old, and contained nothing that was not in the draft before mentioned, except the names of the common council, and some regulations as to serving on juries. At the meeting on the 8th of *October*, the commissioners attended to administer the oaths to the mayor, there being above 200 burgesses present, and not more than 100 of them went into the meeting room upon the commissioner's refusing to put the question as to whether they would accept or refusing the charter, and the charter was not then or at any other time rejected by a majority of the burgesses. At the meeting on the 11th of *October* for the election of a town-serjeant, a large party who were not present attended, and obstructed the proceedings thereat, by very great violence and tumult, and by threats and insult prevented many burgesses from voting, who were desirous of so doing, and for that reason the mayor thought it necessary to adjourn the meeting to the 22d. The business of the election was on that day again greatly obstructed in the same manner as before, and also on the 22d to which day the proceedings were adjourned. On that day the election was completed, and in all 262 burgesses voted at the election. After the election the burgesses represented to the mayor that many burgesses had found it impossible to give their acceptance of the new charter by voting at that election, in consequence of the violent proceedings before mentioned, and that they were desirous of signifying their acceptance of the charter; a book was therefore sent round to each burgess, containing a written declaration of assent to the charter, and 129 resident burgesses and 100 non-resident, who had not voted at the election, signed this written declaration in favour of the new charter. The aggregate number of burgesses resident and non-resident was 820, of whom about 700 were resident; of these 391 had given their assent to the charter either by voting at the election *held under it, or by expressing their assent in writing; and in the latter mode 100 non-residents had also expressed their assent, making an aggregate number of 491.

The *Solicitor-General* and *Russell*, Serjt., showed cause. Two objections were made to the title of *Hughes* were mentioned on moving for the rule, viz. that the charter by which he was appointed mayor was rejected, and that the Statute in *Ann. c. 20, s. 8*, made it unlawful for him to fill the office during the next year, inasmuch as he had held it for the two preceding years. Now it was admitted that a charter may be rejected by those who are specially named in it, or if the whole body to whom it is addressed reject it, the charter becomes dead letter; but if all the persons named in the charter accept it, the objection of another and indefinite body is of no avail. The law has not provided a remedy for collecting the suffrages of the indefinite body, and they are not bound

freemen until they come in and accept the charter. In *Dr. Askeu's case (a)*, this was laid down by *Yates, J.*: "If the inhabitants of a town are incorporated, yet every one must be admitted before he becomes a corporator." And as to the case then before the Court, he said, "I am far from thinking that all the men of and in *London* then practising physic were incorporated by the charter. The immediate grantees under the charter were the six persons named in it, the rest were to be admitted by them. They were not ipso facto made members. They were first to give their consent before they became members, they could *not be incorporated without their consent." The charter incorporated *713] six persons specially named, and *all others of the faculty, of and in the city of London*. In *Rez v. Amery (b)*, which was the case of a charter incorporating "the citizens and inhabitants of *Chester*," a question arose as to the acceptance of the charter. *Buller, J.*, said, "In a corporation consisting of different integral parts, if any of the freemen, being an indefinite body, attend the meetings of the corporation, it is sufficient. It is not required, in all cases, that a majority of the whole body should be present, and if a smaller number than a majority of an indefinite part of the corporation be sufficient to constitute a lawful assembly, for doing corporate acts after they are incorporated, it will be difficult to find a reason why the same number may not accept the charter." These cases show, that they who refuse to come in cannot be incorporated against their will, but that the acceptance will be good as to those who assent to it; and the same point is established by the case of *Rez v. Pasmore (c)*. But whatever may be the law as to the necessity of acceptance by a majority, here the charter was in fact so accepted. All the persons named in the charter, with one single exception, accepted it; 262 burgesses attended a corporate meeting, called under the charter, and voted at an election of a corporate officer; they therefore acted under the charter, which, according to *Rez v. Amery*, was the best evidence of acceptance. Others would have given the same proof of assent to the charter, but were prevented by the violence of those who make this application; they then signed a written declaration of their assent and desire to *714] accept the charter. Now the law has not provided *any specific form of acceptance; and, therefore, any unequivocal act, showing a desire to accept a charter, ought to be held sufficient. The persons who signed this declaration were 129 resident, and 100 non-resident burgesses. In fact, then, the charter was accepted by the whole of the definite bodies, save one individual, and a majority of the burgesses resident and non-resident. The other objection is equally invalid: it depends entirely upon the stat. 9 *Ann. c. 20, s. 8*, which provides that no officer of a corporation who presides at the election of members of parliament, and makes the return, shall be capable of being elected into such office for two successive years. *Hughes* was not elected into the office of mayor of *Stafford* for the present year, but was appointed by the King, who is not bound by the statute.

Campbell contra. The acceptance of the charter in this case was absolutely necessary, in order to make it binding. Suppose this rule were made absolute, and an information filed, the defendant would be bound to aver, not only his appointment under the charter, but that the charter had been accepted. It is the prerogative of the crown to grant a charter, but it is the right of the subjects, to whom it is addressed, to accept or to reject it. Then how is a charter to be accepted? It has been contended, that acceptance by the select bodies named in the charter, and such of the indefinite body as choose to come in, suffices. All the authorities upon the subject are collected in *Rez v. Pasmore*, and the result of them is, that the acceptance in this case could only be by a *715] majority of the old burgesses, to whom the charter was *addressed. *Bagge's case (d)* is directly in point. The argument on the other side

(a) 4 *Barr.* 2200.(c) 3 *T. R.* 199.(b) 1 *T. R.* 588.(d) 1 *Roll. Rep.* 226. 2 *Brownl.* 100.

proceeds entirely on the assumption that the old corporation was dissolved that was not so, and this was not a charter to persons about to be incorporated for the first time. The charter of *Jac. 1* recites, that the corporation had from time immemorial; and there is a great difference between a new charter granted to an old corporation and a charter of original incorporation. *Mayor, &c. of Colchester v. Seaber (a)*, Lord Mansfield says, "The corporation is not dissolved by the judgments of ouster, and subsequent deaths of the mayor and aldermen; though they are without their magistracy, their corporation is not destroyed and gone; their former rights would remain. Would not a new charter of *Colchester* still continue to have a right of common, or to vote for members of parliament?" And in such cases, his Lordship says, it has never been doubted, but that new charters revive and give activity to the old corporation. The present charter then was addressed to 820 burgesses, all of whom had been under former charters, of which they could not be deprived without their consent. It is true, that the new charter closely resembles the former one; but the difference is the same as if they were totally different. In such a case it would be impossible to say, that the select body could, by their acceptance, make the new charter binding in defiance of the indefinite body. There is no authority in favour of such an opinion, and reason is against it. At all events, therefore, the Court will not come to such a decision upon motion. If an acceptance by the indefinite body be necessary, the next question is, How their assent or determination is to be ascertained? The burgesses being a still existing body recognized by law, they who promoted the new charter should have called a meeting, at which the senior alderman might have presided; and at such a meeting the sense of the burgesses might have been ascertained, by a quasi contract. This would have been a much more fair proceeding than procuring the signatures of burgesses, which might have been done by fraud and misrepresentation. But, as to the number of those who agreed to accept the new charter, there is much contradiction in the affidavits; it is, therefore, a question not yet tried. At all events, if the charter has been accepted, that was not until after *Hughes* was sworn in and began to act as mayor. He took the oath on the 8th of *October*. The election of town-serjeant, which is used as a mode of acceptance by 262 burgesses, was not until the 23d; and many of the signatures of the assenting burgesses appear to have been obtained since that time was granted. Then, as to the stat. 9 *Ann. c. 20, s. 8*, it is certainly true that the words of it apply only to the re-election of corporate officers; but the intention of the legislature clearly was, that the same person should not fill the office for two successive years; and the re-appointment of *Hughes* to the mayoralty was directly at variance with that intention.

Lord TENTERDEN, C. J. I am of opinion that this rule ought to be discharged. It appears that the corporation of the borough of *Stafford* consisted of about 820 persons, of whom nearly 700 were resident. Others might acquire the right to become burgesses, by birth and servitude. By the charter of the 12 *J. 1*, the government of the borough was vested in the mayor, ten aldermen, and ten capital burgesses. *By inattention, or some other cause which has not been explained, these definite bodies became so much reduced in numbers, that they were no longer capable of performing any corporate acts, and the government of the borough was, therefore, dissolved, and gone. Whether the consequence of this state of things was that the corporation might, by quo warranto, have dissolved the corporation itself, we are not upon to decide; but I agree that in the absence of any such proceeding, the existing corporators continued to possess their former rights, but without the power to perform the duties imposed on them by their charters; and as they possessed these rights for their own lives only, and in process of time the non-existence of the corporation would have been terminated by the natural death of the corporators. This being the state of the corporation, petitions for

charter were presented to the crown, signed by all the remaining members of the definite and governing bodies in the old corporation, and by 500 of the indefinite body of burgesses; a counter-petition was presented by a smaller number, who employed *Flint* as their attorney. The parties, with their counsel, met before the attorney and solicitor-general, and agreed to the form of the new charter. Then the nomination of the new mayor, and the new officers of the corporation, belonged to the crown. Each party sent in a list of names, and his Majesty made a selection from them. These are the circumstances under which the charter was granted, and the single question to be decided is this, Under what form were the burgesses bound to signify their assent to the charter? It is said that there should have been a public meeting, and a vote upon the question, whether it should be accepted or not, and if *that was ab-
 *718] solutely necessary, the charter certainly has not been accepted. But no instance of any such meeting has been shown, nor has any authority or dictum that such a meeting was necessary been adduced. It has long been the received opinion that there must be an acceptance, but the mode of proving it has always been left open. In general, the acceptance of a charter has been proved by evidence of acting under it, and that is evidence in the case of a new as well as of an old charter. Now it appears by the affidavits in this case, that, when the commissioners met on the day appointed for administering the oaths, there was a meeting, attended by a considerable number of burgesses. There are contradictory affidavits as to the assent of the persons there assembled, and it appears that a few days afterwards a large meeting was convened by *Flint*, who voted to reject the charter; but that determination so expressed was not binding upon any one of them; they might, notwithstanding all that then passed, alter their minds at a subsequent time, and accept the charter. Then, what was the next step? On the 11th of *October* there was a meeting for the election of a town-serjeant; many persons desirous of attending were prevented by violence, tumult, and threats; the meeting was, consequently, adjourned; the same course was pursued on the second day of the election, and a second adjournment became necessary; finally, however, 262 burgesses did actually vote at that election, and by that act showed their acceptance of the charter. The affidavits go on to state that, but for the violent and tumultuous interruption of the proceedings, many more of the burgesses would have attended, and that a written declaration of assent was handed about amongst them in a private manner,
 *719] and signed by 129 over and above the 262 who voted at the election. These two numbers constituted a majority of the resident burgesses, and the signatures of 100 non-residents, being a majority of that body, were also obtained in the same manner. The charter was, therefore, accepted by a majority of the whole body of burgesses. It is said that, if an acceptance of a charter is to be obtained in this private manner, a door will be opened for fraudulent practices. That may be true; but if those who wish to declare their assent publicly are deterred from so doing by violence, I know of no other mode by which they can counteract it, but by signifying their assent in private. We are not, therefore, called upon to decide that acceptance of a charter is not necessary, nor that acceptance by a reasonable number of burgesses would suffice, although there is much to be said in favour of that opinion. My judgment proceeds upon this, that in the absence of any known and settled mode of notifying the acceptance of a charter, that which was done in the present case was sufficient. With respect to the other objection to *Hughes's* title, it is perfectly clear that the statute 9 *Ann. c. 20*, does not apply; that was intended to prevent the re-election of certain corporate officers, and certainly is not binding on the crown, although, doubtless, it is fit to be taken into consideration when a new presiding officer is to be appointed. As to the precise time when *Hughes* became mayor, I think that very immaterial to this case; it was not made a ground for the motion; and, inasmuch as the affidavits, upon which the rule was obtained, have not disclosed the whole of the case, but suppressed material facts, I think that the rule should be discharged with costs.

*BAYLEY, J. I am entirely of the same opinion; there has been a valid acceptance of this charter by a majority of the persons to whom it was addressed. The situation of the corporation at the time when the charter was granted is not an immaterial feature in the case. According to former charters there was a local government for the borough; that was lost by neglect. It is supposed, that all the rights of the surviving burgesses remain. For certain purposes their rights may remain; but, for the purposes of the corporation, in not keeping up the governing body, I am of opinion that it might have been dissolved by quo warranto; and they who, at a meeting in a tumultuous manner, at first voted for rejecting the new charter, may afterwards probably change their opinion, and be desirous of accepting it, when they find that their privileges under former charters might be annihilated by the new charter. And accordingly we find, in a very short time afterwards, a majority of the burgesses signifying their acceptance of the new charter either in writing or by acting under it; and, in the absence of any law fixing the mode in which the acceptance of a charter is to be signified, the mode that which was done in the present case sufficed to show an acceptance of the charter. That charter being now the governing charter of the borough, there can be no objection that *Hughes* lawfully holds the office of mayor.

HOLROYD, J. The crown certainly had a right to invigorate this corporation by granting a new charter, and filling up the definite bodies, which had suffered to be so much reduced that they were no longer capable of discharging their corporate functions. And *when this new charter was offered to the corporation was not necessary to have a corporate meeting, to ascertain whether it should be accepted or not, the assent of the parties to whom it was addressed being sufficiently shown by acting under it. With respect to the other point, I am satisfied that the stat. 9 Ann. c. 20, does not apply to an appointment of a mayor by the crown under a new charter. Besides, *Hughes* was not, in fact, ousted of the office the year preceding the grant of the charter; he was elected, but was ousted by quo warranto.

LITTTLEDALE, J. I entirely agree. The corporation were in such a state that they could no longer perform the functions of a corporation. They were, indeed, had not been seized by the crown, but, on the contrary, a new charter was granted. The crown thereby recognized the burgesses as the corporation, as they existed before, and certain corporate officers were appointed. They were not the corporation, but were appointed to execute certain functions for the corporation. It is, therefore, said, that acceptance of the new charter by the corporation was necessary, in order to make it binding upon them, and upon whom was this acceptance to be declared? On the one hand it is said that acceptance by those named in the charter, or by so many as chose to act, and take the oaths under the charter, is sufficient. On the other hand it is contended, that nothing short of an acceptance by the burgesses at large would be sufficient. I think an acceptance by those named only would not be sufficient. But I am satisfied that acceptance by those persons, together with a majority of the burgesses, was a valid acceptance; and I do not mean to decide that the concurrence of a majority of the *burgesses was necessary. The question is, How was the opinion of these parties to be ascertained? It may, in some respects, be convenient to hold a meeting for that purpose, but there is not any authority for saying that it is necessary; and, from the inconvenience attending such a proceeding would be greater than the inconvenience. At all events, I am of opinion, that any unequivocal act of the corporation showing their assent to accept and be governed by the charter, is sufficient. Here, a majority of the burgesses, either by voting at an election, or by a corporate declaration in writing, expressed such assent. That, I think, is sufficient to show the new charter the governing charter of the borough, and, consequently, that *Hughes* is entitled under it to the office of mayor. The rule for an information against him must, therefore, be discharged.

REX v. The Justices of Glamorganshire.

By a canal act the company of proprietors were authorized to make the canal, and to do all other acts which they might think necessary and convenient for the making, improving, and using the canal; and the profit of the company, on the money expended in making and completing the navigation, was not to exceed 8 per cent. per annum; and in order to ascertain the clear amount of the profits of the navigation, the company were required to keep an account of the money laid out in making the canal, and of all charges incurred before the canal was completed; and also to make out an annual account, balanced to the 29th of *September*, of the rates, and of the charges attending the supporting, maintaining, and using the said navigation, and these accounts were to be laid before the justices at quarter sessions, and they were to reduce the rates whenever the clear profits of the navigation exceeded 8 per cent. upon the money laid out: Held, that the company were authorized to widen and deepen the canal, after it had been once completed (that being beneficial to the public), and that the charge of such widening and deepening was a charge attending the using of the canal.

By an act of the 30 G. 3, s. 1, for making and maintaining a navigable canal from *Merthyr Tydvile*, to and through a place called the *Bank*, near the town of *723] *Cardiff*, in the county of *Glamorgan*, certain persons therein named were made a body corporate, by the name of "The Company of Proprietors of the *Glamorganshire Canal Navigation*," and they were authorized to make and complete a canal, navigable and passable for boats and other vessels from *Merthyr Tydvile*, through several places therein mentioned, and among others, to and through a place called the *Bank*, near to the town of *Cardiff*, and to supply the canal with water, &c. to make reservoirs, &c. And for those purposes the company were authorized to enter into and upon the lands or grounds of any persons, and to set out and ascertain such parts thereof, as they should think necessary and proper for making the canal, and all such other works, matters, and conveniences as they should think proper and necessary for effecting, completing, maintaining, improving, and using the said canal and other works, &c. Another part of the same clause authorized the company to make, set up, and appoint such towing paths, banks and ways, convenient for towing, haling, or drawing of boats or other vessels passing upon the said canal, and proper places for boats and other vessels navigating upon the canal, to turn, lie, or pass each other, and to do all other matters and things which they should think necessary and convenient for the making, extending, preserving, improving, completing, and using the canal and other works, in pursuance and according to the true intent and meaning of that act. Then by the forty-sixth section it was provided, that the clear profits to be received by the company from the navigation should never exceed 8 per cent. per annum upon all such money as should be expended *724] in making and completing the navigation, and the several works relating thereto, and in defraying the expenses of obtaining that act; and in order to ascertain the amount of the clear profits of the navigation, they were thereby required to cause to be entered in a book, a true account of the charges and expenses attending the obtaining of the act, and all money laid out and expended in the making and completing the canal, and of all charges and expenses which should from time to time be incurred on account of the navigation and the several works thereto belonging, previous to and until the same should be made and completed; and they were required from *Michaelmas* next, after the expiration of two years from the time of completing the canal, to cause a true and particular account to be kept, and annually made up and balanced to the 29th of *September*, of the rates received by virtue of that act, and of the charges and expenses attending the supporting, maintaining, and using the said navigation, and the several works thereunto belonging; and the first-mentioned account of the charges and expenses attending the obtaining of the act, and of the making and completing the navigation and other works, and also every such annual account as aforesaid, were to be laid before the justices of

the peace at the *Michaelmas* quarter sessions to be holden for the co-
 after the making up of every such annual account; and if by any suc-
 account it should appear to the justices that the clear profits of the said r-
 should, upon the average of three years then next preceding, have exc-
 rate of 8 per cent. upon all such money as should appear by the first-m-
 account to have been laid out and expended as aforesaid, then the justices
 thorized by an *order to be made at such sessions, to make such reducti-
 in the rates for one year then next as in their judgment would be suffici-
 so that the clear profits of the navigation for that year might be as m-
 cent. upon the money which should by the said first-mentioned accou-
 to have been laid out and expended as aforesaid as might be. By a s-
 act of the 36 G. 3, entitled "An act to amend an act of the 30 G. 3,
 out the title of and reciting that act), the company were authorized
 the canal from the *Bank* to the *Lower Layer*; and it was thereby
 that the extension, when completed, should be deemed part of the c-
 all the powers contained in the recited act (so far as the same were a-
 should extend to the extension; and the company were authorized
 sum not exceeding 10,000*l.* for that purpose, for which they were to r-
 same interest as on the residue of their capital, viz. 8 per cent. By
 it was enacted, "that the said several works aforesaid, and the said
 and all other works whatsoever incident to the canal and extension to
 and done by virtue of the said recited act and that act, should in all
 finished and completed within the space of two years next after the p-
 that act; and no part of the said sum to be raised as aforesaid should
 in or towards defraying the expenses of doing or performing any of
 aforesaid, which should not be done within the space of two years." 1
 4, the company were authorized to raise (if necessary for the purpo-
 said) a further sum of money; but on that sum, so raised, the proprie-
 not to receive more than 5 per cent. profit. In pursuance of the *dire-
 tions contained in the 30 G. 3, the annual account of the company
 proprietors of the rates collected by virtue of that act, and of the c-
 supporting, maintaining, and using the navigation and the several wo-
 unto belonging, from *Michaelmas* 1823 to *Michaelmas* 1824, was pr-
 the justices at the *Michaelmas* sessions 1824, and was filed amongst t-
 of the court, and in that account there was a sum of 536*l.* 11*s.* 10*d.*
 as disbursement, paid labourers, repairs, timber, expenses, and other
 charges. At the *Midsummer* quarter sessions 1827, one *R. Black*
 freighter upon the canal, objected to some of the charges composing the
 and applied to the justices to examine the account, and he particularl-
 to a charge of 400*l.*, which sum was stated to be laid out by the co-
 widening and deepening the canal at the wharf of Messrs. *Crawshay*
 Co. The principal wharfs for loading vessels in that part of the c-
Cardiff were situate above the place called the *Bank*, but within
 of the line of the canal authorized to be made by the act of parliam-
 canal was fifty-five feet in width opposite certain wharfs of *Crawshay*
 The pressure of the trade, and the crowded state of the vessels l-
 and at the wharfs adjoining, required more room. In consequ-
 narrowness there, the navigation was so impeded that vessels cou-
 and pass each other, and obstructions and delays from their jam-
 against the other were constantly occurring. The freighters and
 boats navigating the canal made repeated complaints to the compan-
 questioned that that part of the canal might be widened and *deepen-
 And the company did in 1824 deem it requisite and convenient for
 purposes of the navigation to widen and deepen the canal, and d-
 ingly cause it to be widened from twelve to fifteen feet at the said v-
 the distance of about 260 yards, and also caused it to be partially
 below the same wharfs, and near to the *Sea Lock*; and the sum of

necessarily expended upon the works of widening and deepening that part of the canal. Upon the examination of the accounts before the justices, they made an order that the said sum of 400*l.*, so charged for deepening and widening the canal in the said annual account from *Michaelmas* 1823 to *Michaelmas* 1824, should be expunged from and disallowed in the account. A rule nisi having been obtained, calling upon the justices of *Glamorganshire* to show cause why a writ of certiorari should not issue, directed to them, to remove the order into this Court,

The *Solicitor-General*, *Ludlow* and *Russell*, Serjts., now showed cause. The sum of 400*l.* was properly expunged from the accounts, because the company had no authority under the act of parliament to charge that sum in the accounts laid before the justices. The expense incurred in widening and deepening the canal is not a charge attending the supporting, maintaining, and using the said navigation and the several works thereunto belonging; and by the forty-sixth section, such charges only can be included in the accounts laid before the sessions. It is true that the 30 *G. 3* empowers the company to do all acts which they may deem necessary for (inter alia) improving the canal; but by section *728] 46, the sessions can only allow charges attending the *maintaining, supporting, and using the canal. Assuming, however, that the two sections are to be construed together, and that an expense attending the improving the canal may be allowed by the sessions, the word *improving* must be confined in construction to improvements made on the canal, as it was completed under the first act, and extended under the second. So construing the word, the company may execute new works, for the purpose of maintaining and improving the old line of canal; but they have no authority to make a new canal. This construction was put upon the act in *Rez v. Glamorganshire Canal Company* (a). The deepening and widening was as to the increased depth and width, pro tanto, the making of a new canal, and adapting it to an entirely new purpose, by allowing vessels of a larger size to navigate it. The 36 *G. 3* shows clearly that the legislature did not intend to authorize the company to make new works, for it directs that the extended line of the canal to be made under that act shall be completed within two years. [Lord *Tenterden*, C. J. As far as the question presented to us is concerned, that act is wholly immaterial. It relates only to works to be done for the purpose of extending the canal. The question before the Court is, first, Whether the company had authority by the first act to deepen and widen the canal? and, secondly, if they had, Whether the expense attending such a work be a charge attending the maintaining, supporting, and using the canal?]

*729] Sir *James Scarlett*, *Campbell*, and *Maule*, contra. The *meaning of the legislature must be collected from the different clauses of the act, and not from an expression in one particular clause only. The company are authorized not only to make but to *improve* the canal; for they are to do all other matters and things which they shall think necessary for the making, extending, preserving, *improving*, completing, and using the said canal and other works. Then the forty-sixth section, which limits the amount of their profits, requires them to lay yearly before the sessions accounts of the charges and expenses attending the supporting, maintaining, and using the said navigation, and the several works thereunto belonging. Now it must have been the intention of the legislature that the company should be allowed the expenses of those works which they were enabled by the first clause to make; and by that section they were authorized to do all things which they might think necessary for improving the canal. Although the word *improving* is omitted in the forty-sixth section, still, giving a liberal construction to the words of that section, the expense of making an improvement which the public exigencies require, in order to enable them to have the full use of the canal, may be considered as an expense attend-

ing the using of the said navigation, because without such improvement it could not be used for those public purposes which the legislature intended. [*Bayley, J.* If an act of parliament gave a power to persons to expend money for the supporting, maintaining, and using a road, they might expend money for lowering hills and filling up valleys.] The case of *The King v. The Glamorganshire Canal Company* (a) shows, that though the works be new in specie, yet if they are for the maintenance of the canal, the company are authorized to make them. [*730]

Lord TENTERDEN, C. J. This case depends upon the construction of the act of parliament of the 30 G. 3. The question is, whether the sum of 400*l.*, which has been expended by this canal company in widening and deepening a part of the canal, is to be defrayed out of the 8 per cent. profits allowed to them upon their original expenditure, or whether it is to be brought into the annual account of general charges, the effect of which may be to postpone the time at which a reduction of the tolls for navigating this canal may be made for the benefit of the public. Now the act of the 30 G. 3 incorporates the canal company, and gives them a power to make and complete a navigable canal within specified limits, and to enter upon the lands of any persons, and to set out and ascertain such parts thereof as they shall think necessary and proper for making the said canal, and do all such other works, matters, and conveniences as they shall think proper and necessary for effecting, completing, maintaining, improving, and using the canal and other works. Then in another part of the same section the company are to do all other matters and things which they shall think necessary and convenient for the making, extending, preserving, improving, completing, and using the said canal and other works. The person who framed the act did not even in the same section always use the same language, with reference to the same subject-matter. The word *improving*, however, occurs twice in that clause where the legislature is providing for the *making* of the canal. The forty-sixth section provides that the clear profits of the company, to be derived from the navigation, shall not exceed 8 per cent. upon the money laid out and expended in making the same; and then, in order that the amount of their profits may be ascertained, the company are required, in the first place, to cause an account of the charges and expenses attending the obtaining of the act, and of all money already laid out and expended in making and completing the canal, and of all charges and expenses incurred on account of the navigation, and the several works thereunto belonging, previous to and until the same shall be made and completed; and they are also required to cause an account to be made up and kept annually, and balanced to the 29th of *September*, of the rates collected or received by virtue of that act, and of the charges and expenses attending the *supporting, maintaining, and using* the said navigation, and the several works thereunto belonging; and the question is, Whether the sum of 400*l.* is an item or charge of expense attending the supporting, maintaining, and using the navigation? Now these words, as it seems to me, ought to receive a liberal construction; and so construing them, I think that whatever expense has been incurred in doing any works deemed necessary for the convenient use of the canal, not merely by the proprietors themselves, but by those who are to navigate it, viz. by the freighters, may be considered an expense attending the using of the canal, within the meaning of this clause of the act of parliament. It is not denied that this widening and deepening of the canal was an act done at the request of the persons who navigated it. The deepening was convenient for the using of the canal, by admitting into that part of it vessels of larger burden than otherwise could have been admitted, and the widening was convenient, also, for the using of the canal, by allowing vessels to pass each other in that part of the canal which they could not otherwise conveniently do. I am, therefore, of opinion that the expense of

the widening and deepening may fairly be considered an expense attending the using of the canal, and, therefore, that it was an expense which might be brought into charge under this act of parliament, and that it ought to have been allowed by the sessions. This rule must, therefore, be made absolute.

BAYLEY, J. The canal company, in the first instance, might have made the canal as wide and deep as they have now made it; and I see no reason why they may not, at this period of time, make it wider and deeper, if that be beneficial to the public. By widening and deepening it, they enable the public to make a greater use of the canal; and they therefore are doing an act tending to facilitate the use of the canal.

Rule absolute.

FOX et al. v. JONES. Feb. 11.

The Court, in an action brought against the Marshal for an escape, compelled him or his officer to permit the attorney of the plaintiff to inspect the writ of habeas corpus, and return, and the committitur indorsed thereon.

THIS was an action against the defendant, as the Marshal of the King's Bench prison, for the escape of one *Frederick Howard Burnet*, who was a prisoner in his custody upon meane process, having been committed to the custody of the Marshal by one of the Judges of this Court when brought before him by habeas corpus. A rule nisi had been obtained, calling upon the defendant *upon *733] notice of the rule to be given to his attorney; and the clerk of the papers of the King's Bench prison, upon notice of the rule to be given to him or his deputy there, to show cause why the plaintiffs' attorney should not be at liberty to inspect and take a copy of the writ of habeas corpus, and return thereto annexed, and the committitur of *Frederick Burnet* indorsed thereon, now in the custody of them or one of them. This rule was obtained upon an affidavit, stating that the plaintiff could not safely proceed to trial without having such inspection.

Sir *James Scarlett* and *Campbell* now showed cause.

This is a rule calling upon the defendant to produce evidence against himself. In *Cooper v. Jones* (a), the Court refused to compel the Marshal to file of record a writ of habeas corpus cum causâ, by which a person was committed to his custody in execution; and it was there said, that such writs, with committiturs thereon, had never been filed or kept by the Court or any of its officers, at *Westminster* or elsewhere, except in the office of the clerk of the papers in the King's Bench prison; but that the writ had always remained as any other warrant naturally would, in the hands of the officer to whom it was immediately directed, and whose voucher or authority for the act of detaining the party it properly was. It is, therefore, a private document, which the officer has a right to keep for his own security.

F. Pollock contrâ. Where the Court has jurisdiction, it will compel the production of any paper, in order to effectuate the purposes of justice. Now, in this case *the defendant in the original action being brought before a *734] Judge by a writ of habeas corpus, was committed to the custody of the defendant as an officer of the Court. It is necessary to aver that fact in the declaration, and if the proof does not correspond with the allegation, the plaintiff will be nonsuited. The defendant or his officer will be bound to produce the document at the trial; and the purposes of justice require that the plaintiff

should be permitted to inspect the document before the trial, in order to a nonsuit; and that being so, the Court will compel its production.

Lord TENTERDEN, C. J. The rule in this case only calls upon the to permit the plaintiffs' attorney to inspect the habeas corpus and the titur. In *Cooper v. Jones* (a) the rule called upon the Marshal to affile the writ of habeas corpus and committitur; and there being no instance such instrument having been filed of record, that rule was discharged as it is clear that the Marshal or his officer may be compelled to produce documents at the trial, I think justice requires that the plaintiffs' attorney be permitted to inspect them, in order to adapt the allegation in his de to the proof. This rule must, therefore, be made absolute.

Rule ab

(a) 2 M. & S. 202.

*MALTBY and another, Assignees of J. ELLIL, a Bankrupt,
CARSTAIRS et al.

A. kept cash with K. and Co., bankers, who held securities for any balance which became due to them, either for cash advanced to A., or on bills of exchange accepted, or indorsed by him. Bills of exchange, accepted by A. for the accommodation of E., H. and Co., were deposited in the hands of K. and Co. by M. an indorsee, for his promissory notes. A. became bankrupt, and E., H. and Co. entered into a composition with their several creditors (the assignees of A., as well as A. being parties to the deed). The deed recited that E., H. and Co. had become bankrupt, and that several of the creditors of the copartnership were bills of exchange, as securities for their debts owing to them by the said copartnership, which were drawn by, or on, or accepted or indorsed by A., and that the provision made in the deed should be accepted by the creditors of the copartnership in satisfaction of their debts, as well against E., H. and Co. as against the estate of A. of the said bills of exchange drawn, accepted, or indorsed by them. By a clause in the deed, the creditors expressly released to E., H. and Co., and to two of his sureties named (but not to A.), all bills of exchange, and covenanted to deliver up into the hands of the trustees (named in the deed) all such bills of exchange drawn, accepted, or indorsed by the copartnership of E., H. and Co., or by A., and all such other bills of exchange as they, the respective creditors, parties thereto, then held for the several debts owing to them respectively from the said copartnership of E., H. and Co. K. and Co. in pursuance of the deed, delivered up to the trustees named in the deed the bills of exchange drawn by E., H. and Co., accepted for their accommodation by A.; and E., H. and Co. in settling accounts with the assignees of A., delivered the bills to them. K. and Co. which K. and Co. had on A.'s estate, for cash advanced to him, were satisfied with the proceeds of the securities deposited by him in their hands, and there remained in their hands a surplus, after satisfying those claims: Held, that the composition-deed extinguished the debt due and owing from A. to K. and Co. upon the bills, although K. and Co. were released, and therefore that K. and Co. might retain, in satisfaction of their claim against A. upon those bills, the surplus of the proceeds of the securities which remained in their hands after satisfying the balance due to them for cash advanced to them.

Assumpsit by the plaintiffs, as assignees of J. Ellil, to recover 10*l.*, being the alleged surplus of the proceeds of certain securities, paid to the bankrupt Ellil, before his bankruptcy, in the hands of Messrs. K. and Co. bankers, beyond the claim of Kensington and Co., and which securities had been received by the defendants, in their character of assignees of Kensington and Co., who became bankrupts in the year 1812. The declaration consisted of a count for money had and received, and also the common counts, a count for interest, and a count upon an account stated. A general issue, and notice of set-off, upon which issue was joined. A

*736] before Lord *Tenterden*, C. J., at the *London* sittings before **Michaelmas* term 1822, a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case:

On the 4th *September* 1809 a commission of bankrupt issued against *J. Ellil*, late of *London*, lead merchant, who was duly found and declared a bankrupt, and the plaintiffs were assignees of his estate and effects under that commission. On the 23d *July* 1812 a commission of bankrupt issued against *John Pooley* and *E. Kensington, Syan*, and *Adams*, of *London*, bankers, who were duly found and declared bankrupts, and the defendants were assignees under that commission.

Mr. *Ellil*, prior and up to the period of his bankruptcy, kept a banking account with Messrs. *Kensington* and Co., who were in the habit of making advances of money to him, by way of discount and otherwise. As a collateral security to *Kensington* and Co. for any debt which might become due from *Ellil* to them, either with respect to transactions between them, or in respect of any bills bearing his name, of which they might, by any other means, become the holders, *Ellil*, from time to time, paid to them various bills of exchange; and also, by indentures of lease and release, dated the 26th and 27th *June* 1809, and made between *Ellil*, of the one part, and Messrs. *Kensington* and Co., of the other part, *J. Ellil* conveyed certain property, belonging to him, to *Kensington* and Co. The deed contained all proper powers of sale. At the time of *Ellil's* bankruptcy there was a cash-balance due from him to *Kensington* and Co. to the amount of 3574*l.* 1*s.*, and at that time, besides the property conveyed by the before-mentioned deeds of the 26th and 27th *June* 1809, the following bills of exchange, which had been deposited with them by *Ellil*

*737] *as a general collateral security to the same extent as before mentioned, remained in their hands, viz. ten bills drawn by *Ellil* upon and accepted by *Slade*, and one bill drawn upon and accepted by *G. Lewis*, for 943*l.* 7*s.*, but none of the said bills having the name of *Easterby, Hall*, and Co. thereon. *Ellil* was in the habit of accepting bills for *Easterby, Hall*, and Co.'s accommodation, and also for value, and at the time of his failure was under accommodations for more than 160,000*l.* for their accommodation. *Easterby, Hall*, and Co. had negotiated these bills to a considerable amount; and *Atkinson* and *Mount* of *Broad Street* became the holders of some of these bills, amounting to 18,200*l.*, which they, before the bankruptcy of *Ellil*, deposited with Messrs. *Kensington* and Co., who were their bankers, as collateral securities for their own notes of hand discounted by Messrs. *Kensington* and Co. All demands which *Kensington* and Co. had against *Ellil* on transactions with him were satisfied out of the proceeds of the property conveyed by the deeds of the 26th and 27th *June* 1809 (which property was sold), in that year, after *Ellil's* bankruptcy, by the plaintiffs, who applied to *Kensington* and Co. for their consent to sell for 6600*l.*, which they gave on condition that all the proceeds should be paid to them on *Ellil's* account, and it was so agreed, and they accordingly received the deposit; and the plaintiff *Maltby*, afterwards, on the 16th *April* 1812, paid to *Kensington* and Co. out of the said proceeds 4000*l.*, which overpaid the cash balance due to *Kensington* and Co. by 425*l.* 10*s.* The defendants have also, since the bankruptcy of *Kensington* and Co., that is, in 1814, received the balance of the said proceeds, and they have also received from the

*738] *parties upon the bill accepted by *Lewis* a further sum of 282*l.* 1*s.* 1*d.* The sums so received by the defendants, beyond what would be necessary to satisfy the cash-balance due from *Ellil* as aforesaid, amount together to 1861*l.* 3*s.* 10*d.*, and which last-mentioned sum of 1861*l.* 3*s.* 10*d.* the plaintiffs sought to recover by the present action. The defendants insisted upon a right to retain that sum in respect of a demand upon the bills of exchange deposited as aforesaid by *Atkinson* and *Mount* exceeding that amount. Prior to *Ellil's* failure *Kensington* and Co. were the bankers of *Atkinson* and *Mount*, and had discounted for *Atkinson* and *Mount* their promissory notes of hand, receiving from *Atkinson*

and *Mount*, by way of collateral security, bills of exchange to a certain amount, among which were bills amounting to the sum of 18,200*l.*, drawn by *Easterby, Hall*, and Co. upon, and accepted by *Ellil, Atkinson* and Co. failed; and at the time of *Ellil's* bankruptcy *Kensington* and Co. held the bills, accepted by him for 18,200*l.*, as collateral security for *Atkinson and Mount's* account. After *Ellil's* bankruptcy, *Easterby, Hall*, and Co. were embarrassed in their circumstances, and found it necessary to make an arrangement with their creditors; amongst them were *Kensington* and Co., who held the bills so held by them as aforesaid. The arrangement was carried into effect by a deed dated 23d June 1811, and to which the said *Kensington* and Co., and several other persons.

The deed purported to be made between *George Doubleday, Anthony Easterby, Walter Hall*, and *Frederick Hall*, merchants and copartners, trading under the firm *of *Easterby, Hall*, and Co. of the first part; *Arthur Mowbray, Joseph Bulmer*, and several other persons, the assignees of the estate and effects of *Aubone Surtees* and *John Surtees*, at that time bankrupts, of the second part; *A. Mowbray, C. L. Hollingworth*, and several other persons, bankers of the third part; *R. Puller* the elder and *R. Puller* the younger, both of the city of *London*, merchants and copartners, of the fourth part; *R. Skelton*, of the fifth part; Sir *J. C. Hipplesey*, Bart., *G. J. Skelton*, and the said *A. Mowbray*, of the sixth part; the several persons, created by the deed, of the seventh part; *T. Maltby, T. H. Masterman*, and *S. Brown*, of the eighth part.

By this deed, after reciting that *G. Doubleday, A. Easterby, W. Hall, and F. Hall*, together with the said *A. Surtees* and *J. Surtees*, had established a copartnership for working mines, and that they had become entitled to a variety of mining property in *Durham*, and in various other places, by virtue of several leases; and that to enable them to carry on the mining concern, they became indebted to various persons in large sums of money on account of the partnership of *Easterby, Hall*, and Co.; and that for the payment of the debts of the seventh part this deed was executed. That *Easterby, Hall, and Co.*, on the 10th July 1802, assigned to *Henry Trewhitt*, by way of mortgage, the premises comprised in five of the leases, part of the said copartnership property, for securing the repayment to him of 3000*l.*, which had been advanced by him to the partnership; that on the 4th of July 1806, the two said *Easterby* and *Hall* became bankrupts, and by their bankruptcy the copartnership, *carried on under the firm of *Easterby, Hall*, and Co., was, so far as respected the two *Surtees*, dissolved; and that by indenture of assignment bearing date the 13th May 1808, and made between *G. Doubleday, A. Easterby, W. Hall, and F. Hall* of the one part, and *A. Mowbray* and the other partners of the *Durham* bank of the other part, reciting, among other things, that *A. Mowbray* and the other partners of the *Durham* bank had advanced for the use of *G. Doubleday, A. Easterby, W. Hall, and F. Hall*, various sums of money by or upon the discount of bills of exchange drawn by them on the said persons therein mentioned; and had agreed, in case the occasions of *G. Doubleday, A. Easterby, W. Hall, and F. Hall* should require it, to discount other bills of exchange to be drawn and accepted as therein is expressed: it was witnessed that in consideration of the premises, and for the other considerations therein expressed, the several undivided parts or shares of the said *G. Doubleday, A. Easterby, W. Hall, and F. Hall*, of and in the several mines and hereditaments, and shares of mines and hereditaments, therein particularly described, and also the entirety of various messuages, closes, lands, and hereditaments therein also described (being part of the said leasehold mines and hereditaments and belonging to the said copartnership of *Easterby, Hall*, and Co.) were assigned by the said *G. Doubleday, A. Easterby, W. Hall, and F. Hall*.

the said *A. Mowbray* and the other partners of the *Durham* bank, for the respective residues of the several terms of years comprising the same premises respectively, upon various trusts for securing the payment, liquidation, and redemption of the several sums of money theretofore advanced, or there-
 *741] after to be advanced by the said *A. Mowbray* and the *other partners of the *Durham* bank, for the use or on the account of the said *G. Doubleday*, *A. Easterby*, *W. Hall*, and *F. Hall*, by way of discount upon other bills of exchange, with the usual interest, and with such powers and authorities in the respective events therein specified, to enter and take possession of the premises, and work and conduct the same; and also to sell and dispose of the same, for the purposes of the said security as therein mentioned; and subject to the said security upon trust for the said *G. Doubleday*, *A. Easterby*, *W. Hall*, and *F. Hall*, their executors, &c. It then recited that a considerable sum of money remained due to the said *A. Mowbray* and the other partners of the *Durham* bank, by virtue of the trusts and provisions of that assignment, and that since the bankruptcy of *A. Surtees* and *J. Surtees* the mining concern had been continued and conducted by the said *G. Doubleday*, *A. Easterby*, *W. Hall*, and *F. Hall*, under the firm of *Easterby, Hall, and Co.*, without any interference therein by *A. Surtees* and *J. Surtees*, or either of them, or their assignees, and without any final settlement of the accounts of the said partners touching the said joint concern up to the time of the said bankruptcy; and that *G. Doubleday* and *A. Easterby*, *W. Hall*, and *F. Hall*, had since expended large sums of money in the discharge of many of the subsisting debts and engagements contracted by the copartnership prior to that period, and had in consequence of such payments, and of the great advances necessary to be made, and which had been made by them, for carrying on the mining concern, become indebted to various persons in large sums of money, and among others, to *R. Puller* the elder, and *R. Puller* the younger, for and in respect of divers
 *742] *sums of money advanced by them to or on account and for the accommodation of the said *G. Doubleday*, *A. Easterby*, *W. Hall*, and *F. Hall*, as continuing copartners as aforesaid; that the two *Pullers* did then lately, at the request and for the accommodation of *G. Doubleday*, *A. Easterby*, *W. Hall*, and *F. Hall*, become liable and engaged to many of the several persons parties to the deed of the seventh part, being creditors of the mining concern, for the payment to them of several large sums of money, by drawing, accepting, or indorsing in their favour bills of exchange for the respective amounts of the same sums of money, all which bills of exchange had become due, but that *G. Doubleday*, *A. Easterby*, *W. Hall*, and *F. Hall*, and *R. Puller* the elder, and *R. Puller* the younger, were respectively unable to take up and discharge the same; and that several of the creditors of the said copartnership of *Easterby, Hall, and Co.* were holders of bills of exchange, as securities for their debts owing to them by the said copartnership, which were drawn by or on, or accepted or indorsed by the said *John Ellil*, and of other bills of exchange drawn by or on, or accepted or indorsed by Messrs. *Atkinson and Mount*, of Broad-Street Buildings, London, merchants,—all which bills of exchange were then due; and that a commission of bankrupt had been lately issued against the said *J. Ellil*, under which he had been declared a bankrupt, and the said *Thomas Malby*, *T. H. Masterman*, and *S. Brown*, had been duly chosen assignees of his estate and effects; and that the account-current between the said *J. Ellil* and the said copartnership of *Easterby, Hall, and Co.* had not been made up and settled, and it was then
 *743] uncertain in whose favour the balance of such accounts *would appear upon the final adjustment thereof; but, in consideration of the provisions thereafter contained for the discharge of the debts of the said copartnership of *Easterby, Hall, and Co.*, including the sums of money due and owing upon and secured by the said bills of exchange, drawn, accepted, or indorsed by the said *J. Ellil* as aforesaid, the said assignees of his estate and effects had, with the consent of his creditors for that purpose obtained, agreed to accept payment of

such sum of money, if any, as should or might appear to be due to his upon the balance of the said last-mentioned accounts, in the order and and pursuant to the trusts and directions thereafter contained; and the assignees of the two *Surtees*, with the consent of the creditors said bankrupts, were empowered and had agreed to accept the sum of 10 in lieu and satisfaction of the shares and interests of the said bankrupts, the said assignees in right of the said bankrupts, in the said leasehold part and of and in all other the real and personal estates of or belonging to *G. Doubleday, A. Easterby, W. Hall, F. Hall*, and the said *A. Surtees, J. Surtees*, as copartners as aforesaid; which 10,800*l.* was to be considered a debt due from the said *G. Doubleday, A. Easterby, W. Hall*, and to the assignees of the said bankrupts (the *Surtees*') parties thereto, of the part, and to be paid to them as thereafter mentioned; and it had been agreed, that the said assignees should come in and take a dividend in respect of any balance which might be due to them, as assignees of Messrs. *J. Burdon*, and Co., from the said copartnership of *Easterby, Hall*, and Co., rateably and in the order with the other creditors of the said *copartnership, parties thereto, of the seventh part; and that it had been agreed between *G. Doubleday, A. Easterby, W. Hall*, and *F. Hall*, that the partnership of *Easterby, Hall*, and Co. should be dissolved from that time and in consequence of the dissolution of the said copartnership it had been agreed between *G. Doubleday, A. Easterby, W. Hall*, and *F. Hall*, with the consent of the assignees of the two *Surtees*, and with a view to make a provision for the payment of the debts of the said copartnership, and to wind up and finally settle the concerns of the copartnership, that the mines and the other leasehold premises thereafter mentioned, subject to the rents and covenants payable and to be performed in respect thereof, and also to the said mortgage made to the said *Trewhitt* for the said sum of 3000*l.*, and all the engines, machinery, &c. should be sold; and that the several provisions proposed to be made should respectively intended to be, and should be accepted and taken by the said *G. Doubleday, A. Easterby, W. Hall*, and *F. Hall*, respectively, as against and in discharge of the debts due by them to the said *R. Puller the elder*, and *R. Puller the younger*, as against the estate of the said *J. Ellil*, or against the said Messrs. *Atkinson* and *Mount* respectively, in respect of the said bills of exchange drawn, accepted, or indorsed by them, or by any of them respectively, and then remaining over due within the name of the said *Easterby, Hall*, and Co., or *Hall and Co.* thereon; all which bills of exchange were to be delivered up by the respective holders thereof, and cancelled upon receiving debentures under the hands of the trustees of the said trust funds, for the amount of their respective debts *payable to the bearer pursuant to the proviso thereafter contained; but nothing therein contained was intended to operate as a release and discharge of the said other person or persons, save only and except the said *G. Doubleday, A. Easterby, W. Hall*, and *F. Hall*, *R. Puller the elder* and *R. Puller the younger*, and the said Messrs. *Atkinson* and *Mount*, and the estate of the said *John Ellil*; and that in order to facilitate and promote the said intended payments, and as a further consideration and inducement for the acceptance of the said other creditors of the said copartnership of *Easterby, Hall*, and Co. of the said proposed provision for the payment of their debts in full discharge of the aforesaid, the said *A. Mowbray* and the other partners of the *Durham* had, at the request of the said *G. Doubleday, A. Easterby, W. Hall*, and *F. Hall*, consented and agreed wholly to waive, relinquish, and give up all priority, and advantage whatsoever, to which they the said *A. Mowbray* and the other partners were entitled under and by virtue of the trusts and provisions of the said part recited indenture of assignment of the 13th of May 1808, in respect of the debts due and owing to them from the said last-mentioned copartnership.

and the said Sir J. C. *Hippesley*, G. *Simson*, and Arthur *Mowbray*, having been nominated and appointed by the several parties interested in the said proposed arrangements to be trustees for carrying the same into effect and execution, it was witnessed, that in further pursuance of the said several proposals and agreements thereinbefore recited, and for carrying the same into further effect and execution, and in consideration of the premises, it was thereby declared and agreed by and between all the said parties to that deed, and particularly the said G. *Doubleday*, Anthony *Easterby*, *W. *Hall*, and F. *746] *Hall*, did thereby agree, declare, and direct, that the said Sir J. C. *Hippesley*, G. *Simson*, and A. *Mowbray*, their executors, administrators, and assigns, should stand and be possessed of 146,000*l.*, being the purchase monies for twenty-seven fiftieth shares of the said mines and premises, and of and in the interest to become due for the same upon trust, in the first place, thereout to pay and retain the costs of carrying the said arrangement into effect; and in the next place, thereout to pay to the said A. *Mowbray*, J. *Bulmer*, and others, as assignees of Messrs. *Surtees* as aforesaid, their executors, &c. the sum of 10,800*l.*, and upon trust, immediately thereafter to apply the ultimate residue or surplus of the said 146,000*l.* and interest, so far as the same should extend in payment to the several creditors of the said copartnership of *Easterby*, *Hall*, and Co. (except the *Pullers* and the assignees of *Ellil*), excepting only as to such assignees of *Ellil* in regard to the matter thereafter particularly mentioned, of one or more rateable and equal dividend or dividends upon the amount of the several and respective debts and sums of money justly due and owing to them, the same creditors respectively; and also the said G. *Doubleday* and A. *Easterby*, by their executors, &c. of one or more rateable and equal dividend or dividends upon the said sum of 15,000*l.*, agreed to be paid to them as aforesaid, all such dividends to be made in a just and equal proportion to the amount of the same debts and sums of money respectively, without any priority of any one or more of them to any other or others of them, it being the intention and agreement of the parties thereto, that the 15,000*l.* should be paid to G. *747] *Doubleday* and A. *Easterby*, with the debts of the said copartnership *of *Easterby*, *Hall*, and Co. thereby provided for; and it was thereby agreed, that whereas Messrs. *Kensington* and Co., Messrs. *Harding* and *Hill*, and *Lopez* and *Collins*, lately received respectively several sums by and out of the estate of J. *Ellil*, it was thereby declared that a dividend rateably with the other creditors should be paid out of the said 146,000*l.* to the said assignees of J. *Ellil* upon the said several sums so received by *Kensington* and Co., *Harding* and *Hill*, and *Lopez* and *Collins*, out of the estate of J. *Ellil*, and whereby the said estate had been damnified, but not upon any other sum or balance; and it was expressly agreed and declared between and by the said parties, that the several trusts and provisions thereinbefore contained for payment of the debts of the said copartnership of *Easterby*, *Hall*, and Co. were to be forthwith accepted and taken by the several and respective creditors thereof, in full satisfaction and discharge of their respective debts and demands; and that in case any one or more of the creditors for the time being of the said copartnership of *Easterby*, *Hall*, and Co., or of the said G. *Doubleday*, A. *Easterby*, W. *Hall*, and F. *Hall*, as continuing partners therein, should, upon request for that purpose made by the said trustees or trustee for the time being, neglect or refuse to execute the indentures, or if any such creditor or creditors having notice of the trusts and provisions therein contained, should commence, prosecute, continue, or carry on any actions or suits or other proceedings whatsoever, either at law or equity, for the recovering of all or any part of the debt or respective debts due and owing to the same creditor or creditors respectively, either against the person or effects of them *748] the said *G. *Doubleday*, A. *Easterby*, W. *Hall*, and F. *Hall*, or any of them, or any of their heirs, executors, or administrators, or against the said R. *Puller* the elder and R. *Puller* the younger, or either of them,

Hall, and *Co.*, or *Hall* and *Co.*, or *C.* and *R. Puller*, and *Atkinson* and *J. Ellil*, or any of them, they or any of their clerks or agents.

* *Kensington* and *Co.* refused to execute this deed upon the application of *Easterby* and *Co.*, until they obtained the following letter from *Ellil* assignees: "18th March 1812. Gentlemen, We consent to your the deed of arrangement of Messrs. *Easterby*, *Hall*, and *Co.* with the *tors*, without prejudice to your security on the premises late belonging *Ellil* at *Bankside*." Upon which *Kensington* and *Co.*, in pursuance of the letter, on the same day executed the deed.

After the execution of the deed, and in pursuance thereof, *Kensington* gave up the bills accepted by *Ellil*, amounting to 18,200*l.*, with various bills amounting to 47,288*l.* 2*s.* 1*d.*, to *Easterby* and *Co.*, and received from the trustees under the deed a receipt and a debenture, stating that *Kensington* and *Co.* were holders of bills drawn by *Easterby*, *Hall* and *Co.* to the amount of 18,200*l.*, on which they had advanced monies to various persons to the amount of 22,857*l.* 10*s.* 10*d.*, and that they had given up such bills, and executed the deed of arrangement, whereupon this debenture was given to *Kensington* and *Co.* for the secure payment of the said sum of 22,857*l.* 10*s.* 10*d.* by dividends in the said sum to the sum of 47,288*l.* 2*s.* 1*d.*, the amount of the bills so given up, and the same should be paid out of the trust funds provided by the deed of arrangement. Certain payments have been made on the debenture, amounting to the sum of 18,200*l.* After execution of the deed of arrangement, the accounts between *Ellil*'s estate and *Easterby*, *Hall*, and *Co.* were referred to arbitration, and an award was made, stating, among other things, as follows: viz. "That it likewise appears to us (the arbitrators) that Mr. *Ellil* has accepted for *Easterby*, *Hall*, and *Co.* bills to the amount of 166,886*l.* 2*s.* 3*d.*, not any part whereof is included in the before-mentioned balance, and that *Easterby*, *Hall*, and *Co.* must either deliver to the assignees of Mr. *Ellil* all the said bills, or account for the same." Upon the above award the plaintiffs and *Easterby*, *Hall*, and *Co.* arranged the deed, and upon that occasion the bills drawn by *Easterby*, *Hall*, and *Co.* up to the amount of 18,200*l.* before mentioned, were delivered up by *Easterby*, *Hall*, and *Co.* to the plaintiffs, and the account settled accordingly, and has ever since remained in the plaintiffs' hands.

The case was argued on a former day in this term by

F. Pollock for the plaintiffs. The debt due from *Ellil*, for cash advanced by *Kensington* and *Co.*, having been satisfied, and the bills of exchange to the amount of 18,200*l.* drawn by *Easterby*, *Hall*, and *Co.* upon and accepted by *Ellil*, having been delivered up by *Kensington* and *Co.* to *Easterby*, *Hall*, and *Co.*, whereby the latter were enabled to settle their accounts with the assignees of *Ellil*, as if those bills had been fully satisfied, *Kensington* and *Co.* cannot, on account of those bills, retain, as against *Ellil*'s estate, any claim in their hands belonging to his estate. First, the deed of the 23d of June 1812, to which the plaintiffs and *Kensington* and *Co.* were parties, operates as an extinguishment of any debt due from *Ellil* or his assignees to *Kensington* and *Co.* upon those bills of exchange. Secondly, the letter of the 19th of March 1812, does not operate as a waiver of any benefit which the plaintiffs, as assignees of *Ellil*'s estate, would otherwise have derived under that deed. The principal object of the deed undoubtedly was to provide a fund for the payment of the debts of *Easterby*, *Hall*, and *Co.*; but it contains a recital that several provisions proposed to be made shall be accepted by the respective parties in full satisfaction of their debts, as well against *Easterby*, *Hall*, and *Co.* as against the *Pullers*, or against the estate of *J. Ellil*, or against *Atkinson* and *Co.* respectively; and it provides that the deed shall not operate as a release in favour of any other person except *Easterby*, *Hall*, and *Co.*, the *Pullers*, *Atkinson* and *Co.*, and the estate of *J. Ellil*. The deed, therefore, is to operate as a release from *Ellil*'s estate. By another clause, after reciting that *Kensington* and

several other persons had received several sums out of the estate of *Ellil*, it is provided that a dividend should be paid out of the 146,000*l.* to the assignees of the said *J. Ellil*, upon the sums so received by those persons. By a still later clause the creditors covenant, on receiving debentures from the trustees, to deliver to the trustees all bills of exchange drawn and accepted by *Easterby, Hall*, and *Co.*, or the *Pullers*, or by *J. Ellil*, or by *Atkinson* and *Mount*. *Kensington* did, in pursuance of this covenant, deliver to the trustees of *Easterby, Hall*, and *Co.* the bills of exchange, and thereby enabled the latter to settle their accounts with the assignees of *Ellil* as if those bills were satisfied; and they have been delivered up to the latter. *Kensington* and *Co.*, by delivering up the bills of exchange, and accepting the provisions made by the deed in full satisfaction of all claims against *Ellil*, have agreed that all debts owing to them by *Ellil*, or *756] his assignees, on those bills should be *extinguished. The case of *Ex parte Curstairs* (a) will be relied upon by the other side. The question there arose as to *Slade's* bills, which were treated as bills accepted for value, and therefore transferring to *Kensington* and *Co.* *Slade's* debts to the drawer. The Vice-Chancellor was of opinion that the debt due from *Slade* and *Co.* on these bills was extinguished by the deed. But Lord *Eldon* was of a different opinion, and allowed *Kensington* and *Co.* to prove those bills under *Slade's* commission. The authority of that decision is not intended to be disputed; but the case is distinguishable from the present, because there was nothing on the face of the deed to show that any debt due from *Slade* to any other creditors, by virtue of any bill of exchange, was to be extinguished. But there is a recital showing, manifestly, that it was intended that debts due from *Ellil*, in respect of bills of exchange, to the creditors who signed the deed should be released. Secondly, the plaintiff's letter of the 17th *March* does not operate as a waiver of any other advantage which they would be entitled to derive by virtue of the deed. That letter relates only to the security which *Kensington* and *Co.* had upon the premises at *Bankside*; but *Kensington* and *Co.* could not be deprived of that security, for the deed operated only upon the bills of exchange.

Parke contra. The plaintiffs are not entitled to recover: for, first, the deed does not affect their remedy upon the securities in their hands; and, secondly, if it otherwise would have done so, that effect is prevented by the letter which *757] was given at the same time. At *the time when *Kensington* and *Co.* executed the deed, *Ellil* was indebted to them for a cash-balance, and also on bills of exchange accepted by them for 18,200*l.* To secure both those debts, they had securities in their hands, viz. a conveyance of the estate at *Bankside*, *Lewis's* bill, and *Slade's* bills. By executing the deed, and giving up the bills accepted by *Ellil* to the trustees, *Kensington* and *Co.* have relinquished all future remedy upon *Ellil's* bills, or against his estate, but not the benefit of those securities upon *Ellil's* property which they already had. They delivered up the bills for the special purpose only of discharging the estate of *Easterby, Hall*, and *Co.* That was clearly the principal object of the deed, and *Kensington* and *Co.* executed the deed as creditors of *Easterby, Hall*, and *Co.* The deed at most can operate only to discharge the direct remedy upon the bills, but leaves the remedy upon all other then existing securities in the hands of *Kensington* and *Co.* in full force. *Kensington* and *Co.* may, therefore, retain any money coming to them either from the premises at *Bankside* or from *Lewis's* bill in satisfaction of the debt due to them from *Ellil*, as the acceptor of the other bills. That the principal object of the deed was to discharge the estate of *Easterby, Hall*, and *Co.* appears manifest from the whole of the deed taken together. It is true that there is a recital that the provisions proposed to be made should be accepted by the creditors of the said copartnership in full satisfaction of their respective debts, as well against *Easterby, Hall*, and *Co.* as against the *Pullers*, or against

the estate of *J. Ellil*, or against *Atkinson* and *Mount* respectively, of the said bills of exchange drawn, accepted, or indorsed by them or a respectively, and then *remaining over due, with the names of *Easterby, Hall, and Co. thereon*. This recital shows an intention only, that provisions should be accepted by the creditors of the copartnership of their debts, inter alia, against the estate of *Ellil*; but the *Bankside* and *Lewis's* bill were not, quoad the purposes of this deed of *Ellil*: they were part of the estate of *Kensington* and *Co.* to their lien. This recital, therefore, does not show that there was an releasing that property. Besides, the deed does not contain any *Ellil's* estate. It expressly releases *Easterby, Hall, and Co.* and the (but not *Ellil*) from all debts due to them, the creditors, from the cop of *Easterby, Hall, and Co. the continuing partners, or the two S partners*. The creditors of *Easterby, Hall, and Co.* release jointly and the two *Pullers*, but not the estate of *Ellil*, from all judgments, bills of promissory notes, and other securities made for securing the payment several debts, or any of them, which they the said several creditors were entitled to against the said firm or copartnership of *Easterby, Hall, and Co.* against the two *Pullers*, or either of them, by reason of the said several relating to the copartnership, or the concerns thereof, antecedently to the deed. The release does not extend to any debt due by *Ellil* to creditors who execute the deed; but it extends to all debts due from *Hall, and Co.*, or from the *Pullers*, to any of the creditors; and then, clause, the creditors agree "to give and deliver up into the hands of the such bills of exchange drawn, accepted, or indorsed *by the said firm copartnership of *Easterby, Hall, and Co.*, or by the *Pullers*, or *J. Ellil*, or by *Atkinson* and *Mount*, and all such other bills of as they the several respective creditors, parties thereto, now have several debts due and owing to them respectively from the said ship of *Easterby, Hall and Co.*, or any part of such debts respectively creditors therefore agree to deliver up the bills of exchange before and thereby give up all remedy upon those bills, but they do not give up the means of satisfaction for these bills, which they already have in their hands. In effect, the bills so delivered up may be considered as paid by the securities placed in their hands for the purpose of paying them; the creditors do not mean to refund that partial payment. Lord *Ellenborough* *parte Carstairs (a)*, was of opinion, that the creditors did not mean to give up, and that they had not thereby given up their remedy on the bills of exchange accepted by *Slade*, and he decided that they could not under his commission, and his decision goes the length of deciding that for *Slade's* bills, *Lewis's* bill, and the estate at *Bankside*, are all secured for the same debt, viz. the debt owing to *Kensington* and *Co.* by *Ellil*, the acceptor of his bills; and if, notwithstanding the deed, *Kensington* and *Co.* prove against *Slade's* estate and thereby receive the proceeds of *Slade's* estate, they may also retain the proceeds of the other securities, *Lewis's* bill, and the mortgaged estate. But, secondly, the letter at all events prevents the release having the effect contended for; for it could not apply to any claim, or debt due from *Ellil* on the bills, for none other could possibly be *judged by the deed, and it is wholly collateral to the deed. It operates as a declaration, that as between *Kensington* and *Co.* and *Ellil's* estate, the securities in the hands of the former should be pledged to them for the payment of *Ellil's* bills.

Cur. a

Lord TENTERDEN, C. J., now delivered the judgment of the Court

(a) 1 Buck's B. C. 560.

The plaintiff's claim to recover in this action is founded upon the supposed effect of the deed executed for payment of the debts of *Easterby, Hall, and Co.* It appears that Messrs. *Kensington* refused to execute that deed until they received from the plaintiffs a written assurance, that by so doing they should not prejudice their security on the premises, lately belonging to the bankrupt *Ellil, at Bankside*. The greater part of the money now claimed by the plaintiffs was the produce of that security. It was contended, on their part, that this assurance was intended only to relate to the claim on those premises, as security for the cash-balance due to Messrs. *Kensington* from *Ellil*. But we think it is impossible to understand it in this narrow view, because the deed has not the smallest connection with, or relation to, that balance. If, therefore, the execution of this deed shall have the effect for which the plaintiffs now contend, Messrs. *Kensington* and the defendants, who represent them, will have great reason to complain that they have been deluded. Still, if this be the legal operation of the deed, we, in a court of law, are bound to give that effect to it. We are of opinion, however, that the deed has not that effect. It is material to consider what the situation of Messrs. *Kensington* on the *one hand, and of the plaintiffs on *761] the other, was before the execution of that deed. Now Messrs. *Kensington* were the holders of bills of exchange to an amount exceeding 18,000*l.*, drawn by *Easterby and Hall* upon and accepted by *Ellil*, and which had been deposited with them by *Atkinson and Mount* as security for money advanced. They had, therefore, a right to prove those bills against the estate of *Ellil*, under the commission. They were also the legal proprietors of the premises at *Bankside*, which had been conveyed to them by *Ellil* with a power of sale, and the holders of certain bills of exchange accepted by *Slade*, and of a bill accepted by *Lewis*; and the *Bankside* premises had been conveyed, and these bills of exchange deposited, by *Ellil*, as security not only for the cash-balance that might be due from *Ellil*, but also for the payment of any bills of exchange bearing his name, of which they might by any other means become the holders. The bills to the amount of 18,200*l.* were of this description; and in making their proof on these bills they must have mentioned the *Bankside* premises, and the bills of *Slade* and of *Lewis*, as securities in their hands. It does not appear of what precise value these securities ultimately became; but it appears that *Slade*, as well as *Lewis*, had become bankrupt; and if the value of the whole, beyond the amount of *Ellil*'s cash-balance, be taken at 5000*l.* or 6000*l.*, it will, probably, be not underrated; and this would leave their proof good, in the narrowest and strictest view, for 12,000*l.* or 13,000*l.*

It must, therefore, have been desirable, by those who had the management of *Ellil*'s affairs, and an interest in his funds, to relieve his estate from the proof *762] on these bills; and this sufficiently accounts for the desire *manifested by the plaintiffs, that Messrs. *Kensington* should execute the deed in question. By executing it they consented to give up, and did in fact give up, the bills, to the amount of 18,200*l.*

The estate was thereby absolutely relieved from that proof, and Messrs. *Kensington* took the chance of the produce of the estate of *Easterby and Hall* under the deed, in the place of their right to a dividend under *Ellil*'s commission. The bills, to the amount of 18,200*l.* had been accepted by *Ellil*, for the accommodation of *Easterby and Hall*. There were various and complicated dealings between those parties; and when the deed was made, it was unknown in whose favour the balance would ultimately be found to be. The deed contains a provision for paying to the assignees of *Ellil* a dividend out of the first portion of the fund, on the money then actually received by Messrs. *Kensington*, and other persons there named, out of the estate of *Ellil*; and a provision for paying out of the secondary or collateral fund of 186,000*l.*, the balance that might ultimately be found due to *Ellil*'s estate.

The deed itself is of very unusual length, and very multifarious and complicated. There is an abstract of it sufficient for the purpose of this cause in

Mr. *Buck's* report of the case, *Ex parte Carstairs*, before my Lord and I do not think it necessary to repeat the detail of its provisions, clear, that the great and primary object was, the payment of the debts of *Easterby* and *Hall*, and the relieving of them from the pressure of their debts. It is not clear that any instrument which did not furnish a direct charge against them was contemplated. There were many bills of exchange standing, which did furnish such a charge against them, *and also against some other persons, the two Messrs. *Pullers*, for instance, who had put their name to bills which had been sent abroad for the debts, or on the account of *Easterby* and *Hall*. These two gentlemen were to take a part in the arrangement, both of the sale and purchase of the mines; and accordingly their names are mentioned in the clause of release, by the creditors of *Easterby* and *Hall*, though neither *Atkinson* and *Mount* nor the estate of *Ellil* are mentioned in that clause: they are mentioned in some of the recitals, but not in the operative part. And, as was said by Lord *Eldon*, with whose judgment we entirely agree, it cannot be found, on an attentive perusal of the deed, that any bills of exchange were intended to be given up, except those which constituted debts due and payable by *Easterby* and *Hall* (of which description were the bills for 18,200*l.*) It is said as to any bills of the description of those accepted by *Slade* and *Co.* There is nothing expressed to prevent the holders of such bills from retaining them, although, by so doing, a remote and circuitous charge might eventually arise against *Easterby* and *Hall*. *Slade's* bills were the subject of the case before Lord *Eldon*: they are not distinguishable from the bills mentioned in the present case, and his Lordship's judgment is, therefore, an authority in favour of the defendants as to that part of the plaintiffs' claim. In principle, also, it is an authority in their favour on the other part of their claim, for if the collateral security of a bill of exchange was not lost by the giving up of the deed, and the giving up other bills, for the payment of which the collateral security, neither could the security of real property be lost by the operation of the deed: *there can be no difference in principle between the one and the other. It may not unreasonably be supposed that many of the creditors of *Easterby* and *Hall* would be willing to give up bills of exchange, and that, if they were allowed to retain the benefit of their collateral securities, they would have refused to do so, if they had not been allowed to retain them. Any attempt to deal with such securities would probably have been impracticable, and would have defeated the whole scheme of arrangement. The parties were probably sanguine enough to think likely to provide a fund sufficient in the end to meet all demands, present and contingent. The assignees of *Ellil* may be well supposed to have been content with the prospect of reimbursement of such sum as Messrs. *Kensington* might obtain out of their collateral securities, out of the secondary fund, on the final settlement of accounts between them and *Easterby* and *Hall*, and to have participated in the arrangement which left in the hands of Messrs. *Kensington* the collateral securities only, to the then existing state of things, which gave Messrs. *Kensington* not only these collateral securities, but also the right of proof and dividend for a further sum of many thousand pounds.

For these reasons, our judgment is in favour of the defendants, and no order is to be entered.

Judgment for defendants.

*GOLDING et al. v. FENN.

A custom that there shall be a select vestry of an indefinite number of persons, continued by election of new members made by itself, and not by the parishioners, is valid in law. Semble, that it must be part of such custom that there should always be a reasonable number, and that the reasonableness of the number must be decided with reference to long-established usage, and to the population of the parish; such a custom having existed from time immemorial in a parish.

In the year 1662, by a faculty granted by the Bishop of London, forty-nine persons, together with the vicar and churchwardens, were named as the select vestry; and that number was to be kept up by elections, to be made by ten at least of those forty-nine, together with the vicar and churchwardens. In the year 1673 this number of ten was, by another faculty, reduced to seven; and these faculties were acted upon ever afterwards. Ten out of the fourteen vestrymen, exclusive of the vicar and churchwardens, who were present at the vestry holden next before the promulgation of the first faculty, were part of the forty-nine named in that faculty: Held, that as the vestry appointed by the faculty, and since continued, was not inconsistent with the vestry previously existing by the custom, the custom was not destroyed by the parish having accepted the faculty, and acted upon it ever since, the faculty not being binding in law, and the vestry having power at any time to depart from its directions.

A RULE had been obtained in this Court for a prohibition in a suit instituted in the consistory court of the Bishop of London, by the defendant *Fenn*, a parishioner of *St. Martin's in the Fields*, to compel the plaintiffs and others, as churchwardens of that parish, to produce the accounts of their receipts and disbursements. They pleaded in the Ecclesiastical Court that their accounts had been duly allowed by a select vestry, which had existed in the parish from time immemorial: the defendant, *Fenn*, denied that any such select vestry existed by law. Upon showing cause against the rule for a prohibition, the parties agreed to try the question between them on a feigned issue: the issue was, Whether there was, and from time immemorial had been, a vestry of the said parish, composed of select persons, parishioners of the said parish, for the time being, or not? There were two other issues, as to a custom for the churchwardens to have their accounts audited by the select vestry, which it is unnecessary to notice more fully, as it was not disputed that if the plaintiffs were entitled to a verdict on the first issue, they were entitled to it on the second and third issues also. Plea, *766] the general issue. At the trial *before Lord Tenterden, C. J., at the *Middlesex sittings after Easter term, 1827, the following evidence was given:

A charter of feoffment of the year 1225, by which *William*, the tailor of the parish of *St. Martin's*, of *Charing*, confirmed certain lands in that parish; a fine levied in the 35th year of *Henry* the Third, of property described to be in the parish of *St. Martin's in the Fields*. An extract from the ecclesiastical taxation of Pope *Nicholas*, 12 *Edu.* 1, in the year 1291, relating to part of the temporalities of the abbot of *Westminster*, described to be in the parish of *St. Martin in the Fields*. An assize of novel disseisin, in the year 1309 (3 *Edu.* 2), brought in the Court of Common Pleas by *John de Hyde* v. *William Brown*, for common of pasture in the parish of *St. Martin in the Fields*, as belonging to his freehold in the same parish. In 1339 (14 *Edu.* 3), an account preserved in the exchequer of certain rolls of certain payments for the ninth sheaf, fleece, and lamb, in the parish of *St. Martin in the Fields*. A deed of confirmation in 1367 (42 *Edu.* 3), from *Henry de Bello Monte*, knight, to King *Edward* the Third, of a place and garden, and appurtenances, near to the cross of *Charing*, in the parish of *St. Martin in the Fields*. The defendant, as to this part of the case, relied upon letters patent of the 4 *Jac.* 1, which recited that the inhabitants of *St. Martin in the Fields* had made their humble application unto his Majesty, stating, "that whereas, in the time of King *Henry* the Eighth, the said inhabitants had no parish church, but did resort to the parish church of *St. Margaret's*, in *Westminster*, and were thereby forced to bring

their bodies by the court-gate of *Whitehall*, which, the said *He* *misliking, caused the church in the parish of *St. Martin in the Fields* to be erected, *and made a parish there*, which now is so greatly inhabited, as the church is not of sufficient bigness to receive the parishioners, the church-yard so little, as there is no room to bury their dead," &c.

Many entries in the parish books, from 1574 to 1662, were there to prove the existence of the select vestry. These entries appeared to be signed by persons described generally as "the masters of the parish." In some instances, however, they were described as "parishioners." It appeared from these entries, that the business transacted was done by a very small number of persons then present. Before the year 1600, it did not appear in what manner these persons were chosen; but after that period, it appeared that the body called upon others to become constituent members of their order. Before the year 1662, the number of persons varied; they never amounted to forty-nine, and at one time were less than twenty. In the year 1662, a faculty was granted by the Bishop of *London* for a select vestry, to consist of nine persons besides the vicar and churchwardens, and authorizing the vicar and churchwardens to act. At the vestry holden next year, a faculty was granted, fourteen vestrymen were present, and ten of them were included in the forty-nine appointed by the faculty. A second faculty was granted in 1673, enabling the vicar and churchwardens, and seven vestrymen to act. From 1662, the select vestry had always consisted of forty-nine persons, the vicar and churchwardens. The plaintiffs then gave in evidence the following records: first, a copy of a judgment *in *Trinity* term 1744 (5 G. 2), between *W. Kendal* and *Sir H. Penrice*, which was an action for a false return to a mandamus, commanding *Sir H. Penrice*, archdeacon of *Middlesex*, to swear in *Tucker* and *Kendal* as churchwardens, they having been chosen by the parishioners. He returned that he had sworn in *Tucker* and *Wood* as the churchwardens, they having been elected by the vestry, and upon that the action was brought for a false return. The verdict was for the defendant. Secondly, a copy of a judgment in 1744, feigned issue between *Ferrers* and *Tind*, which appeared by the record to have been tried at bar; the issue was, whether there then was, and from time to time, &c. there had been, a vestry of the said parish, composed of a certain number of persons, parishioners of the said parish for the time being, &c. was a verdict in favour of the affirmative of the issue. Thirdly, a judgment in prohibition in a case of *Berry v. Banner* (a), where the issue raised upon the pleadings was, Whether the churchwarden ought to be sworn in by a select vestry or by the parishioners, and there was a verdict for the plaintiff, the election by the select vestry. The plaintiff then relied upon several acts of parliament in which the select vestry of the parish of *St. Martin in the Fields* was recognized as an existing body. One of them, passed in 1532, entitled, "An act for erecting a new parish, to be called the parish of *St. James*, within the liberty of *Westminster*," enacted, "that the vestrymen of any six or more of them, should exercise the like power and authority in relating the affairs of the parish of *St. James* as the vestrymen of the parish of *St. Martin* have and exercise in reference *to that parish." Another, passed in the 10th *Anne*, entitled, "An act for enlarging the time given to the commissioners for building fifty new churches, &c. authorized the commissioners to name a convenient number of persons to be such new parish, who shall exercise the like powers and authorities for relating the affairs of such new parish as the vestrymen of the present parish which such new parish or the greater part thereof shall be taken, now exercise; and if there be no select vestry in each present parish, the

(a) *Hilary* term, 34 G. 3. *Peake*, N. P. C. 156.

vestrymen of the parish of *St. Martin in the Fields*, within the liberty of the city of *Westminster*, in the county of *Middlesex*, now have or exercise."

Lord *Tenterden*, C. J., left it to the jury to say, upon the evidence, first, whether the parish had existed from time immemorial, and if they thought it had, then they were to consider next, whether the select vestry had existed from time immemorial. If they thought there had been such select vestry from time immemorial, they must find for the plaintiff, otherwise for the defendant. The jury having found a verdict for the plaintiff, Sir *James Scarlett*, in *Trinity* term 1827, obtained a rule nisi for a new trial, or for a consultation, notwithstanding the verdict, on the ground that the custom stated on the record, and proved at the trial, was bad for uncertainty, inasmuch as it did not define the precise number of which the select vestry must consist; and he cited *Dent v. Coates* (a) and *Broadbent v. Wilks* (b), to show that the custom was void for uncertainty. *770] And, secondly, assuming that the custom *was good, still it was clear, from the evidence, that it had not existed from time immemorial, because the faculty which had been obtained in 1662, and acted upon by the parishioners ever since, operated as an abandonment of the custom.

The *Solicitor-General*, *Taunton*, *Gurney*, and *Barnewall* now showed cause. The custom or prescription set out on the record, and proved at the trial, is not invalid in law on the ground that the precise number of which the select vestry is to consist is not defined by it. There is little to be found in the books on this subject. A select vestry is a body (distinct from the parishioners at large) to whom the conduct of the parish affairs is committed by the parishioners. It is not essential, therefore, to such a body that it should always consist of any precise definite number. The objection assumes that it is a rule of universal application that the number of the select vestry must be certain. If any case, therefore, can be stated in which a custom or prescription for a select vestry consisting from time to time of an uncertain number would be good, it will show that the rule insisted upon cannot prevail. Now, suppose a custom that all the parishioners who pay a certain annual rent should compose a select vestry. The precise number of the vestry would then vary from time to time; but as such a custom would mark the distinction between those who are and those who are not admissible to the vestry, and would throw the administration of the affairs of the parish into the hands of persons who would be most likely to administer them faithfully and impartially, it would clearly, therefore, be a good custom or prescription; and if so, then the rule insisted upon cannot *prevail universally. The societies of the inns of 771] court furnish an instance of a select body uncertain in number, which has existed from the earliest times. The conduct of the affairs of those societies is committed to certain persons who are called masters of the bench (as the members of this select vestry in ancient times were called masters of the parish). They consist of no definite number, and they have a power of electing others. There can be no doubt that the benchers of these societies are a legal body, and they bear a very strong analogy to a select vestry. So where by charter the mayor of a town corporate is elected from the burgesses, and the person who has filled the office of mayor is to fall back, and become a common councilman, the numbers of the common council would vary in some degree from time to time. But it is more reasonable that the number of persons who are to compose a select vestry, which has existed from time immemorial, should vary with the population of the parish, rather than that it should be fixed; for the number of persons reasonably required in the time of *Richard the First* to manage the affairs of the parish of *St. Martin in the Fields*, when the population was probably very small, would be very ill fitted to conduct those affairs when the population, and the consequent duties to be performed by the vestrymen, have so greatly increased. It is not disputed that the number of the select

(a) 2 Str. 1145.

(b) *Willes*, 360.

vestry must be reasonable with reference to the population of the parish, and the importance of the trusts committed to the members of the vestrymen; but there is no ground for saying in this case that a number of forty-nine is unreasonable. There are many authorities to show that a custom is void for uncertainty; but in such cases the uncertainty has been made the custom unreasonable. In this case it is more reasonable that the number of the select vestry should be uncertain than fixed. The authorities therefore, do not apply. In the case of *Dent v. Coates* (a) the custom was, that whenever twenty-four parishioners, or the major part of the parish, and appointed how much should be raised throughout the whole parish, in proportion thereof had been used to be raised by the hamlet of *Romney*, their separate churchwarden, and paid over to the rest. That custom is reasonable upon two grounds; first, because any twenty-four parishioners constituting a select body, might tax the whole parish; and, secondly, as a proportion of the burdens laid upon the whole parish were to be raised by a particular township, reason and justice required that that proportion should be defined. In *Viner's Abridgment*, tit. *Custom*, the case of *Batt v. Watkinson* (c) is cited to show that such custom shall be void for want of certainty in case of such grant would be void for want of certainty; but the editor has quæred this, for there may be a custom which may not begin by a grant. The present case furnishes an instance of such a custom, for the select vestry must, in the first instance, have derived its origin, not from a grant to the members of it, but from a delegation of authority from a body of the parishioners to the members of such vestry to manage the affairs of the parish. *Gibson's Codez*, 246, cited in *Burn's Ecc. Law*, vol. i. The case of *Batt v. Watkinson* (c) is an authority to show that a select vestry may be created by prescription; and where a select vestry has been proved (as it has in this case) to have existed from very early times, every presumption ought to be made in favour of its legal commencement. It may, therefore, be presumed that the parishioners, in the first instance, delegated to the members of the select vestry the power, not only of managing the affairs of the parish, but of increasing or diminishing their own numbers at their discretion, according to the nature and quantity of the duties which they might have to perform. This qualification, that the members should always be parishioners, and frequently as such, that they should always have an interest that the affairs of the parish should be properly conducted, and as vestrymen, that the members should be adequate to the duties cast upon them from time to time. It is presumed (if necessary) in favour of such long-continued usage, that the select vestry delegated to them was subject to this limitation, that the number of vestrymen should never exceed the greatest number, nor be less than the smallest number, which, by the entries in the books, appeared to have composed the select vestry at different times. The case of *Corporations* (d) affords a very recent instance of such a presumption having been made. The charters of the corporations prescribed that the election of mayors should be by the burgesses or alty or burgesses; but the ancient and usual mode of election had been by a select body, and it was decided that such election was good in law; and there laid down that as the corporation had the power of making laws for the better government of their body, it might be presumed that they had the power to make an ordinance sanctioning the ancient mode of election, such reverend respect (Lord Coke adds) "the law attributes to the ancient and continual allowance, though it begin within the time of our memory." An act of parliament may even be presumed in favour of such ancient and long-continued usage, *Farrar's* case, cited in *Lady St. Llewellyn* (e), *Mayor of Hull v. Horner* (f), *Pickering v. Lord St.*

(a) 2 Str. 1145.

(c) Lutw. 1027.

(e) Skinner, 78.

(g) 2 Ves. jun. 272.

(b) Sir John Davis's Reports, 34.

(d) 4 Rep. 77 b.

(f) Cowper, 102.

Chalmers v. Bradley (a). It is true that the issue upon the record supposes a prescriptive right, and would not be supported by proof of a select vestry founded on an act of parliament. But if such an act of parliament ought to be presumed, a new trial ought not to be granted.

Secondly, the acceptance of the faculty in 1662 by the then vestry, does not operate as an abandonment of the antecedent right, because the members of the then vestry had no authority to annihilate all the rights of the parish by accepting a new constitution. If once, in point of law, the government of the parish was vested in a select vestry, it is as much the right of the parishioners to be governed by such a vestry as in ordinary cases it is that it should be governed by the parishioners at large. The acceptance by a corporate body of a new charter, varying in some particulars from those by which the corporation had been previously governed, does not necessarily abrogate all antecedent rights, and the acceptance of a void charter clearly would not abrogate those rights. So the acceptance of a void lease does not work a surrender by operation of law of a prior valid lease, *Roe d. Berkeley v. The Archbishop of York* (b).

*775] But the object of the faculty was not to destroy the select vestry, but to purify it. In the case of *Berry v. Banner* (c) the jury found for the plaintiff, and there Lord *Kenyon* said, that the faculty proprio vigore was a dead letter, though it was evidence of the antecedent right. Besides, there are various acts of parliament, which recognize the select vestry of *St. Martin in the Fields* as a lawful body, and the statute of *Anne* for building the fifty new churches recognizes it as existing at that time, and it then consisted of forty-nine members.

Scarletti, Brougham, and Joshua Evans contra. A custom that a select vestry, the members of which are selected from time to time by the parishioners, shall always consist of an indefinite number, may be good. But a custom that an uncertain and indefinite body shall elect each other, and be the sole judges of what number their own body shall consist, is an unreasonable custom, and, therefore, void. It is possible that their number may be reduced to one or two persons, and it surely would be unreasonable that the affairs of a populous parish should be administered by one or two persons, *Com. Dig. tit. Prescription and Custom. Broadbent v. Wilks* (d), and the case of *Tanistry* (e), show that a prescription or custom must be both reasonable and certain. In *Batt v. Watkinson* (f), the select vestry consisted of a definite number, twenty-four. It may not be necessary that the precise number of which the vestry is to consist at all times should be defined by the custom; but to make such a custom

*776] reasonable, it should, at all events, fix a minimum. An act of *parliament, even if it was presumed in this case, would not prove the issue stated upon the record, which supposes the select vestry to have existed from time immemorial; but an act of parliament cannot be presumed in order to support a custom uncertain and unreasonable; for if it could, it might have been presumed in every case to support customs which were held to be bad, because unreasonable, as in *Selby v. Robinson* (g), *Fitch v. Rawling* (h), and *Beckwith v. Harding* (i). The benchers of the inns of Court have been referred to as a select body, uncertain in number; but they bear no analogy to a select vestry. The societies themselves are voluntary societies, the members of which, like the partners in a trading concern, may commit the management of their affairs to any number of directors or trustees that they think proper. Then it is said, too, that the common council in some corporations are an indefinite body; but corporations are constituted by the crown, who, by the terms of the charter, may direct that the common council shall be of a number either certain or uncertain. Secondly, this custom or prescription has been broken or dea-

(a) 1 Jac. & W. 31.

(d) *Wilks*, 360.

(g) 2 T. R. 758.

(b) 6 East, 86.

(e) *Davis's Reports*, 32.

(h) 2 H. Blackst. 393.

(c) *Peake's N. P. C.* 156.

(f) *Lutw.* 1027.

(i) 1 B. & A. 508.

troyed by the faculty; for in 1662 the faculty was accepted by the vestry, and from that time they have acted under it. Now a prescription must not only have begun beyond the time of legal memory, but it must have continued without interruption down to the present time. It is true, that in *Roe on the demise of The Earl of Berkeley v. The Archbishop of York* (a), the acceptance of a void lease was held not to be a surrender by operation of law of a concurrent valid lease; but that does not apply to the present *case. Here the very existence of the select vestry depends on custom or prescription. It is [*777 of the very essence of such custom or prescription that the usage should be continuous down to the very time when it is relied upon. The prescription stated upon this record assumes that from the time of *Richard the First* there always has existed in the parish of *St. Martin in the Fields* a select vestry, consisting of an indefinite and uncertain number. A select vestry, therefore, constituted in any other manner, is not consistent with that custom or prescription. Now it was in evidence, that before 1662 the vestry did not consist of the number of forty-nine. From that period it has consisted of that number, which was specified in the faculty. The custom, therefore, has been departed from and discontinued, and, consequently, the prescription is broken.

Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court. This case was before the Court on a motion for a new trial of certain issues directed by the Court. The principal issue (the others being in fact dependent upon this) was, Whether in the parish of *St. Martin in the Fields* there has been from time immemorial a vestry composed of select persons, parishioners and inhabitants of that parish for the time being, or not? The cause was tried before me; the jury found the affirmative. Considering this as a question whether this parish has had a select vestry, or whether the inhabitants generally have met in vestry, this is the third verdict finding a select vestry. The first was upon issues directed by this Court in the 18 G. 2, and tried at the bar of the Court; and it was consequential to a *trial in an action for a false return to a [*778 mandamus, at which, according to all probability, the same question had been tried, and the same verdict found, although the form of the record is not such as to show this with entire certainty. The second was in the year 1792, in a proceeding in prohibition, in which questions of law might have been raised and put on the record to be taken to the highest tribunal of the country. There are also acts of parliament relating to this parish, referring matters to the authority of the select vestry, and, consequently, recognizing the existence of such a vestry; and there was a statute in the reign of Queen Anne relating to the new churches built at that time, appointing the vestry of this parish of *St. Martin's*, as it then existed in practice, as a model to be followed by such of the new parishes as had not select vestries otherwise constituted. It was said, however, and said truly, that the select vestry of this parish, as it existed at the date of those acts of parliament, is not precisely that vestry which *may* exist according to the custom found at the present trial. And a similar remark was made as to the two former trials; whether correctly as applicable to the first of them only may be doubted; as applicable to the opinion given by Lord Kenyon at the trial in 1792, on the form of the issue as then presented, and to the evidence and verdict as conformable to that opinion, the remark is undoubtedly just. At the trial before Lord Kenyon, the form of the issue was treated as a question on a vestry composed of some definite number of persons, whereas, the present record raises no such question, and the jury were so informed by me at the trial, and the verdict must be considered as establishing a select vestry not necessarily composed of any definite *number of persons. And this has given rise to the objections on [*779 which the motion for a new trial was founded. The objections were

two; first, that a custom for a select vestry of an indefinite number of persons, continued by election of new members made by itself, and not by the parish at large, was void in law. And, secondly, that the custom in this parish appeared by the evidence to have been discontinued and abandoned, and therefore lost and gone. It is obvious that the first objection does not properly belong to a new trial; but as the issues in this case were directed by the Court, with a view to a proceeding pending in the Court, it properly belongs to that view of the case; and, therefore, the manner of bringing it forward and discussing it is not material. In support of the first objection, it was very strenuously urged, that unless a number be fixed by the custom, below which the vestry must not fall, a vestry filling up its numbers at its own choice may allow itself to be reduced to two or three only, exclusive of the vicar and churchwardens, and thereby the whole government of the parish, as far as relates to the church and its management, and the churchwardens' accounts and other matters of that kind, may fall into the hands of a number of persons much too small to secure reasonable and proper management, and due attention to the interest of the inhabitants of the parish.

It was also objected, that if the number be not limited, the vestry may consist of too many persons, even of the whole parish. This point, however, was little urged, and there is obviously no weight in it; the great complaint against select vestries being, that they consist not of too many persons, but of too few: and if
 *780] a maximum had been fixed by custom in the very remote times to *which custom must go back, the number that might have been proper in those times might, and properly would, be too small for the great increase of population that has gradually taken place. We are also of opinion, that a custom of this kind is not void in law for want of a minimum. But although we are of this opinion, as a matter of law, I would by no means have it understood that we think the evidence or the verdict in the present cause establishes the fact, that there may not be a minimum in this parish. It will be quite consistent with the verdict, and not inconsistent with the evidence, that the number should never be less than the lowest that can be found in any of the lists, and this I believe will, in no list, be found so few as twelve. The form of the issue raised no question of this kind. Now, although no numerical minimum be fixed by the custom, it by no means follows as a consequence, that the number may be reduced to two or three as the objection supposes: the law may consider it as part of such a custom as the present, that there shall be a reasonable number. I am aware that this may lead to questions what shall be a reasonable number. Such a question, if raised, would be to be decided with reference to long-established usage and to the population of the parish. That number, which might not be too small and not unreasonable three or four centuries ago, in a parish in which there might not be more than a dozen substantial householders or even fewer, might not be reasonable on a change of circumstances, when, by covering fields with houses, the number might be increased more than a hundred-fold. And whatever may be thought of the degree of influence that the love of power exercises on human
 *791] conduct, I believe the love of ease does not exercise less; and *as no instance is known in practice, in which two or three persons have gratuitously taken upon themselves the whole burthen of administering such of the affairs of a populous parish as belong to a vestry, I do not think there is any reason to provide in theory against such an occurrence, by requiring a definite minimum as essential to the validity of a custom. The question in this case, as in many others, turns upon the balance of convenience. We think it more convenient that a custom of this nature should leave the number undefined, capable of being regulated by reason, and varying with the changes that time produces, than that there should be any fixed point, from or below which no change of circumstances should allow a departure. We therefore think the custom good in law.

The second objection, viz. that the custom in this parish appeared, by the evidence, to be discontinued and abandoned, and therefore lost and gone, is a

question properly suited to the motion for a new trial. It appears by evidence, that in the year 1662 a faculty was obtained from the Bishop of London naming forty-nine persons, together with the vicar and churchwardens select vestry, and appointing that number in future to be kept up by election to be made by ten at least, together with the vicar and churchwardens. In the year 1673, this number of ten was by another faculty reduced to seven. These faculties have since been constantly acted upon, have been considered as binding the parish, and treated as a legal foundation of the practice that has prevailed. It is clear that these faculties have no validity in law. As to the constitution of the first vestry thereby appointed, it appears that ten out of fourteen vestrymen, exclusive of the vicar and churchwardens, who were present at the vestry holden immediately before the promulgation of the first faculty, are part of the forty-nine named in that faculty. In the vestry, as appointed by the faculty, and as it has since continued, inconsistent with the vestry previously existing by the custom, there was more weight in this objection than can at present be given to it. It is not consistent with a custom fixing no definite number, that, for a certain period, a vestry should be considered as consisting of a definite number. If there be any reasonable number, forty-nine may be thought to be that number, and may be considered as the proper number. Suppose a vestry, consisting of twelve or eighteen persons, should have come to a resolution to increase the number to forty-nine, and should do so, and recommend that number to be kept up in future, and that this resolution and recommendation should be followed in practice for a century and a half, nothing inconsistent with the ancient usage would in fact be done. The resolution would have no binding force, might be departed from, and a greater or less number chosen, if the court should think fit. And the case would be the same, even if it should be proved that during that time the vestry and the parishioners had thought the resolution binding upon them, and had acted under that opinion. And this is precisely the case of these faculties, and of the opinion and usage that have since prevailed. I have already observed, that ten members of the old vestry became members of the new; and, therefore, the old vestry, or at least a majority thereof, may be considered as having acquiesced in the new. And it is as competent for a vestry to increase or diminish their number, as if no faculty had ever existed. And as the practice is not inconsistent with the custom, we are of opinion that the custom has not been destroyed, but still remains as a part of the parish. The rule for a new trial must, therefore, be discharged.

Rule discharged.

HOWELL v. WILKINS. Feb. 12.

An affidavit to hold to bail, purporting to be sworn "at the King's Bench office, Inner Temple, before T. C.," was held to be sufficient.

In this case the affidavit to hold to bail appeared by the jurat to have been sworn at the King's Bench Office, Inner Temple, London, the 7th Feb. 1828, before *Thomas Chambre*. A rule nisi had been obtained by *Reade* for discharging the defendant out of the custody of the sheriff on filing a writ of habeas corpus, on the ground that it did not appear that the affidavit of debt was sworn before any person who had authority to take affidavits, and he cited *Molloy v. Poland* (a), to show that an affidavit of debt not entitled in any court, and

with the words "by the court" written at the bottom of the jurat, was not sufficient.

Sir *James Scarlett* and *Follett* now showed cause, and contended that it was sufficient if there was any thing on the face of the affidavit to show that it was sworn before an officer who had power to take affidavits. Now it appeared by the jurat, that it had been sworn at the King's Bench Office, *London*, and it *784] must be *intended that *Thomas Chambre*, who certified that fact, was a person attending there and duly authorized to take affidavits. In *Kennett and Avon Canal Company v. Jones (a)*, it was held to be no objection to an affidavit to hold to bail, that it appeared to have been taken before *A. B.*, a commissioner, &c. without adding "of the court of *B. R.*;" and in *Bland v. Drake (b)*, an affidavit not entitled in the court, but purporting at the foot to have been sworn before *J. Y.*, deputy filicer, was held to be sufficient.

Reader, contra, on the authority of the case cited, contended that it did not appear by the affidavit that *Thomas Chambre* was an officer of this Court.

Lord TENTERDEN, C. J. This affidavit appears to have been sworn in the King's Bench Office, before *Thomas Chambre*. I think it must be understood, and we are bound to take notice, that *Thomas Chambre* was an officer of this Court, attending at the King's Bench Office, and authorized to take affidavits.

Rule discharged.

(a) 7 T. R. 451.

(b) 1 Chitty's Rep. 165.

*785] *REX v. The Inhabitants of the Parish of All Saints in the Town and County of the Town of Southampton. (a).

Where an examination of a soldier, taken before two magistrates, was tendered in evidence to prove his settlement, but it did not appear by the examination itself, or by other proof, that the soldier, at the time when he was examined, was quartered in the place where the justices had jurisdiction: Held, that it was not admissible.

UPON an appeal against an order of two of the justices of the peace for the county of *Hants*, whereby *Elizabeth Carden* was removed from the parish of *Romsey Extra*, in the said county of *Hants*, to the parish of *All Saints*, in the town and county of the town of *Southampton*, the sessions confirmed the order, subject to the opinion of this Court on the following case:

Elizabeth Carden was the widow of one *Richard Roe Carden* deceased, and in order to prove the settlement of the said *Richard Roe Carden* the respondent parish offered in evidence, and duly proved, the paper writing following:

"Town of *Romsey Infra*, in the county of *Southampton*.—The examination of *Richard Roe Carden*, a private soldier in his Majesty's 25th regiment of foot, taken on oath before us, two of his Majesty's justices of the peace for the said town, the 6th day of *April* 1782, touching the place of his last legal settlement.

The said examinant on his oath saith, that he was born in the parish of *786] *Romsey Infra* aforesaid, as he hath *heard and verily believes, where his father was a settled parishioner. That about fifteen years ago last har-

(a) The Judges of this court sat, as on former occasions, from *Wednesday*, the 13th day of *February*, to *Thursday*, the 21st day of *February* inclusive. During that period, this and the following cases were argued and determined.

vest, he hired himself as a covenant servant for a year to *David Pullan* parish of *All Saints*, in the town and county of the town of *Southampton* at the wages of 4*l.*, and in consequence thereof he entered into the service of said *David Pullan*, and served him there till about *Christmas* following; this examinant went with his master and his family to *London*, where he lived with him about three months, when he returned with his said master to the parish of *All Saints*, and continued in his said master's service there during the remainder of the said year, and at the expiration thereof he received his wages. And that he hath never done any act since to his knowledge to gain a settlement, and that he hath a wife named *Elizabeth*, and a son named *Moses*, aged two years and upwards.

(Signed) "RICHARD ROE CA"

"Sworn the day and year above mentioned, before us,

(Signed) "WILLIAM BRIGGS, M"

"THOMAS DAWKIN."

The appellant parish objected to the Court's receiving this paper, as it did not appear on the face of it, that at the time the examination was made the soldier was quartered in the town of *Romsey Infra*, and therefore a due examination within the provision and meaning of the mutiny act. The Court, however, found the paper to be a due examination under the mutiny act, and thereupon confirmed the order.

*The question for the opinion of the Court is, whether such paper was a due examination within the provisions of the mutiny act or not. If it was, then the original order and order of sessions to stand; but if not, the said orders to be quashed.

Dampier in support of the order of sessions. If it can be shown that the examination in question was taken under the mutiny act, it was admissible in evidence. Now the 22 *G. 3, c. 4*, the mutiny act in force at the time the examination was taken, gives power to two justices to take the examination, provided the soldier has a wife or child. It appears on the face of this examination that the party was a soldier, and had a wife and child, and it was subscribed by two justices who administered the oath. It must, therefore, have been a proper examination under the statute. It will be objected that it was not shown that the soldier was quartered at the place where he was examined, but the document is not more than five years old; parol evidence of the fact could not therefore be expected. In the absence of any evidence to the contrary, it must be presumed that the soldier was in quarters with his regiment, and that the magistrates acted properly. If this were a conviction, it might, perhaps, be insufficient; but proceedings of this nature have never been construed so strictly. The dissenting opinion of Lord *Ellenborough* in *Rex v. Austrey* (a), that the authority of magistrates must appear upon the face of their proceedings, was not upon a point before the Court; besides, it was used with reference to orders and other proceedings of that nature, which third persons are bound at their peril to obey.

Carter and *Poulter* contra. In several cases the objection now made to receiving this examination in evidence has been suggested, and in each case the examination was rejected, although not upon that precise ground. See *Clayton le Moors* (b), *Rex v. Warley* (c), *Rex v. Bilton* (d). In all these cases the magistrates in any way analogous to this, their jurisdiction must appear on the face of them. Many orders of removal and orders for relief of soldiers have been quashed on the ground that the jurisdiction did not appear. See *Chilvers Cotton* (e), *Rex v. Holme* (f), *Rex v. Stoke Ursey* (g), *Rex v. Bilton* (h); and the same rule has been applied to commitments, *Rex v. Bilton* (i).

(a) *Phill. on Ev.* 471.

(d) 1 *East*, 14.

(g) 1 *Str.* 9.

(b) 5 *T. R.* 704.

(e) 8 *T. R.* 178.

(h) 1 *Str.* 9.

(c) 6 *T. R.* 534.

(f) 11 *East*, 380.

(i) 3 *Burr.* 1636.

Rex v. York (a); and to orders for payment of tithes or of wages, *Rex v. Funness* (b), *Rex v. Corbett* (c), *Rex v. Helling* (d); and to orders for dismissing servants from their service, *Rex v. Hulcott* (e). Here the magistrates had not power to examine *any* soldier touching the place of his settlement, but only such as were quartered within the place for which they were justices. The examination in question should therefore have stated that the party was quartered within the town of *Southampton*.

*789] *BAXLEY, J. I am of opinion that the examination given in evidence in this case was not properly admissible, and that the order of sessions must be quashed. The mutiny act 22 G. 3, gave to the justices a special power to examine, without which the examination would have been wholly extrajudicial. They had no jurisdiction except in the case of a soldier quartered in the place for which they were justices; it was therefore necessary to make out either aliunde or by the examination itself that the party examined was a soldier, and at that time quartered within that place. The case of the *Banbury Peerage* (f) is expressly in point. An attempt was made to prove a reputation as to pedigree by a bill and answer in equity, and depositions which purported to be made by servants in the family; and one question proposed by the House of Lords to the Judges was, whether those depositions were evidence that the parties making them were servants in the family, or whether that fact must be proved aliunde; and they held that it must be so proved. In the present case I am inclined to think it should have been proved aliunde that the party examined was a soldier, otherwise the examination must be considered as proof of the fact, which gave the justices jurisdiction; and, at all events, it should have appeared on the face of the examination that he was quartered at *Southampton*. In the case of *Regina v. Gouche* (g) it was held that jurisdiction shall be presumed unless the contrary appears; but that was overruled in *Rex v. Helling* (h), and the latter opinion was confirmed by Lord *Kenyon* in *Rex v. Hulcott* (i), after considering all the authorities. In *principle I cannot find any *790] distinction between this case and those relating to orders; in the latter the jurisdiction must appear on the face of the order, and I think it should in this case also; and for want of it, the examination ought not to have been received in evidence.

HOLROYD, J. The rule, that in inferior courts and proceedings by magistrates the maxim "*omnia presumuntur rite esse acta*" does not apply to give jurisdiction, has never been questioned. Here, then, the jurisdiction should, at all events, have appeared on the face of the examination, supposing proof of it aliunde not to have been necessary.

Order of sessions quashed.

(a) 5 Burr. 2684.
(d) 1 Str. 7.
(g) 2 Salk. 441.

(b) 1 Str. 263.
(e) 6 T.R. 583.
(h) 1 Str. 7.

(c) 3 Salk. 261.
(f) 2 Selw. N.P. 743.
(i) 6 T.R. 583.

REX v. The Inhabitants of Kibworth Harcourt.

Where a pauper *bonâ fide* hired a house and garden in A. for a year at the rent of 10*l.*, and occupied it for a year, and the whole rent was paid to the landlord, but not by the pauper: Held, that he nevertheless gained a settlement in A., inasmuch as the statute 6 G. 4, c. 57, did not require that the rent should be paid by him.

Two justices, by their order, removed *James Asher*, with his wife and their five children, from the township of *Kibworth Beauchamp* to the township of

Kibworth Harcourt, both in the county of *Leicester*. The sessions, confirmed the order, subject to the opinion of the Court of King's Bench in the following case :

After proof of a *prima facie* settlement in the appellant township it was found that about *Lady-day* 1825, the pauper took of one *Thomas Bradshaw* a house and garden, situated in the township of *Kibworth Beauchamp*, at the rent of 10*l.* for a year, to commence at the *ensuing *Michaelmas*. The house and garden were then in the occupation of one *Cooper*, whose term of years then expired at *Michaelmas*; but Mr. *Bradshaw* said he should require *Cooper* to stand as tenant till *Michaelmas*, and should expect the rent of the premises from *Matthew Waterfield*, who was tenant of other lands to Mr. *Bradshaw*, and it should be all put in one receipt. The pauper was let into possession immediately by *Cooper*, and paid rent up to *Michaelmas* to him (*Cooper*), at which time he continued to occupy the premises, and paid rent, as after *Michaelmas* until *Michaelmas* 1826. Early in the pauper's tenancy, *Matthew Waterfield* then being churchwarden of the township of *Kibworth Beauchamp*, called on the pauper, and represented to him that *Bradshaw* had let the pauper's premises together with other lands, to himself (*Waterfield*), and that he (the pauper) thenceforward to pay the rent quarterly to him. At the same time *Waterfield* told the pauper that he should make a reduction in his rent of 8*s.* which reduction the pauper assented, and a rent of 9*l.* 12*s.* was agreed to be paid by the pauper to *Waterfield*, in the course of that year, by four quarterly payments, as follows, viz. the first two payments to *Matthew Waterfield*, the last two, after the death of *Matthew*, to *John Waterfield*, his son and successor in the farm. At the end of the year the sum of 55*l.* was paid by the pauper to the landlord, *Bradshaw*, which sum included the pauper's rent of the house and garden for the year first completed, and the residue was composed of the rent of the other land occupied by the pauper. *Bradshaw* returned 5*l.* to *Waterfield*, and gave him one receipt for the same. It further appeared, that *John Waterfield* was *reimbursed out of the parish funds for the sum of 8*s.* paid by him to the landlord, over and above the 9*l.* 12*s.* received from the pauper. The court of quarter sessions found that there was fraud in this case on the part of the township of *Beauchamp*, but that neither the landlord nor the pauper were privy to the fraud.

Reader and *Humfrey* in support of the order of sessions. The case was upon the words of the statute 6 *G.* 4, *c.* 57, which makes it necessary to the gaining of a settlement by renting a tenement, that it should be bona fide rented by the pauper, at and for the sum of 10*l.* a year at the least; and that the premises should be occupied under such yearly hiring, and the rent paid for one whole year at the least. It is stated in the case, that the pauper took premises at the rent of 10*l.* The first thing required by the statute was, therefore, complied with, but he did not occupy it for a year under that hiring. [*Bayley, J.* said that the gain made by the landlord could not be destroyed by that which was paid to the pauper. *Waterfield*.] The landlord's act of receiving the rent from *Waterfield* for the gross sum for the premises in question, together with others, raises a presumption that the landlord had agreed to take him as tenant; and the case was decided in favour of the pauper, who assented to hold of *Waterfield* at the reduced rent of 9*l.* 12*s.* was the whole amount of rent ever paid by the pauper.

Dwarris and *Hildyard*, contra, were stopped by the Court.

BAYLEY, J. If the stat. 6 *G.* 4, *c.* 57, had required that the rent should be paid by the pauper, there would have *been some difficulty in overcoming the fraud found by the sessions. But the requisites mentioned in that statute are, that the premises should be bona fide rented by the pauper for the sum of 10*l.* a year at the least, for the term of one whole year, and that the premises should be occupied under such yearly hiring, and the rent actually paid for one year at the least. It does not require that the rent should be paid by

Now the facts stated in the case show that the premises were rented for one whole year, at the rent of 10*l.*, and that that rent was actually paid for one whole year. I also think, that the pauper occupied the premises for one whole year, under that hiring; for nothing that was done by *Waterfield* could have the effect of altering the original tenancy created between the pauper and the owner of the premises. The pauper remained tenant under the original taking, and the landlord might have distrained upon him for the rent of 10*l.*, if it had been in arrear. I therefore think that the settlement was gained in *Kibworth Beauchamp*, and the orders of removal and confirmation must be quashed.

HOLROYD, J., concurred.

Both orders quashed.

*794]

*HOLDSWORTH and another v. WISE et al.

Where a ship, being in a very leaky state, was deserted at sea by her crew, acting bona fide for the preservation of their lives, and was on the following day, found and taken possession of by the crew of another vessel, who succeeded in taking her into port, where she was repaired, and afterwards sent to this country, but subject to claims for salvage and repairs equal to or exceeding her value: Held, that the owners having given notice of abandonment before they received any tidings of the ship's safety, were entitled to recover against the underwriters as for a total loss.

ASSUMPTION on a policy of assurance on the ship *Westbury*, valued at 1800*l.*, at and from *Belfast* to her port or ports of loading in *British America* (river *St. Lawrence* excepted), during her stay there, and back to a port of discharge in the United Kingdom, between *Falmouth* and *Greenock*, on the west side of *England* and *Scotland*, or a safe port in *Ireland*; to call at *Cork* for orders. Averment, that the vessel sailed from *Belfast* to *St. Andrew's*, *New Brunswick*, being a port in *British America*, not on the river *St. Lawrence*, and afterwards departed thence back to her port of discharge, to wit, *Valentia*, being a safe port in *Ireland*; and on her homeward voyage was totally lost by perils of the sea. Plea, the general issue. At the trial before *Hullock*, B., at the *Lancaster Summer assizes* 1827, it appeared, that the vessel sailed from *Belfast*, in ballast, on the 23d of *June* 1826, at which time she was seaworthy. She arrived at *St. Andrew's* on the 22d of *August*, and sailed thence, on her homeward voyage, on the 16th of *September*, laden with timber. At that time the vessel made eight or ten inches of water an hour, and the crew were obliged to pump her out every two hours. She continued in the same state until the 20th of *September*, when she encountered a gale of wind, by which she was much strained, and afterwards was found to be so leaky that the crew thought it necessary to abandon her. On the 23d they hoisted a signal of *dis-
*795] tress, and a vessel called the *Columbia* seeing it, bore down to her assistance, and took the crew on board. No attempt was made by the crew of the *Columbia* to save the *Westbury*, but they sailed to *Boston*, and there landed the crew of the *Westbury*. On the 6th of *November* the plaintiffs gave notice of abandonment to the agent of the underwriters at *Liverpool*. On the 24th of *September*, the day after the *Westbury* was deserted by her crew, she was found by an *American* vessel called the *Bolivar*, and the captain put some men on board, who succeeded in navigating her to *New York*, where she arrived on the 14th of *October*, and intelligence of her arrival at that port was received at *Liverpool* on the 16th of *November*. The *Westbury*, on her arrival at *New York*, was taken possession of by the *British* consul, and under his sanction was repaired by Messrs. *Barclay*, agents for *Lloyd's* at *New York*

The expense of her repairs, together with salvage, amounted to 1 bottomry bond was granted by the captain (who was appointed by consul), to Messrs. *Barclay* for 850*l*. She then sailed for *Liverpool*, her arrival there, possession of her was taken by Messrs. *Barclay*, claiming title under the bottomry bond and a right to be reimbursed expenses incurred, making their demand above 1200*l*. The vessel further damage in the river *Mersey*, the repairs whereof were estimated. The learned Judge left it to the jury to say, whether the ship was damaged when she sailed from *Belfast*. Whether the captain and crew acted in deserting the ship, and whether notice of abandonment was given in reasonable time? The jury answered all the questions in the affirmative, and found for the plaintiffs for a total *loss. In *Michaelmas* term a writ of *nisi* for a new trial was obtained on two grounds: viz. that the misconduct of the captain in sailing from *Boston* with a vessel making ten inches per hour exonerated the underwriters, and that the loss was at all events an average, and not a total loss.

Pollock and *Parke* showed cause. The jury found that the ship was not worthy at the commencement of the voyage; her condition when she sailed was therefore immaterial. Supposing the captain to have acted imprudently in that port with his ship in such a condition as to require pumping out for several hours, still that was nothing more than negligence on his part, which would discharge the underwriters, *Busk v. Royal Exchange Assurance Co. v. Pentland (b)*. [*Bayley, J. Walker v. Maitland (c)* is to the same effect.] Several facts applicable to the second point are perfectly clear. The ship was deserted by the crew acting *bonâ fide* for their own preservation. The abandonment was given before the news of her safety had been received. When she arrived at *Liverpool* she was subject to a charge of 1200*l* for the fresh damage in the river to the extent of 858*l*. The declaration stated that the subject-matter of the insurance has been totally lost to the plaintiff, and that it has become of no use or value to him. Did, then, the desertion of the ship in consequence of perils of the sea produce a total loss? At the time, no doubt, the loss was total. Has the ship ever been restored to the assured? She has not, in fact, been restored at *all. The ship is still in possession of the salvors; but actual restoration of the ship in specie, if not beneficial, would not suffice to change the character of the loss, *M'Iver v. Henderson (d)*. The case of *Thornely v. Brougham and Starkie* was very different; there the vessel was never entirely deserted, and was at any time a total loss; the vessel was always in the possession of the salvors, acting for the benefit of the original owners.

Brougham and *Starkie* contra. It must be admitted that the ship was not worthy when she sailed for *Boston*, so that the implied warranty of seaworthiness was fulfilled; but there was another implied warranty, viz. that the ship should be a captain and crew of competent skill, *Tait v. Levi (f)*. *Thornely v. Hodgson (g)*, *Lawrence, J.*, says, "I do not know that it was a mistake that a loss arising from a mistake of the captain was a loss within the policy." A policy of insurance on a ship must, in like manner, be subject to this qualification, that the subject-matter of the insurance shall not be exposed to any unreasonable degree of risk. Here the vessel must have been grossly ignorant, and exposed the ship to a very unreasonable danger by sailing from *Boston* when his ship was so leaky as to make ten inches of water an hour. Then as to the second point, *Thornely v. Brougham* is a strong authority for the defendants. There the vessel was abandoned by the crew, but taken possession of on the same day by other persons.

(a) 2 B. & A. 73.

(d) 4 M. & S. 576.

(g) 6 T. R. 659.

(b) 7 B. & C. 219.

(c) 2 B. & A. 513.

(e) 5 B. & A.

(f) 14 East.

*798] held not to be a total loss. Here, the vessel was *taken possession of on the morning after the crew left her, but whether she were left deserted a few hours more or less, cannot affect the question of total or average loss. In cases of recapture, the loss is not total if the ship be in good safety at the time of bringing the action, *Faulkner v. Ritchie* (a); and the same principle must apply to a case of this nature, where the vessel has been once deserted, but possession afterwards taken by other persons, and the vessel brought into a place of safety before action brought.

BAYLEY, J. I abstain from delivering my opinion upon the first point, because there is another case pending in this Court, in which the question as to the effect of negligence in the captain of a ship will be again discussed (b). Upon the other point there is no difficulty. If the subject-matter of insurance ultimately exists in specie, so as to be capable of being restored to the hands of the *799] assured, there cannot be a total loss *unless there has been an abandonment. Now, in order to justify an abandonment, there must have been that, in the course of the voyage, which at the time constituted a total loss. Thus, capture or the necessary desertion of the ship constitutes a total loss. Here, then, for a time, there was a total loss. The crew of the *Westbury* were taken on board the *Columbia*, and no effort was made by the crew of the latter vessel to save the *Westbury*, probably because her situation appeared to be hopeless. Then notice of abandonment was given, at which time no tidings of the *Westbury* had been received, and she did not arrive until long afterwards. If at one period of time there was a total loss and an abandonment before news of the vessel's safety had been received, her subsequent return did not entitle the underwriters to say that it was no longer a total loss. The case of *Thornely v. Helson* may be laid out of the question, for the single point decided there was, that there had not been at any period of time a total loss. There are cases which show, that the mere existence of a ship after a total loss and abandonment will not reduce it to a case of partial loss, *M'Iver v. Henderson* (c), *Cologan v. The London Assurance Company* (d). The ship must be in esse in this kingdom under such circumstances, that the assured may, if they please, have possession, and may reasonably be expected to take it. Here such circumstances do not exist. The ship was valued at 1800*l.* in the policy; she came back subject to a charge of 1200*l.*, and in the river at *Liverpool* sustained further damage to the extent of 858*l.* There was no prospect that she could *800] be of sufficient value to *make it worth while for the assured to take her again. The loss was therefore total, and the abandonment good.

HOLROYD and LITTEDALE, Js., concurred.

(a) 2 M. & S. 290.

(b) The case alluded to by the learned Judge was *Shors v. Bentall*, on the trial of which it had been stated by Park, J., that the defendant, the underwriter, was not liable if the loss was occasioned by the negligence of the crew. A verdict was found for the defendant, and a rule nisi for a new trial granted, which came on for argument in this court in *Trinity* term, when

Cateridge for the defendant, admitted that it would be difficult to contend against the cases in which it had been said that underwriters are not discharged from liability where a loss arises through the negligence of the captain and crew; and

Lord TENTERDEN, C. J., said, We are all of opinion that underwriters are responsible for the misconduct or negligence of the captain and crew; but the owner, as a condition precedent, is bound to provide a crew of competent skill.

Rule absolute.

(c) 4 M. & S. 376.

(d) 5 M. & S. 447.

SANDON v. PROCTOR and another.

Scire facias on recognizance of bail. Plea, no ca. sa. duly issued, lodged, and returned. Replication, ca. sa. issued and returned non est inventus. Rejoinder, that the writ did not lie in the sheriff's office four days exclusive of the day it was lodged, and an intervening Sunday. Demurrer: Held, upon demurrer, that the plea was bad.

SCIRE facias upon a recognizance of bail. Plea, that no writ of *duly* sued out against the principal upon the judgment, and *duly* by the sheriff of *Middlesex* (being the county in which the venue in the action was laid), and *duly* returned, according to the custom and practice of the Court. Replication, that a ca. sa., directed to the sheriff of *Middlesex* (being the county in which the venue in the said action against the principal was laid), was issued against the principal; that the writ, before the return thereof, to wit, on the 23d of *May* 1827, was lodged with *C. F.* and *H. W.*, sheriffs of *Middlesex*, and that they returned non est inventus. Rejoinder (ad demurram), that the plaintiff sued out the said writ of ca. sa., as in the replication alleged; that the return day of the writ of ca. sa. was the 23d of *May* 1827, and that the writ was lodged by the plaintiff with the sheriffs of *Middlesex* on the 23d of *May* 1827, and not before, and that the 20th day of *May* 1827 was a *Sunday*; and so defendants say, that the writ of ca. sa. in the replication mentioned was not *duly* lodged with the sheriff of *Middlesex*, according to the custom and practice of the court. Demurrer. The causes of demurrer were, that the rejoinder was a departure from the plea, inasmuch as the plea it was alleged that no ca. sa. was issued against the principal; whereas in the rejoinder it was admitted that a ca. sa. was issued; and that the defendants had in their rejoinder pleaded and attempted to put in issue a matter relating merely to the practice of the Court, and that the practice of the Court could not be pleaded.

Patteson, in support of the demurrer. Assuming that the allegation in the plea that no ca. sa. was duly sued out, lodged, and returned, import that the writ was not sued out, lodged, and returned, so as to enable the plaintiff to maintain the action on bail, and, therefore, that, according to *Dudlow v. Watchorn* (a), that the plea is not a departure from the plea; the demurrer raises the question, whether the practice of the Court can be pleaded? The proceedings against the plaintiff in this case undoubtedly have been set aside for irregularity, because the ca. sa. was not laid in the sheriff's office four days exclusive of the return day and an intervening *Sunday*, as required by the practice of the Court. But that the breach of a rule of practice, and the practice of the Court cannot be pleaded. See *Elliot v. Lane* (b), and *Warmesley v. Macey* (c). The very point was decided on demurrer, in *Cherry v. Powell* (d); and the Court held that the point, whether matter of practice were pleadable, was not. The case of *Dudlow v. Watchorn* is distinguishable. There the ca. sa. was issued in the wrong county; for, by the general rules of law, the ca. sa. ought to be directed to the sheriff of that county where the venue in the original action was laid. That is not a matter required by any rule or practice of the Court, but by the general law of the land. A court of error must see to the record, where the venue in the original action is, and into what county the ca. sa. issued, and would be bound to take notice of the general rule of law, and could only issue into the county where the venue lies; but it could not plead the practice of another court.

Manning contra. If the plea that no ca. sa. was duly sued out, and returned, is a plea, the rejoinder in this case is good; for the suing out of a ca. sa. on bail can be fixed is only required by the practice of the Court, and

(a) 16 East, 40.
(c) 5 B. Moore, 168.

(b) 1 Wils. 334.
(d) 1 D. & R. 50.

condition of the recognizance. The condition is, that the defendant shall pay the damages or render. If he does neither, there is a breach of the condition, whether a ca. sa. be sued out or not. *Elliott v. Lane* (a) was decided on the ground of departure. [Littleale, J. The case of *Bull v. Manuaptors of Russell* (b), decided in *Trinity Term*, 4 Anne, shows that a matter of irregularity cannot be pleaded. There, in scire facias against bail, the defendant pleaded that no capias was sued out and returned against the principal; the plaintiff replied a ca. sa. and set it out. Demurrer. One objection was, that the capias set out in the replication appeared to have but five days between the teste and return. As to that, it was answered and resolved by the Court, that *803] there ought to be eight days between the teste and *return of the ca. sa. against the principal, by the practice and course of the Court; and if the defendants had moved for irregularity, the Court would have helped them; but in point of law the process of this Court may be returnable de die in diem, especially when issued into *Middlesex*, and, therefore, they shall not take advantage of this, which is but an irregularity on demurrer.] The case of *Dudlow v. Watchorn* (c) is inconsistent with that. In the latter case, Lord *Ellenborough* said, "We must take notice of the practice of the Court in a case like this, where it is the very subject-matter of dispute, and is put in issue. For what purpose is the issuing the ca. sa. at all in this case except as matter of practice?" As to *Cherry v. Powell* (d), it was decided on the authority of *Elliott v. Lane*.

BAYLEY, J. The question in this case is, Whether it is an answer to an action on the recognizance, for the bail to say, that the capias ad satisfaciendum, sued out against the principal, had not lain in the sheriff's office for that period of time which by the rule of Court it ought to have done to charge the bail? In *Elliott v. Lane* (e), to scire facias against bail the defendant pleaded no ca. sa. against the principal; the plaintiff replied a ca. sa., and a return non est inventus. The defendant rejoined that the ca. sa. did not lie four days in the sheriff's office, and upon demurrer the Court held the rejoinder to be bad. The decision appears by the report to have proceeded on the ground that the rejoinder was a departure from the plea; but if the matter alleged in the rejoinder had *804] been a defence on the merits, the defendant would *undoubtedly have applied for leave to amend on payment of costs. No such application having been made, that case rather shows by inference that a mere irregularity cannot be pleaded. The same question presented itself to the consideration of this Court in *Powell v. Taylor*, Mich. 28 G. 3, cited by Mr. *Tidd* in his *Practice* (f), to show that the bail cannot take advantage of a mere irregularity, by pleading. He there says, "They (the bail) may also plead, in discharge of their liability, that there was no capias ad satisfaciendum sued out and returned against the principal, and if there be a void writ, it is as none. But if the writ be merely irregular, as if it was sued out after a year, without a scire facias, or made returnable on a day out of term, or if it has not lain four days in the sheriff's office, the bail cannot take advantage of the irregularity by pleading." In *Cherry v. Powell* (g) this Court again decided that such an irregularity could not be pleaded. But it is insisted, that the suing out of a ca. sa. against the principal is rendered necessary only by the rules and practice of the Court, and that as the omission to sue out a ca. sa. is a good plea, the matter stated in this rejoinder may also be pleaded. But it seems to me that the obligation to sue out a ca. sa. results by law from the terms of the recognizance. The language of the condition of the recognizance is, "if the principal shall not pay the damages, or render himself." The latter words, "or render himself," have been construed to import that the principal is to render in discharge of his bail only when the plaintiff

(a) 1 Wils. 334.

(e) 16 East, 40.

(g) 1 Wils. 334.

(g) 1 D. & R. 50.

(b) 2 Ld. Raym. 1176. 2 Salk. 602.

(d) 1 D. & R. 50.

(f) P. 1129, 9th edit.

has, by suing out a ca. sa., intimated an intention to take the body of the defendant. If the plaintiff elects to proceed by fieri facias or elegit, the bail are not bound to render the principal; so if the principal dies before the ca. sa. is returnable, the bail are discharged, because they are bound by the recognizance to render the principal before the return-day of the ca. sa. In *Hobs v. Tedcastle* (a), *Tedcastle* sued a bill of debt against *Hobs* in B. R., who put in bail (*Hobs*, the plaintiff, and another,); afterwards the defendant, was condemned, and died before the condemnation of his body rendered, whereupon a scire facias was awarded against the bail, after two nihil returned, execution was awarded, and the plaintiff proceeded to execution, whereupon he brought his audita querela, surmising that *Holloway* the defendant. There was not any capias awarded against the bail. The Court held, that the recognizance of the bail that the principal should render himself, &c. is to be intended, upon process awarded against the bail, &c. and that as there was not any process awarded against the bail in lifetime, the bail were discharged, and judgment was given for the bail. That case shows that the plea of no ca. sa. is a good plea, because by the instruction put upon the terms of the recognizance, the bail are not bound to render their principal until the plaintiff sues out the ca. sa. The case of *low v. Watchorn* (b) was properly decided, because there was no verdict sued out in that case. For it is a general rule of law, that the executioner pursue the judgment, and that a ca. sa. must be directed to the sheriff of the county in which the action is brought. *I am not aware of any case where a party who in pleading has relied upon the practice of the Court has not failed. In *Donnelly v. Dunn* (c), to an action on the record of bail, the defendant pleaded the bankruptcy of his principal, and the Court overruled the general demurrer. The bankruptcy of the principal is a ground for objection to this Court to enter an exoneration on the bail-piece. But it was held that it could not be pleaded; and there *Buller, J.*, said, "It is of importance to the public and to the profession, to put an end to attempts to introduce questions of record questions of practice, which cannot be considered as legal defences, which belong rather to what may be called the equity side of the Court. If an action is brought for a legal demand, arising upon a debt of record, the defendant is called upon to state a legal defence upon record, not merely to show that he has equity in his favour. Now, what legal defence has he set up? He must either show a legal impossibility to perform the condition, or show something that will discharge him. Has he done either? Certainly not. The plaintiff remains unanswered." That applies to the present case, for the defendant here has neither shown performance of, nor any legal excuse for not performing, the condition of the recognizance.

HOLROYD, J. I have entertained some doubts in this case, and they were caused by some expressions which fell from the Court in *low v. Watchorn*. But I am now satisfied that a mere matter of practice cannot be pleaded. There is a material distinction between those things which are required to be done by the common or statute law of the land, and things required to be done by the rules or practice of the Court. Any thing required to be done by the law of the land must be done by a court of error; but a court of error cannot notice the practice of another court. A plea that no ca. sa. has issued, or that the defendant died before the return of the ca. sa., is good, because, according to the common law, which the law puts on the recognizance of bail, the defendant is not bound to render until the return day of the ca. sa. The party entering the recognizance engages that the defendant shall pay the damage, or render the principal. The latter words have been construed to import, not that the defendant is bound to render at all events, but only in case he is required by the plaintiff

(a) *Cro Eliz.* 597.(b) 16 *East*, 40.(c) 2 *Bos. & Pul.* 43.

action so to do; and the suing out of a ca. sa. is notice to the bail that the plaintiff does require the defendant to be rendered. If this matter may be pleaded, a court of error may reverse our judgment. Any matter which may be taken advantage of in a court of error may properly be pleaded; but mere matter of irregularity, depending on the rules of another court, of which rules a court of error cannot be supposed to have any knowledge, cannot be pleaded.

LITTLEDALE, J. Upon this record the practice of the Court of King's Bench is not stated, and a court of error cannot take notice of the practice of another court. The record is, therefore, defective. But if the practice of the Court had been set out on the record, it would make no difference. For the practice of the Court cannot be pleaded. That very point was decided in **Ball v. The Manucaptors of Russell* (a), to which I have already referred, and *Powell v. Taylor*, cited in *Tidd's Practice* (b), and in *Warmesley v. Macey* (c). The decision in *Dudlow v. Watchorn* (d) was perfectly right, because by the general law of the land a ca. sa. must issue into the county in which the action was brought. Upon the authorities, therefore, I am of opinion, that, generally speaking, a mere rule or matter of practice cannot be pleaded. But then it is insisted, that the suing out a ca. sa. against the principal, in order to fix the bail, is required only by the rule or practice of the Court: I am of opinion that that is rendered necessary by the recognizance. The condition of the recognizance is, that the defendant shall pay the damages, or render himself. Now, if this had been a common contract, the principal would be bound to render within a reasonable time after the judgment; but inasmuch as the object of the recognizance is to secure to the plaintiff in the action satisfaction of his judgment, it has been construed with reference to that object; and as the plaintiff may at his election sue out execution either against the property or the person of the defendant, the condition has been held to be satisfied if the principal be rendered within a reasonable time after the plaintiff has notified his intention to have execution against the person of the defendant. As long ago as the 38 *Eliz.* it was held, that the render required in the recognizance was to be intended a render upon process awarded. The suing out of the process, therefore, is not a matter required by any rule or practice of the Court, but by the recognizance, and on **809* that **ground* it is a good plea, that no ca. sa. issued. But the recognizance does not require that the ca. sa. shall remain in the sheriff's office four days exclusive of the return day and an intervening *Sunday*. An allegation that it has not remained for that time in the sheriff's office, shows that the party has broken a rule of the Court, but not that the condition of the recognizance is satisfied.

Judgment for the plaintiff.

(a) 2 *Ld. Raym.* 1176. *Salk.* 602.
(c) 5 *B. Moors*, 168.

(b) P. 2129, 9th edit.
(d) 16 *East*, 40.

CALVERT and another v. GORDON, Executrix.

Debt on bond. Plea, after craving oyer of bond and condition, which was, that *A. B.* should faithfully account for all monies received by him as collecting clerk; that *A. B.* did account. Replication, that *A. B.* received divers sums, amounting to 2000*l.*, for which he did not account. Rejoinder, that the sums mentioned in the replication were three sums of 1000*l.*, 500*l.*, and 500*l.*, received by *A. B.* of *C. D.* and *F.* and *G.*, and that *A. B.* accounted for those sums. Surrejoinder, that the sums mentioned in the replication were other and different sums than those alleged in the rejoinder to have been received and accounted for by *A. B.*, and concluding to the country: Held, upon special demurrer, that the surrejoinder was good.

DEBT on bond of the testator, which upon oyer appeared to be conditioned for the fidelity of *R. Edwards*, as collecting clerk to the plaintiffs (brewers), that he should continue in their service. Plea, that *Edwards* continued in their service till the testator's death and till the defendant's notice thereafter received, and during that time faithfully accounted; and that defendant, as to the first breach, within a short and reasonable time after the testator's death, and before the breach of the condition, gave notice in writing to the plaintiffs that he no longer remained their surety, or responsible; and if any damnification occurred by the giving of the notice, it was of the plaintiff's own wrong. Replication, that before the notice *Edwards* collected divers sums, amounting to 2000*l.*, for which he did not account; and for assigning a further breach, according to the condition, that he *collected divers sums *after* the notice for which he did not account. Rejoinder, as to the first breach, that the same sums, stated in the plea, that breach to have been received and unaccounted for by *Edwards*, were several sums of money, to wit, one of them being 1000*l.*, part of which was received from one *Gapp*; another part, viz. 500*l.*, from *J. Cole*; and the residue from *R. Cole*; and that *Edwards* duly accounted for them. And as to the second breach, that the sums mentioned in that breach to have been received and unaccounted for by *Edwards* were three, viz. 1000*l.* from *W. Rumsey*, 500*l.* from *W. Burgess*, and the other 500*l.* from *H. Edwards*; and that *Edwards* duly accounted for them. Surrejoinder, as to both breaches (admitting that *Edwards* received and accounted for the sums mentioned in the plea in rejoinder), that the sums mentioned in the breaches were *other and different sums* which *Edwards* collected, and for which he did not account. Demurrer, assigning for cause, that the surrejoinder introduced new matters not concluded to the country, and that it ought to have concluded with the plea, and to have specified the sums which *Edwards* collected, and for which he received them.

R. Bayly in support of the demurrer. First, the replication is bad, because it does not specify the persons from whom *Edwards* received the sums. There is a distinction in this respect between debt and covenant. In the case of a breach assigned may be as large as the covenant; but in debt upon bond, the breach assigned must be as precise as the covenant. In the case of a bond conditioned to perform covenants specified in an indenture, a precise breach must be shown, because a breach is a forfeiture of the whole bond; *Brigstock v. (a)*. *In *Com. Dig. Pleader* (E. 5), it is laid down, that a plea that the defendant had expended 810*l.* for repairs, *et alia onera necessaria*, is bad for uncertainty; for the defendant ought to show for what charges he expended them, by which the Court may judge whether they were necessary or not. In *Rowe v. Rouch* (b) the declaration stated, that the plaintiff was fully possessed of mines and ore gotten and to be gotten from them, and in treaty for the sale of the ore, and that the defendant published an advertisement, cautioning persons against purchasing the ore, per quod he was prevented from selling. The defendant pleaded that the adventurers or persons interested or shares in the mines thought it their duty to caution persons against purchasing the ore, and it was held to be bad on special demurrer, because it did not disclose the names of the adventurers, or who they were. [Is there any instance of such a replication? The usual replication, in a case of performance, is that used in the present case; and the usual rejoinder is, to allege that the clerk well and truly accounted, and to the country.] The rejoinder is not a departure from the plea, for the matter only tends to fortify the plea, and may, therefore, be properly allowed. *Long v. Jackson* (c). The surrejoinder is bad, because it introduces new matters, viz. that the sums mentioned in the breach were *other and different sums* than those for which *Edwards* had accounted, and concludes to the country, without concluding to the country, the defendant is deprived of an opportunity of replying to the plea.

(a) 1 *Ld. Raym.* 106.(b) 1 *M. & S.* 304.(c) 2 *Wils.*

answering that new matter. It is a rule in pleading, that where either party introduces new matter, the other *side shall have an opportunity of
 *812] answering to that new matter; *Filewood v. Popplewell* (a).

Chilton, contra, was stopped by the Court.

BAYLEY, J. I have no doubt as to the validity of the surrejoinder. It is unnecessary to decide whether the plea be good, though I entertain a very strong opinion that it is bad, on the ground that the obligation created by the bond cannot be determined at the will of either party by notice. It is clearly established by the authorities, that the plaintiff was not bound, in his replication, to set out the names of the persons from whom *Edwards* received the money. In *Shaw v. Farrington* (b), to debt on bond conditioned for J. S. rendering account to the plaintiffs of all monies which he should receive as their agent, the defendant pleaded performance in the words of the condition. Plaintiffs replied that J. S. received divers sums of money amounting to 2000*l.*, belonging and relating to the plaintiffs' business as their agent, and had not rendered to them an account of the said 2000*l.*, or any part thereof; and this replication was demurred to, on the ground that it did not thereby appear from whom the sums mentioned in the replication were received, and it was held to be sufficient. And in *Barton v. Webb and Another, Executors of Jacques* (c), to debt on bond of the testator conditioned that one B. R. should faithfully account for and pay over to the plaintiffs, as treasurers of a charity, such voluntary contributions as he should collect for the use of the charity, the defendants pleaded general
 *813] performance; the plaintiffs replied, that B. R. had received divers sums, amounting to a large sum, viz. 100*l.*, from divers persons for divers voluntary contributions for the use of the said charity, which he had not accounted for or paid over; and on special demurrer, assigning for cause that it did not appear by the replication from whom the sums of money therein supposed to have been received by B. R. were received, it was held that the replication was sufficiently certain, and that the case of a surety and his executors stood exactly in the same situation as that of the principal himself. Upon these authorities, therefore, I am of opinion that the replication in this case is good. The defendant in his rejoinder alleges, that *Edwards* received certain specific sums from A., B., C., and D., &c. and accounted for those sums. The plaintiff in his surrejoinder says, that the sums mentioned in the breaches are other and different than those which the defendant is stated in the rejoinder to have accounted. That is not an allegation of any new matter, but merely a denial of the allegation in the rejoinder, that the same sums (viz. those mentioned in the replication), were three several sums of money, to wit, &c. The plaintiff, by alleging that they were different, denies that allegation in the rejoinder. I think, therefore, that the surrejoinder is good, and that the plaintiff is entitled to the judgment of the Court.

HOLROYD, J. The regular mode of rejoicing to this replication would have been to allege that *Edwards* had well and truly accounted, and to have concluded to the country. But the defendant has departed from the usual mode, and alleged in the rejoinder that the sums mentioned in the breaches assigned in
 *814] the replication were certain specific sums received by *Edwards* from persons whose names are mentioned. The plaintiffs in their surrejoinder are thereby driven to vary from their usual surrejoinder, and they were at liberty to take issue on any of the facts stated in the rejoinder. One of those facts was, that the sums mentioned in the assignment of breaches to have been received by *Edwards*, and not accounted for by him, were specific sums received of A., B., C., D., and E., F. The plaintiffs in their surrejoinder had a right to deny that fact, and they have done so by alleging that these sums so stated in the replication to have been received and unaccounted for were different from those mentioned in the rejoinder. It would lead to an unnecessary length and

prolixity of pleading if we were to hold that it was necessary to conclude a surrejoinder with a verification.

LITTLEDALE, J. The replication is in the form sanctioned by precedent. The rejoinder is not in the usual form. But if the rejoinder be good, the replication is also good, for it denies a fact stated in the rejoinder. The substantive allegation in the surrejoinder is, that the sums mentioned in the replication to have been received and unaccounted for by *Edwards*, were other and different from those alleged in the rejoinder to have been received and accounted for by him. That is a denial of a fact alleged in the rejoinder. The surrejoinder therefore, properly concludes to the country.

Judgment for the plaintiff.

*MARSDEN and another v. STANSFIELD.

Upon an issue whether a certain messuage is situated within a chapelry, a person who occupies rateable property within the chapelry is a competent witness to prove that

THIS was an issue directed by this Court, for the purpose of trying "whether a certain messuage or tenement, with the lands and appurtenances thereto belonging, commonly called or known by the name of *Hill Barn*, in the occupation of the defendant, or any part thereof, was situate within the chapelry of *Littleborough*, in the county palatine of *Lancaster*, and the bounds and extent thereof," the plaintiffs thereupon maintaining the affirmative, and the defendant the negative. At the trial before *Hullock, B.*, at the last Summer assizes, in the county of *Lancaster*, *James Cryer*, then occupying rateable property within the chapelry of *Littleborough*, was called as a witness on behalf of the plaintiffs, and after objection made as to his competency by the defendant's counsel was admitted. In *Michaelmas* term last, upon motion for a new trial on the ground of the reception of such witness, the Court directed a special case to be stated, raising the question of the admissibility of the above witness. The questions for the opinion of the Court were :

First, Whether *Cryer* was a competent witness on this issue under the circumstances?

Secondly, If he were incompetent at common law, whether such incompetency was removed by the 54 G. 3, c. 170, s. 9.

Courtenay for the plaintiffs. The witness, although he had rateable property within the chapelry, was competent at common law to prove that the land in question was within the chapelry. If he had been actually rated, he would have been incompetent. But a mere liability to be rated does not disqualify, not even if his name be omitted out of the rate for the express purpose of using his testimony, *Rees v. Kirdford (a)*. In *Deacon v. Cook (b)*, where it was a question as to the boundaries of two adjoining parishes, it was held that a parishioner actually rated was not a competent witness to extend the boundaries of his parish, but that one liable to be rated was. In *Rhodes v. Worth (c)* the owner of an estate was held to be an incompetent witness to deny the liability to repair a chapel, on the ground that he had a permanent interest. Assuming that the witness was incompetent at common law on the ground of interest, he was clearly rendered competent by the provision of the statute 54 G. 3, c. 170, s. 9. The issue is, Whether certain lands are

(a) 2 East, 559.

(c) 1 B. & A. 87.

(b) Cited in *Rees v. Kirdford*, 3 East, 562.

the chapelry; that is a matter relating to the rates and cesses. In *Meredith v. Gilpin* (a), on a question of title, in an action of trespass, between a parish and an individual, to certain lands claimed by the former under an inclosure act, by the provisions of which the land in dispute would (if they had a right to it) be vested in them in trust for the parish in aid of the poor's rates, it was held, that rated inhabitants were admissible witnesses, on the ground that the matter in issue had relation to rates and cesses, because the property, if recovered, would go in aid of the parish rates.

Alderson, contra, relied on *The Earl of Clanrickard v. Lady Denton* (b).
 *817] There the issue was, Whether *there was a custom within the weald of *Kent*, that all owners and proprietors of any coppices or woods should be discharged of tithe for all manner of wood; the testimony of those who were entitled, either as owners or farmers, to any wood within the weald of *Kent*, was rejected, for the custom was alleged to be general through the whole weald, and though they were not parties to the suit, yet inasmuch as the custom concerned them in their private profit, and in this immunity, they were quasi parties, and their testimony quasi in propria causa.

BAYLEY, J. The issue in this case was, Whether a messuage and lands in the occupation of the defendant were within the chapelry of *Littleborough*? The question for our consideration is, Whether a person having rateable property in the chapelry was a competent witness to prove that it was? The burden of making out that the witness is incompetent lies on the party who makes the objection. It is not stated in this case what are the chapelry burdens, whether it maintains its own poor, roads, or chapel. The witness would not be competent to increase the number of contributors, unless the burden to be borne would thereby be subject to be increased, or his rights damaged by such increase. But the increase of the number of contributors would not only lessen each man's share of the chapel-rates, but would lessen also each man's privilege within the chapel, by increasing the number of claimants for seats and sepulture. So that there may, perhaps, viewing the case in this manner, be a balance of advantage and disadvantage, and we are bound to see that an interest does exist before
 *818] we can say that this witness was *incompetent. Now *Rex v. Kirdford* (c) establishes that the fact of a party being the occupier of rateable property in a parish, but for which he is not rated, does not make him an incompetent witness. Here the case only states that the witness was an occupier of rateable property. Upon the authority of that case, therefore, I am of opinion that he was competent at common law. I also think that this is a very plain case, according to the true construction of the 59 G. 3, c. 170, s. 9, which enacts, that no person rated, or liable to be rated, to any rates or cesses of any district, &c., shall before any court be deemed and taken to be, by reason thereof, an incompetent witness for or against such district in any matter relating to such rates or cesses, or to the boundary between such district and any adjoining district. The substantial question in this case is, Whether the owner of certain property was liable to contribute to the rates of the chapelry? That is a question relating to the rates or cesses of the district. And the question, Whether certain land be situate within the chapelry, was a matter relating to the boundary between the district and the adjoining district.

HOLROYD and *LITLEDALE, Js.*, concurred.

Judgment for the plaintiff.

(a) 6 Price, 146.

(b) 1 Gwill. 360.

(c) 2 East, 559.

*MELLISH v. RICHARDSON.

(In Error.)

A general verdict was given for the plaintiff on a declaration consisting of several counts, some of which were bad in point of law. The evidence applied to all the counts. The Court of Common Pleas, after writ of error brought, and after argument in the Court of King's Bench, amended the postea by entering the verdict for the plaintiff on the first count, and for the defendant on the others; and amended the judgment-roll remaining in the Court of King's Bench, by the amended postea, after the judgment had been reversed by the King's Bench. Semble, That the court of King's Bench is bound to amend the record by the amended postea, and the court of Common Pleas.

ASSUMPSIT on a special agreement. The declaration contained four counts and three common counts. Plea, general issue. At the trial before Lord Gifford, C. J., at the London sittings after *Hilary* term 1824, a verdict was found for the defendant in error on all the counts in the declaration, with 7500*l.* damages, and final judgment was signed in the Court of Common Pleas on the 17th of *July* 1824. A writ of error was brought in the Court of King's Bench, returnable in *Michaelmas* term following. The principal question assigned was, that the declaration did not set forth any good or sufficient consideration for any of the promises stated in the declaration, but no distinction was made in the assignment of errors between the different counts. The defendant (*Richardson*) joined in error. The case was argued before the judges of this Court at the sittings in banc after *Trinity* term 1825, and judgment of reversal was pronounced on *Friday* the 25th *November*, and a writ de novo was awarded, on the ground, that there did not appear on the record to be any good or sufficient consideration for the promises alleged in the third and fourth counts of the declaration, and the judgment of reversal was entered of record at the opening of the office on the following day, and a writ of venire facias de novo awarded by the same court in eight days after *Hilary*, in *Hilary* term 1826. The defendant in error, having been advised of the intended reversal of the judgment of the Court of Common Pleas, applied on the 8th of *November* to Lord Gifford to alter the postea, by confining the verdict to the first count of the declaration. Lord Gifford refused, no longer a judge of the Court of Common Pleas, refused to interfere. On the 9th of *November* 1825, the defendant in error obtained in that court a rule for amending the postea by the notes of Lord Gifford, by entering a verdict for the defendant in error on the first count of the declaration, and for the plaintiff in error on the other counts, and that rule was made absolute on the 25th of *November* 1825. On *Friday* the 25th *November* (being the day on which judgment of reversal was pronounced by the Court of King's Bench), a writ de novo (a) for amending and making the judgment-roll conformable to the postea obtained, and that rule was made absolute on *Saturday* the 26th of *November* 1825, being after the judgment of reversal had been entered of record in the Court of King's Bench. On the same day the defendant in error obtained a rule nisi in this Court for staying the judgment of this Court, and for annulling the judgment returned into this Court on the writ of error by the amendment of the Court of Common Pleas, which rule was, by consent of the judges, enlarged to the fourth day of *Hilary* term 1826. In *Easter* term 1826, *Scurlett* and *Barnewall* showed cause against the rule. This amendment of the record in this Court, by the amended judgment-roll remaining in the Court of Common Pleas, ought not to be allowed. It appears by the affidavit that the postea was amended by the Court of Common Pleas after the record

(a) *Wilde*, Serjt., before the granting of this rule, informed the Court of C. P. that the judgment had been reversed in K. B.

*821] been removed into this *Court, after joinder in error and argument; and that the judgment-roll of that Court was amended *after* the judgment of that Court had been reversed. First, the *postea* was improperly amended in the Court below. The rule is, that where general damages are given on a declaration containing several counts, and one count is defective, and the evidence at the trial applies to that count only, the verdict may be amended by the Judge's notes, and confined to the good count; but if the evidence applies to all the counts, the *postea* cannot be amended, because it is impossible for the Judge to say on which of the counts the jury found the damages, or how they had apportioned them. In such a case, the only remedy is by awarding a venire de novo, and the Court of King's Bench acted upon this distinction in *Grant v. Astle* (a) and *Spencer v. Goter* (b). In *Holt v. Scholefield* (c), where some counts were good and others bad, and general damages given, this Court arrested the judgment, and refused to award a venire de novo, and the same thing was done in *Cook v. Cox* (d). *Williams v. Breedon* (e) will be relied on by the other side; but that case was decided on the ground, that it appeared sufficiently that the jury had calculated the damages on one count only. Assuming that the *postea* was amendable, it was not amended in due time or in proper manner, for the plaintiff below ought to have made his election in the term after the trial, on what count he would enter up his verdict, *Lee v. Muggeridge* (f), *Doe v. Perkins* (g). In *Harrison v. King* (h), where a general verdict had been *822] taken *for the plaintiff, the Court of King's Bench refused to allow the verdict to be entered on one count after a lapse of eight years, and the judgment had been reversed. The observations there made by Lord Tenterden apply strongly to the present case. The only cases in which the *postea* has been amended, by confining the verdict to particular counts, are *Hankey q. t. v. Smith* (i), *Eldowes v. Hopkins* (k), and *Williams v. Breedon* (l). But in all these cases the amendments were made before final judgment. There is no case where an amendment of this description has been made after final judgment and after a writ of error brought. In all those cases the *postea* was altered according to the actual finding of the jury, or according to what must have been the finding. The *postea* has been amended after error, where the mistake has appeared on the face of the proceedings, and it was not necessary to have recourse to the notes or memory of a Judge to rectify the mistake; as in *Wood v. Matthews* (m), *Doe v. Perkins* (n), and *Petrie v. Hannay* (o). Secondly, the *postea* ought not to have been amended by the Court of Common Pleas, but by the Judge who tried the cause, *Sandford v. Porter* (p). If the *postea* was not amendable, or if it was not amended in due time, or in a proper manner, it would not warrant the amendment of the judgment-roll; and even if the *postea* were properly amended, still the judgment-roll was not properly amended by the Court of Common Pleas. For when a writ of error on a judgment of the Court of Common Pleas is brought in the King's Bench, the record itself, and not merely a transcript, is removed into that *823] *Court. 40 Assiz. 29. Year Book, 22 Edw. 3, 6, pl. 24. F. N. B. 20 (F.) Roll. Abr. Error, 752, 753, *Danver's Abr. Error*, (B 2), Com. Dig. Pleader, (3 B 13), Vin. Abr. tit. Error, (P), Bac. Abr. tit. Error, (B 2), *Rutter v. Redstone* (q). The Chief Justice of the Common Pleas has certified that he has returned the record to this Court. In *Wood v. Matthews* (r), although the *postea* was amended in the Common Pleas after the record had

(a) Doug. 722.

(d) 3 M. & S. 110.

(g) 3 T. R. 749.

(k) Doug. 376.

(n) 3 T. R. 749.

(q) 2 Str. 837.

See *Andrews v. Lord Cromwell*, Yelv. 6 Cro. Eliz. 891. *Coot v. Lanch*,Ld. Raym. 427. *St. John v. Commyn*, Yelv. 118. *Vicar v. Haydon*, Cowp. 843.

(v) Poph. 102.

(b) 1 H. Bl. 78.

(e) 1 Bos. & Pul. 329.

(h) 1 B. & A. 161.

(l) 1 Bos. & Pul. 329.

(o) 3 T. R. 659.

(c) 6 T. R. 691.

(f) 5 Taunt. 36.

(i) Barnes, 449.

(m) Poph. 102.

(p) 2 Chit. Rep. 351.

been removed, the application to amend the record was made to the King's Bench, where the record sent up from the Common Pleas was according to that which was indorsed on the back of the pannel; for the indent on the pannel was said to be the warrant for certifying the poster the entry on the roll. As to *Frend v. The Duke of Richmond* (a), there reported to have been said by *Hale, C. B.*, as to the obligation of the King's Bench to amend a record amended by the Court of Common Pleas after it had been removed into the Court of King's Bench, is a mere dictum. In *Pickwood v. Wright* (b), and *Moody v. Stracey* (c), it does not appear that the records at the time when the amendments were made had been by the writ of error into the King's Bench. In *Short v. Coffin* (d), *Petrie v. May* (e), *Doe v. Perkins* (f), *Dunbar v. Hitchcock* (g), *Blackmore v. Molyneaux's case* (i), *Rutter v. *Redstone* (k), and *Usher v. Dansey* (l), the application to amend was made to the Court of King's Bench. In *March. Rep. 72, pl. 109*, this case is stated. "A writ of error was brought to reverse a judgment given in the Common Pleas, and after a certain number of errors assigned, they in the Common Pleas did amend the record. And the whole Court (*Croke* only absent) they cannot do it, for after a *translatio* they have not the record before them. And *Barkley* said, that the difference stands betwixt the Common Pleas and the King's Bench, and betwixt the King's Bench and the Exchequer. For the record remains always in this Court notwithstanding a writ of error brought in the Exchequer Chamber, and, as we may amend after. Wherefore the Court said, that if the thing were amendable, they would amend it. But the Court of Common Pleas cannot."

Assuming, however, that the application to amend was properly made to the Court of Common Pleas in the first instance, and that it is no objection to the amendment of the *postea* that the evidence at the trial applied to all the parts of the declaration, still the amendment ought not to have been made in the Court of Common Pleas, and ought not now to be made in this. At common law, an amendment could only be made so long as the proceedings were on paper, and not as they were entered upon record. This amendment, therefore, made in the Court of Common Pleas, if it be allowable, must be authorized by some statute. By 14 *Edw. 3, stat. 1, c. 6*, it was enacted, that no process shall be awarded for *misperision of the clerk in writing one syllable too much or too little*, but shall be amended; and by 9 *H. 5, stat. 1, c. 4*, made perpetual by 4 *H. 6, c. 12*, it is declared that the justices shall have the same power, as well after *judgment*, so long as *the record and process* are before them; and by 8 *H. 6, c. 15*, the king's justices are empowered to amend the misperisions of their clerks and other officers, sheriffs, &c. in any record, *&c. depending before them, as well by way of error, as otherwise, in one letter or syllable too much or too little*. The amendment warranted by these statutes, either in the court where the action is originally brought, or in the court where the error, must be in respect of errors on the record occasioned by the misperision of the clerk in writing a letter or syllable too much or too little. There was no misperision in this case, for the clerk entered in writing upon the *postea* the verdict found by the jury, and warranted by the evidence. If, indeed, the judge had directed the verdict to be confined to the first count, and the officer who took the verdict had entered it on all the counts, that might have been a misperision or mistake of the clerk within the meaning of the statutes. But the verdict was that found by the jury, and warranted by the evidence. Many cases have been cited on the other side, where amendments have been allowed after the record has been entered of record, and even after error brought; but this is not the case in all cases of misperision. Thus, in *Wood v. Matthews* (m), the officer

(a) *Hardr. 505.*(d) 5 *Burr. 2730.*(e) 3 *M. & S. 591.*(k) 2 *Str. 837.*(b) 1 *H. Bl. 643.*(c) 3 *T. R. 659.*(h) 8 *Co. 162.*(l) 4 *M. & S. 94.*(c) 4 *Taunt. 588.*(f) 3 *T. R. 749.*(i) 2 *Roll. Rep. 4.*(m) *Poph. 102.*

Court had indorsed on the postea a verdict different from that which had been given by the jury and entered on the pannel. That was clearly a misprision; and in *Foster v. Tuxley* (a), there was a rasure on the record. In *Healings v. The Mayor, Commonalty, and Citizens of London* (b), the clerk who entered up the judgment had omitted to insert in the judgment the word *citizens*, which *826] was part of the description of the corporation. In *Mason v. Fox* (c), the judgment was not warranted by the verdict. In *Petre v. Hannay* (d) there was a general verdict for the plaintiff. The officer had, by *mistake*, omitted to enter any verdict for the plaintiff on the issue joined on the plea of the statute of limitations. In *Doe v. Perkins* (e), the officer of the court had, by mistake, inserted in the postea matter not found by the jury. In *De Tustet v. Rucker* (f), the officer of the court had omitted to enter the finding of the jury on the issue joined on a plea of set-off. In *Grenville v. Smith* (g), which was an action against an executor, the officer entered up a judgment not warranted by law, the entry on the postea being right. There are other cases where the verdict has been for larger damages than those claimed by the plaintiff in his declaration, and a remittitur has been allowed to be entered on the record. But in those cases the officer of the court at Nisi Prius had before him the Nisi Prius record, which contained a statement of the amount of damages claimed by the plaintiff. The entry, therefore, of a larger sum than the plaintiff claims in his declaration, may fairly be considered a misprision of the clerk.

Assuming, however, that the Court has, by statute, the power to amend in this case, it is discretionary in them to exercise the power or not; and if the effect of allowing the amendment will be to prejudice the plaintiff in error, it ought not to be allowed. The application to amend was made to this Court after the judgment reversing the judgment of the Court of Common Pleas had been entered of record, and a venire de novo had been awarded. The judgment of the Court of Common Pleas became thereby destroyed, and the plaintiff *827] in error became entitled to have his case submitted to another jury, upon whose verdict it would then depend whether he should ultimately succeed or not. If this amendment be allowed, the plaintiff will be deprived of the benefit to which he became entitled by the judgment pronounced by this Court. It is not, therefore, consistent with justice, that in this stage of the proceedings the amendment prayed for should be allowed.

Marryat and Campbell contra. The Court of Common Pleas were authorized by law to amend the postea, and the judgment-roll remaining in that court after the writ of error brought; and this Court is authorized by law, and ought, in affirmance of the judgment, so to amend the record here; for the associate of the Common Pleas has entered a verdict for the plaintiff on all the counts of the declaration, when it ought to have been entered on the first count only. That was a misprision of the associate at Nisi Prius; *Eddowes v. Hopkins* (h); and the entry made on the judgment-roll, according to the postea, was also a misprision of the clerk who made up the judgment-roll. And if it was a misprision of the clerk, the postea and judgment-roll may be amended at any time. The judge who tried the cause may at any time order the verdict to be entered up nunc pro tunc. But it is said, that the Court of Common Pleas ought not to have amended the judgment-roll after error brought, because the record of the judgment was by the writ of error removed into this Court; and in support of that objection it has been urged, that the Lord Chief Justice of the Court of Common Pleas has certified that he has returned the record and proceedings to *828] this Court. The Chief Justice of this Court makes a similar return to a writ of error brought in the Exchequer Chamber; and by the statute

(a) *Poph.* 196.(b) *Cro. Car.* 574.(c) *Cro. Jac.* 632.(d) 3 *T. R.* 659.(e) 3 *T. R.* 749.(f) 3 *Brod & Bing.* 65.(g) *Cro. Jac.* 628.(h) *Doug.* 376.

27 *Eliz. c. 8*, the Chief Justice of King's Bench is to cause the record things concerning the judgment, to be brought before the Barons of the Exchequer Chamber. Yet the record undoubtedly remains in the King's Bench. There are numerous cases in which the Court of Common Pleas has amended, after error brought upon their judgments, amended the judgment. *Wood v. Matthews* (a), "the issue in the Common Pleas was, whether the writs were taken by a *capias satisfaciendum* or not; and upon the trial *Nisi Prius*, the jury found for the plaintiff in this action, to wit, that the writ was not taken by the said *capias*, and upon the back of the pannel of the record it was dicunt pro quer.; but on the back of the *postea* the clerk of the Court certified the pannel thus, to wit, that the jury say that no *capias* was taken, which was otherwise than was put in issue or found by the jury, and the record was according to the *postea*; and upon this judgment given for the said *Matthews*, then plaintiff, upon which this variance between the verdict was assigned for error; and after deliberation had upon this matter alleged by the defendant in the writ of error, and certified to the Court of Common Pleas, the Court awarded that the record sent up out of the Court of Common Pleas by the writ of error should be amended, according to that which was endorsed on the back of the pannel; for the indorsement upon the pannel was a warrant for the certifying of the *postea*; and so this warrant over to the Court makes the entry upon the roll; and, therefore, whereas it was alleged that the *postea* was amended in the Court of Common Pleas after the record removed, it was holden to be well done there; for although the record was removed by the writ of error, yet the *nisi prius*, the *postea*, and the verdict remain still there, as it is of the warrant of attorney and the like; and the *postea* had not been amended there, but sent up with that which was endorsed upon the pannel, all shall be amended here according to that which was endorsed upon the pannel." In that case the Court of Common Pleas amended the record for error; and the Court of King's Bench also amended the record in the writ of error. In *Foster and Tayler's case* (b), "after error brought upon a judgment in the Court of Common Pleas, and after the record was certified into this Court, the Court of Common Pleas amended a rasure of the record which was there: and this Court, after having been assigned for error, and after argument, and some doubts expressed by some of the Judges, whether the amendment ought to have been made, the Court awarded that the record had been transmitted to this Court, and the error of a judgment, in the Court of Common Pleas, in debt brought by the defendant against the plaintiff, on the obligation of 400*l.*, the error assigned was, because the judgment was given for the plaintiff, and the defendant should recover the debt, for costs, *eisdem majori et communitati adjudged* (omitting *civibus*), and such corporation, which was held to be error. But afterwards, upon the record being brought into the Court of Common Pleas, and upon examination and perusal of the record (where it was well entered), it was awarded to be amended." In that case the amendment was made, not only after error was assigned, but after the Court of Common Pleas had expressed an opinion in favour of the plaintiff in error. In *Pett v. Hannay* (c), to assumpsit for money paid to the use of the defendant, and had and received by the defendant to the use of the plaintiffs, and for money paid by the testator to the use of the defendant, and had and received to the use of the testator in separate counts, the defendant pleaded the general issue and the statute of limitations. A verdict was found for the plaintiffs generally on the first issue, and no notice taken of the error. At last, the defendant brought a writ of error in the House of Lords, and assigned for error, that no verdict was given on the second plea; and this Court awarded that the court in which the action was brought, after such error had been

(a) *Poph. 102, Hil. 38 Eliz.*(c) *Cro. Car. 574.*(b) *Poph. 196.*(d) 3 *T. R. 659.*

allowed the plaintiffs to amend, according to the judge's notes, by adding a verdict for them on the second plea. In *Doe v. Perkins* (a), after a writ of error brought upon a judgment of this Court in the Exchequer Chamber, and after joinder in error there, Lord *Loughborough*, who tried the cause, amended the postea by his notes, and Mr. *J. Buller* ordered the judgment-roll to be amended by the amended postea; and the Court held, that the amendment had been properly made. In *De Tastet v. Rucker* (b), after error brought, the Court of Exchequer Chamber amended the transcript, and the Court of King's Bench the postea. So in *Foster v. Blackwell* (c), the Court of Common Pleas, after writ of error brought into this Court, and after in nullo est erratum pleaded, amended the judgment. In *Frend v. The Duke of Richmond* (d), *Hale*, C. B., states, "that it is the constant practice, that if a record be removed into the *831] King's Bench out of the Court of Common Pleas, by writ of error, *and afterwards amended by rule of Court in the Common Pleas, the Court of King's Bench must amend it accordingly, but, without such rule they must not amend it; so if a record removed hither be mistaken, it is amendable by the record in the Common Pleas, brought into this Court by an officer out of the Common Pleas, because these things are in affirmance of the first judgment, and, therefore, favoured in law." These authorities show that an error in the record, caused by a misprision or mistake of the clerk, may be amended after error brought, by the court where the action was commenced.

It is contended, however, that the entry of a general verdict, in a case where the declaration contains several counts, some of them being bad, which was actually found by the jury, is not a misprision of the clerk. In *Mason v. Fox* (e) in an ejectment in the Common Pleas, judgment was that the plaintiff recover possession of a messuage, sixty acres of land, fifteen acres of meadow, and fifteen acres of pasture, but the verdict was entered for a messuage, ten acres of meadow, and thirteen acres of pasture, and for the residue, not guilty; and after error brought and assigned in this Court, it was held that this was a misprision of the clerk, who had not entered the judgment according to the verdict, and, therefore, that the judgment was amendable. That is an authority to show that the entry of the judgment, contrary to the verdict entered on the postea, is a misprision of the clerk. Several authorities are cited in that case; among others, *Whitby's* case, where the mis-entry of the verdict was held to be but a misprision of the clerk. In *Grenville v. Smith, Executor* (f), which was an action of covenant brought for non-payment by testator of 400*l.*, there was a *832] verdict for 420*l.*, and for *costs 53*s.* 4*d.* The entry upon the postea was, that the plaintiff should recover the damages 432*l.* de bonis testatoris si tantum, et si non; then the costs de bonis propriis; but the entry of the judgment upon the roll was, that he should recover the damages de bonis testatoris si tantum, et si non, then de bonis propriis; and this was held to be a mere misprision of the clerk, for the entry upon the postea was well, and that was his warrant for entering it upon the roll, and his entering it otherwise was a fault of the clerk, and this was amended upon view of the postea. There, too, the amendment was made by the King's Bench, and, after diminution alleged in the Exchequer Chamber, a certiorari was awarded to certify it; and after diminution, it being certified according to the amendment, the judgment was affirmed. An anonymous case, in 2 *Roll. Rep.* 471, shows that there may be a certiorari at any time. In *Short v. Coffin* (g), the Court of King's Bench, after in nullo est erratum pleaded, and after argument in the Exchequer Chamber, amended a judgment which had been entered against an executor de bonis propriis, by making it de bonis testatoris, &c., et de bonis propriis si non, &c., upon the ground that the mis-entry of the judgment was a mistake of the clerk; and in *Chapman v. Gale* (h) there

(a) 3 T. R. 749.

(d) *Hardr.* 505.(g) 5 *Burr.* 2730.(b) 3 *Brod. & Bing.* 65.(e) *Cro. Jac.* 632.(h) 2 *Lev.* 22.(c) *Barnes's Notes*, p. 7.(f) *Cro. Jac.* 628.

cited, the mistake of the clerk of the attorney was held to be a misprision of the statutes of amendment. In *Pickwood v. Wright* (a), *Hardy v. C* and *Usher v. Dansey* (c), the verdicts had been given for larger damages than those laid in the declaration; and after error assigned on that ground, the plaintiffs below were allowed to enter on the record a remittitur of the excess. *In those cases, the officer of the Court entered the verdict found by the jury, and warranted by the evidence, and yet such entry was held to be a misprision of the clerk. These authorities establish, that the error is not the postea of a verdict, other than that which the party in whose favor it was given have found is by law entitled to have entered for him, is considered as the act of the clerk, within the meaning of those words in the statutes of amendment.

There are several authorities (besides those already cited) to show that an amendment may be made by the court of error. Thus in *Dunbar v. Cock* (d), after error brought from the Common Pleas into this Court, the Court into *Dom. Proc.*, this Court allowed an amendment to be made on the record by inserting the certificate of the judge who tried the cause, and the plaintiff treble costs, which had been omitted by the clerk in entering the judgment in the Common Pleas, also by inserting the true terms in which the judgment of errors and joinder were made, instead of an entry on the judgment by the clerk of this Court, that they were made on an impossible day, and term, although both these errors were assigned in *Dom. Proc.*, and after judgment of the Court below had been affirmed in the King's Bench. In *Meredith v. Davies* (e) the Court ex officio awarded a certiorari on account of a defect in the body of the record, after in nullo est erratum had been found by the court of error. In that case the certiorari was granted after argument, after the Court had expressed an opinion that the objection assigned as ground for the certiorari was fatal. So in *Franklin v. Reeves* (f), in trespass for taking dung, where the defendant alleged to be dung of the *plaintiff, upon error brought, the objection was held fatal; but Lord *Hardwicke* says, that it was cured by the recital in the original writ, that the defendant might remove the error by a certiorari, and that the Court might award such a certiorari, though the objection be alleged, ad inform. conscient. cur.; and the same thing is laid down in *Bac. Abr., Error, E.* In *Rees v. Morgan* (g) the defendant in replevin was in cognizance for rent in arrear, and the jury found a verdict for him, and awarded to the amount of the rent claimed in his cognizance, without finding the amount of the rent in arrear, or the value of the cattle distrained, and a judgment was entered for the damages assessed; this Court (being the court of error) permitted the defendant to amend his judgment, and to enter a judgment in common law pro retorno habendo. These authorities show that where the Court may, by inspecting the record, amend the judgment, they ought to award a certiorari to bring the judgment before them, and if so, the Court ought either to award a certiorari, or to inspect the record of the judgment in the Common Pleas, and amend the record here according to it. No instance can be found where the Court, in which the action is brought, having affirmed the judgment of the court of error have refused to amend. In *Harrison v. King* (h), no error was made to the Court in which the action was brought to make a judgment, and there had been a lapse of eight years before any application was made to this Court.

On the 23d of February 1827, the judgment of the Court was delivered by
BAYLEY, J.:

We have paid great attention to this case, and there being a difference of opinion among the Judges, we *think it right to state the facts upon which we are of opinion, so that a court of error may have an opportunity of considering

(a) 1 H. Bl. 642.

(d) 3 M. & S. 591.

(g) 3 T. R. 349.

(b) 1 Marsh. 180.

(e) 2 Salk. 270.

(h) 1 B. & A. 161.

(c) 4 M. & S. 94.

(f) Cas. temp. Hardwicke.

whether the amendment which we have required to be made ought to be made or not. We have drawn out the entry, and will deliver it to the clerk of the rules, and he will deliver a copy to each of the parties. I forbear giving any opinion upon the case, thinking it better that it should go without prejudice to the court of error, where the question may be considered whether the amendment was properly made or not.

Rule absolute. (a)

(a) The following is a copy of the entry mentioned by the learned Judge.

After the joinder in error, the record set out various continuances, until in fifteen days of *St. Martin* in *Michaelmas* term, 6 G. 4, and then proceeded as follows: At which day, before our said lord the king at *Westminster*, come the parties aforesaid, by their attornies aforesaid, and hereupon, as well the record and proceedings aforesaid, and the judgment aforesaid in form aforesaid given, as the matters aforesaid by the said *W. Mellish* above for error assigned, being seen, and by the Court of our said lord the king now here fully understood, and mature deliberation being thereupon had, it appears to the said Court of our said lord the king now here, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error. Therefore, it is considered that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid be reverse, annulled, and altogether held for nothing; and that the said *W. Mellish* be restored to all things which he hath lost by reason of the said judgment, &c., and that the Court of our said lord the king now here, do award a venire facias de novo, and proceed according to law. Therefore, the sheriffs are commanded that they cause to come anew before our said lord the king in eight days of *St. Hilary*, wheresoever our said lord the king shall then be in *England*, twelve, &c., by whom, &c., and who neither, &c., to recognize, &c., because as well, &c., the same day is given to the parties aforesaid, &c., before which, in eight days of *St. Hilary*, that is to say, on *Monday* next after fifteen days of *St. Martin* in this same *Michaelmas* term, before our said lord the king at *Westminster*, come as well the said *G. Richardson* as the said *W. Mellish*, by their respective attornies aforesaid. And hereupon the said *G. Richardson*, on the said *Monday* next after fifteen days of *St. Martin* in this same *Michaelmas* term, gives the Court here to understand and be informed, that before the giving of the said judgment of the said Court of our said lord the king now here, ^{536]} that is to say, on *Thursday* the 10th day of *November*, in this same term, the following rule or order was made by the Court of our lord the king of the bench at *Westminster*, as to the roll or record of the proceedings of the said cause, wherein the said *G. Richardson* was plaintiff, and the said *W. Mellish* was defendant; that is to say, "Upon reading the record of *Nisi Prius* between the said parties, and the notes of the Right Honourable *Robert Lord Gifford*, late Lord Chief Justice of this Court, and the affidavit of *P. P.*, gent., it is ordered, that the defendant, upon notice of this rule to be given to him or his attorney, shall show cause to this Court on *Saturday* next why the postea in this cause should not be amended by such notes, by entering the verdict for the plaintiff on the first count of the declaration, and for the defendant on the other counts;" and the said *G. Richardson*, on the said *Monday* next after fifteen days of *St. Martin* in this same *Michaelmas* term, giveth the Court here further to understand and be informed, that before the giving of the said judgment of the Court of our said lord the king now here, that is to say, on *Thursday* the 24th day of *November* in this same term, the following rule or order was made: "Upon reading a rule made in this cause on *Thursday* the 10th day of *November* instant, and on hearing counsel on both sides, it is ordered, that the postea in this cause be amended, by entering the verdict for the plaintiff on the first count of the declaration, and for the defendant on the other counts, without the payment of any costs." And the said *G. Richardson*, on the said *Monday* next after fifteen days of *St. Martin* in the same *Michaelmas* term, also giveth the Court here further to understand and be informed, that after the giving of the said judgment of the said Court of our said lord the king now here, that is to say, on the said *Friday* in fifteen days of *St. Martin* in this same term, the following rule or order was made, in and by the said Court of our said lord the king of the bench aforesaid, as to the roll or record of the proceedings of the said cause; that is to say, "Upon reading a rule made in this cause yesterday, the affidavit of *J. J.*, and the paper writing thereto annexed, it is ordered, that the defendant, upon notice of this rule to be given to him or his attorney, shall show cause to this Court peremptorily on the morrow, why the judgment-roll in this cause should not be amended and made conformable to the amended postea, the plaintiff by his counsel hereby offering to allow to be deducted the difference (if any) between the costs which have been taxed and allowed in this cause, and the costs upon the postea, as amended, or to pay the said difference forthwith to the defendant or his attorney;" and the said *G. Richardson*, on the said *Monday* next after fifteen days of *St. Martin* in this same *Michaelmas* term, also giveth the Court here to understand and be informed, that after the giving of the said judgment of the said Court of our said lord the king now here, that is to say, on *Saturday* the 26th day of *November* in this same term, the following rule or order was made in and by the said Court of our said lord the king of the bench aforesaid, as to the roll or record of the proceedings of the said cause; that is to say, "Upon reading

a rule made in this cause yesterday, the affidavit of T. S., gent., agent for the defendant, paper writing "thereto annexed, and on hearing counsel on both sides, it is ordered that the judgment-roll in this cause be amended, and made conformable to the amendment of the postea, the plaintiff by his counsel hereby offering to allow to be deducted (if any) between the costs which have been taxed and allowed in this cause, and upon the postea as amended, or to pay the said difference forthwith to the defendant's attorney;" and hereupon, on the said *Monday* next after the fifteen days of *St. Michaelmas* term, it is certified to the Court of our lord the king the Justices of our said lord the king of the bench aforesaid, that they have examined the postea and judgment-roll in this cause to be respectively amended according to the rules; which said amended roll, as to the postea and subsequent proceedings thereon, follows; that is to say, (the Common Pleas roll as amended was then set out of record, and by that it appeared that the jury found that the defendant had not promised, as the plaintiff had in the first count of his declaration complained; other counts of the declaration, that the defendant did not undertake and promise, and form as the plaintiff had in those counts complained against him;) and the said *G. Richardson*, on the said *Monday* next after fifteen days of *St. Martin* term, the Court here will cause the record now here remaining to be amended in and proceed to give judgment according to the said amendments so ordered to be made by the Court of our lord the king of the bench; and the said *W. Mellish* in truth of the said matter so suggested by the said *G. Richardson*, but alleged in trial of the said issue, the verdict was pronounced by the jury, for the said *G. Richardson* generally, upon all the counts in the declaration, and not for the said *G. Richardson* in the said first count of the declaration, and for the said *W. Mellish* on the other counts; and the assertion of the said *W. Mellish* the said *G. Richardson* does not deny, otherwise he insists that the said *W. Mellish* cannot be allowed to make such assertion again, but is, by the record, estopped from making the same; and the said *W. Mellish* insists that the said *Robert Lord Gifford* did not amend the said postea, but declined to leave the amendment thereof to the consideration of the said Court of our lord the king of the bench, and that the same Court made the several rules for amending the postea and judgment-roll without the consent of the said *W. Mellish*, which allegation the said *G. Richardson* admits; and the said *W. Mellish* insists, that the Court of our lord the king now here ought not to proceed to give judgment according to the said amendments, especially, unless the Court here examines into and is furnished with the means for examining into the grounds and foundations of the said amendments; but which the Court cannot examine into, as it is not furnished with such means, nevertheless the Court on the said *Monday* next after fifteen days of *St. Martin* term, because it appears to the Court that this Court is bound by law to cause the record now here remaining to be amended according to the prayer of the said *G. Richardson*, and ought to give judgment according to the said amendments, without examining into or being furnished with the means for examining into the grounds or foundation thereof, and which the Court here cannot examine into, as it is not furnished with such means: therefore, it is ordered by the Court that the record now here remaining be amended according to the prayer of the said *G. Richardson*, and the same being so amended is as follows; that is to say (the amendment of the postea and judgment were then set out); and it is considered that the judgment of the Court of our lord the king of the bench, according to the amendment, be, and hereby in all things affirmed.

The Master, Wardens, Assistants, and Fellowship of the Company of Tobacco Pipe Makers of the Cities of London and Westminster, and of the County of Middlesex, and of the Town of Berks, and of the County of England and Dominion of Wales, v. WOODROFFE.

By charter, the king incorporated the Tobacco Pipe Makers in *London* and *England* and *Wales*; and after naming the first master, wardens, and assistants, and provided for the future election of officers, and the transaction of other corporate meetings to be holden in a hall in *London*, or within three miles thereof, the master, wardens, and assistants should there yearly elect out of the assistants be wardens of the society; and it then authorized the master, wardens, and assistants to make bye-laws for the government of the society, and every member thereof, any person using the art or mystery of making tobacco pipes in *London* and *Wales*, any other parts or places in *England* or *Wales*: Held, that although the charter was inadequate to bind all the tobacco pipe makers in the kingdom, it was competent for such of them as became members of the corporate company. Secondly, that

by fixing the place of meetings to *London* or *Westminster*, or within three miles thereof, sufficiently established local limits for the corporation. Thirdly, that a bye-law, which imposed a fine on every master, warden, or assistant who should not attend all courts to be holden, was a valid bye-law. Fourthly, that a bye-law, "that if *any person* chosen to be warden should refuse to accept the office of warden, he should forfeit to the company 6*l.* 13*s.* 4*d.*," was good, the words *any person* applying to persons eligible by the terms of the charter to the office of warden. Fifthly, that a bye-law, that every free-man, using or not using the said art, mystery, or trade, should pay yearly to the company 8*s.*, to be paid quarterly, and every journeyman of the company 4*s.* yearly, to be paid quarterly, and that every person refusing should forfeit twice the sum, was bad, inasmuch as it did not appear that any rightful expenditure of the company required such a contribution.

DEBT by the plaintiffs to recover from the defendant a fine of 6*l.* 13*s.* 4*d.*, and certain penalties alleged to have been incurred under the bye-laws of the Company of Tobacco Pipe Makers. The declaration set forth a charter of *Charles* *839] 2, to the company, and the *acceptance of that charter, by which they were empowered to make bye-laws, under which the said fine and penalties became due, as was alleged; and the plaintiffs claimed on the first count 2*l.* 16*s.*, being twice the amount of fourteen quarterly payments under the fifteenth bye-law; in the subsequent counts, up to the twenty-fifth count inclusive, the sum of 2*s.* in each count, amounting in the whole to 2*l.* 8*s.*, for non-attendances, in pursuance of the fifth bye-law, in consequence of the defendant's refusal to accept the office of warden. Plea, nil debet. At the trial before Lord Tenterden, C. J., at the *London* sitting after *Hilary* term 1825, a verdict was found for the plaintiffs for the fine and penalties, subject to the opinion of this Court on the following case:

By charter of the 15 *Charles* 2, the king did, among other things, grant and declare that his subjects, the tobacco pipe makers, within his cities of *London* and *Westminster*, and his kingdom of *England*, and dominion of *Wales*, and every of their apprentices whatsoever, when they should have served as apprentices to the said art or trade by the space of seven years, and all and every other person and persons who had served as apprentices to the said trade, or had used the said trade by the space of seven years, and all others which thereafter from time to time should be admitted and made free of the said society in such manner as thereafter was declared and specified, should be, from thenceforth for ever, one fellowship and body corporate and politic in deed and in name, by the name of the Master, Wardens, Assistants, and Fellowship of the Company of Tobacco Pipe Makers in his said cities of *London* and *Westminster*, and his kingdom of *England*, and dominion of *Wales*, and that by the same name they *840] should have *perpetual succession. The charter then stated, that the king granted, among other things, that from thenceforth for ever there should be one master, four wardens, and fifteen or more assistants of the said society, to be constituted and chosen in such manner and form as thereafter was expressed and specified. (Then followed the appointment of the first master by name for one year, of the first four wardens by name, also for one year, and of the first fifteen assistants by name, for life :) and, further, the king did thereby ordain, that from and after such time as the said first master should have served in the office of master of the said society during the time before limited, then the wardens and assistants for the time being, or the greater part of them, for that intent or purpose being assembled at or in a meet-house or hall, to be by them for their use purchased within his said city of *London*, or three miles of the same, should, within convenient time, nominate and elect a fit and sufficient person, who had formerly been one of the wardens of the said society, to be master of the said society, and so the master for ever thereafter to be annually elected to the office of master upon the 25th of *March*, and so to continue for one whole year then following: and, further, the king granted that the said master, warden, and assistants, or the greater part of them, from and after the 25th of *March* 1664, should yearly on the 25th of *March* (if it were not a *Sunday*, or if

Sunday, then the next day after), at the hall or place of meeting and nominate and elect out of the said assistants four to be wardens of the which said wardens should continue wardens until the end of one whole year next ensuing, and from thence until some other meet persons should be elected *chosen into the said office as wardens as aforesaid, if the said warden should so long live, or should not be removed from thence for some just cause as aforesaid: they, the said master and wardens so newly elected, should take oath before the master and wardens then being their last predecessors, two or more of them, for the due execution of the said several offices; and then that every such master and warden, masters and wardens so elected, to time leaving and departing from his and their places of masters and wardens respectively, at the end of his year should instantly become and remain masters and assistants of the said society in the room of him or them that should be chosen out of the assistants to be master and wardens of the said society as aforesaid: and, further, the king granted that if any of the said assistants of the said art or mystery should die, or be removed from his or their place of assistants for some reasonable cause, that then and so often it should be lawful for the said master, wardens, and assistants, or the greater number of them, to choose and make one or more other meet person or persons to be assistant or assistants of the same society, to continue in the said office or offices during his or their lives, except they, or any of them, for any reasonable cause, should happen to be removed out of the said offices: and further, that it should be lawful for the master, wardens, and assistants for the time being, or the greater part of them, from time to time to set or impose a reasonable fine and sum of money, not exceeding 10*l.* and every such person and persons as should be at any time thereafter brought before the said several offices of master, warden, and assistants, or any of them, as aforesaid, and should refuse to *undergo and accept the same; and that it should be lawful for the said master, wardens, and assistants, or the greater part of them, to levy by distress of the goods and chattels of the person or persons so refusing as aforesaid, or otherwise by any other lawful way, to execute the charter then empowered the master, wardens, and assistants, and their heirs, to assemble in their hall or place before mentioned, and there to make such constitutions, laws, &c., for the rule and government of the master, wardens, assistants, and society, and every member thereof, and in what order or manner the said master, wardens, assistants, and society, and all and every other person or persons using the art or mystery of making tobacco pipes within the city of *London* and *Westminster*, and any other parts or places within the counties of *Middlesex* or *Wales*, should demean and behave themselves, as well in all matters touching the said art or mystery, as also in their several offices, functions, mysteries, and business touching the said society as aforesaid, and all and singular such penalties, &c. by fines against any offender who should transgress the said constitutions, laws, &c. to be made, to provide, impose and limit, as to the same the said master, wardens, and assistants of the said society, or the greater part of them, for the time being should seem expedient; all which laws, &c., the king granted should be commanded to be obeyed and performed in all things, as the same ought to be, under the reasonable penalties, forfeitures, &c., in the same to be imposed, provided, &c., so as the same laws, statutes, &c., penalties, forfeitures, fines, or any of them, should not be repugnant or contrary to the laws and statutes of *England*, or prejudicial to the customs of the city of *London*.

At the trial it was objected for the defendant, that evidence ought to be given that the charter had been *accepted by a majority of those whom the king intended to incorporate, whereupon it having been proved that the defendant had been admitted a member of the company, and had acted as such, and that quarterage and other dues had been received from tobacco pipers in different parts of *England* ever since the granting of the charter, the Chief Justice stated that it was not for the defendant to dispute the authority of the charter, and his Lordship left it to the jury upon this evidence.

to the point of acceptance, that it was complete and conclusive evidence against the defendant that the charter had been accepted, and the jury found the fact to be so. And it is for this reason alone stated as a fact in the case as against the defendant, that the tobacco pipe makers of *London* and *Westminster*, and kingdom of *England* and dominion of *Wales*, accepted the charter, and have ever since acted under it.

On the 30th of *August* 1820, at a meeting of the master, wardens, and assistants of the company duly assembled for that purpose at the *Guilthall* of the city of *London*, forty-five bye-laws were duly ordained, established, and declared, which the defendant took an active part with the committee of the company in forming and passing, and signed the same as one of the assistants of the company, together with a petition to the Lord Chancellor, the Lord Chief Justice of the Court of King's Bench, and the Lord Chief Justice of the Court of Common Pleas, to examine, approve, and sign the same. The bye-laws and the petition were signed and approved pursuant to stat. 19 *Hen.* 7, by the Lord Chancellor and the two Chief Justices. (As the decision of the Court applies only to the bye-laws stated in the declaration, it is unnecessary to set out the *844] others.) The fifth bye-law *ordered that the master, wardens, and assistants of the said company should, upon notice to him or them given, or left at his or their usual place or places of abode, appear at all other courts to be holden for the company at such place of meeting to be appointed as aforesaid, unless hindered by sickness, or some other reasonable cause, to be allowed by the master, wardens, &c. for the time being, or the greater part of them, upon pain of forfeiting for every default the sum of 2s.; and if he should not appear at the hour to be appointed by the master and wardens for that purpose, to pay the sum of 6d. for every default; or if he should leave the court without licence of the master, to pay the sum of 6d. for any time he shall so offend: the said several sums to be paid to the company for the use thereof.

The tenth bye-law ordained, among other things, that if any person who should be chosen to be a warden of the company should refuse to accept the office of warden, or take the oath appointed to be administered to him in that behalf, every person so refusing should forfeit to the company, for the use thereof, 6l. 13s. 4d.

The fifteenth ordained, that as well every freeman and brother of the said company within the cities of *London* and *Westminster*, and any other parts or places within the kingdom of *England* and dominion of *Wales* as limited by the said charter, either using or not using the said art, mystery, or trade of making tobacco pipes, should pay yearly, by the name of quarterage money, to the master and wardens of the company for the time being, to the use of the said corporation, the sum of 8s. yearly, which should be paid quarterly by equal portions; and every journeyman or journeywoman of the said company who *845] should be kept or set on work by or with any *member or members thereof, should pay 4s. yearly at the four quarterly days aforesaid, by equal portions, to the said company for the use thereof; and the same quarterages should be paid at the said quarterly assemblies in the place of meeting aforesaid; upon condition that, every person refusing or neglecting to pay his or her quarterage at the said quarterly courts, or to the renter-warden, within the space of ten days after any of the said quarterly meetings, according to the rates aforesaid, should forfeit and pay twice as much as should be at any time in arrear and not paid to the master and wardens for the time being, or some of them.

The defendant was a tobacco pipe maker carrying on business in *Old Street*, and at *Vinegar Yard, Belton Street, Bloomsbury*, both in the county of *Middlesex*. On the 7th *January* 1812, at a court of the company duly holden, he was admitted and sworn into the freedom of the company; since which he had frequently attended the meetings of the company held under the charter and bye-laws. At a court duly holden on the 25th *March* 1813, the defendant was

chosen steward of the company, and served that office; and at another holden in 1814, he was chosen one of the assistants, took the oath and paid the freeman's quarterly money then due from him. On the 1st of January 1815, and at many subsequent courts from that time till March 1823, he sat and acted as an assistant, and during those periods took a great part in the affairs of the company. At a general court duly holden on the 1st of March 1823, at which the defendant was present, he was duly chosen one of the assistants of the company, of which he had notice, but refused to take upon him the office. Prior to 1820 he had frequently paid the *quarterage money mentioned in the fifteenth bye-law; but from Midsummer 1820 to Christmas 1823, he being all that time a freeman and one of the assistants of the company, neglected to pay the quarterage, the same having been demanded of him. The several courts, stated in the second and subsequent parts of the declaration, were duly holden, at which the defendant was summoned to attend, but neglected so to do.

F. Pollock for the plaintiffs. The charter is valid. The circumstances of the company having power to make regulations for the trade throughout the city of London and Wales, might have furnished an argument against its validity, if it had given exclusive privileges tending to narrow or restrain the exercise of the trade. But its tendency is otherwise, for it includes all persons exercising the trade. *The Butchers' Company v. Morey* (a) affords an instance of a charter giving a company powers more extensive. There, the power was given to the company to make bye-laws for the government of all persons exercising the trade of a butcher in London, whether they were members of the company or not. It must be taken as against the defendant, after the finding of the jury, that the charter was accepted. Secondly, the bye-laws, as a whole, are valid. The company had authority to make them, and their object is beneficial to the public, and not in contravention of the common or statute law. And it is not that some of them are void, that will not render the others void. The bye-law is clearly good. The company had authority to make *it. It contains a regulation legal in itself, and binding on all the members. The tenth, which imposes a fine on every person refusing office, is a regulation of the same nature. Giving a reasonable construction to the words there, the word *person* must apply to the persons liable to serve the offices. It is not by the charter that the officers must be chosen out of the members, but the bye-law must be construed with reference to that provision in the charter. The fifteenth bye-law is good as against the members of the company: it may not be good as against journeymen, though it relates to journeymen of the company. But that part of the bye-law on which the action is brought is binding on members of the company, and that is good. The defendant, being a member, is bound by it.

George contra. The charter is void. Secondly, the whole body of bye-laws is void. Thirdly, two of those bye-laws on which the action is brought are bad. The effect of the charter is to subject to bye-laws, and to fines, all persons who shall carry on the trade or handicraft of a tobacco maker, not in any particular place, but in the cities of London and Westminster, or in the kingdom of England and dominion of Wales. First, the act of such a charter would be impracticable; for how could all the tobacco makers in the kingdom be assembled for that purpose? But the crown has by its prerogative grant such a power to a corporation; it can be granted by act of parliament; and a charter which professes to give to a particular company a power to regulate by bye-laws the trade of the whole kingdom is void, because it is in restraint of the common law right which every person has to exercise every lawful trade, *Com. Dig. tit. Trade, (A 6)* In the same work, tit. *Prerogative* (D 38), it is laid down, that the king, for

(a) 1 H. Bl. 370.

the public good, may grant an embargo upon a merchant ship; but that an embargo shall not be allowed if done for the benefit of a private trader or company, and *Child v. Sands* (a) is cited. Upon the same principle, it would seem that the king cannot by charter grant a monopoly for the benefit of a particular company. In tit. *Prerogative* (D 38), it is said that the king may erect societies for the management of trade, and there is a reference to title *Trade* (B.); and there the case of *The City of London* (b) is cited to show that the king may erect an incorporation of merchants for the advancement of trade. In that case it was resolved, that the custom of *London* "that no person whatever, not being free of the city of *London*, shall keep any shop for putting to sale of any wares by way of retail, or use any trade, occupation, mystery, or handicraft for hire, gain, or sale within the city of *London*, was a good custom; and that a constitution made according to the custom, upon pain of forfeiture of 5*l.*, was also good. And as to that, first, it was resolved, that there was a difference between such a custom, within a city, &c.; and a charter granted to such a city, &c. to such effect; for it is good by way of custom, but not by grant; and, therefore, no corporation made within time of memory can have such privilege, unless it be by act of parliament." Now the Tobacco Pipe Makers' Company cannot be a corporation by prescription for tobacco was introduced into this country in 1583, within the time of legal memory.

*849] That case, therefore, is an authority to show that a charter giving an exclusive right to a particular company to carry on trade within a city, is void. A fortiori, a charter giving a power to a company to make bye-laws, binding all persons who exercise a trade throughout the kingdom, must be void. The very term bye-law implies a law limited to a particular district; *Jacob's Law Dictionary*, tit. *Bye-Law*. The only instance of a corporation like this which is to be found, is the case of the Soap Makers' Company, *Hayes v. Harding* (c). It appears by that case, that King *Charles* the First by charter ordained that there should be in *England* and *Wales* one society or body corporate of soap makers, and that none, not free of that society, should use that trade without admittance into the society, upon pain to forfeit all the soap they should make. It does not appear, however, that any judgment was given in that case. But, secondly, this charter is void, because the corporation is not constituted of any particular place, and that is essential to every corporation. The case of *Sutton's Hospital* (d), *Rolle's Abr.* tit. *Corporation*, (D).

Then, as to the bye-laws, it is not contended that all the bye-laws are bad because one is bad; but it is fair to look to the object for which the bye-laws were made, and if it appears that the general object of most of the bye-laws was to extract money from all persons, whether they be members of the corporation or not, who exercise the trade, they were illegal, and if the major part be void on that ground, the whole must be taken to be void. (He then proceeded to show that the object of many of the bye-laws not set out in the report was as above stated; but *as the Court, in their judgment, took no notice of *850] these bye-laws, it has been deemed unnecessary to state the argument further upon that point.) It may be conceded, that there is no objection to the fifth bye-law per se. The tenth bye-law is void: *The Mayor of Oxford v. Wildgoose* (e) is in point. There the bye-law was, "that if any person should be duly elected chamberlain and refuse, he should forfeit a certain sum to the mayor, &c. And a bye-law to elect aliquam personam was held to be void, because thereby they might elect any stranger to be their chamberlain." That case shows that the tenth bye-law is bad, and if it be bad because it extends to all persons, it will not be good as to those to whom it is applicable; because a bye-law being entire, if it be unreasonable in any particular, shall be void for

(a) 1 *Salk.* 32. 3 *Levins.* 353.(c) *Hordr.* 53.(e) 3 *Levins.* 293.(b) 8 *Co.* 125 a.(d) 10 *Co.* 32 b.

the whole, *Com. Dig.* tit. *Bye-Law*, (C 7.) The fifteenth bye-law imposes payment on members of the corporation, whether they use the trade or not, does not state for what purpose the money is to be raised, or that it is necessary for any purpose for which the company might by law raise money. That so, this bye-law is at all events void.

Cur. adv. vult.

Lord TENTEDEN, C. J., in *Trinity* term 1826, delivered the judgment of the Court.

This was an action upon three bye-laws, the fifth, tenth, and fifteenth by the Tobacco Pipe Makers' Company, in *August* 1820. The company was incorporated by charter of the 15 *Car.* 2, and has a master and four wardens who are chosen annually, and fifteen *assistants. The fifth bye-law imposes a penalty of 2*s.* upon the master, or any warden or assistant who does not personally appear at each court. The tenth bye-law imposes a fine of 6*l.* 13*s.* 4*d.* upon any person chosen warden who does not accept the office and take the oath; and the 15th bye-law requires every freeman or brother of the company, whether he used the trade or not, to pay 2*s.* per annum for the use of the company. The action was brought for 2*l.* 8*s.* under the fifth bye-law, 6*l.* 13*s.* 4*d.* under the tenth, and 2*l.* 16*s.* under the fifteenth; and the questions were, Whether the charter was valid, and the bye-laws, or any of them, good?

The charter professed to incorporate the tobacco pipe makers in *London, Westminster, England* and *Wales*, and their apprentices, when they have served seven years; and every person who had for seven years served as an apprentice to the trade, or used the trade, and all others thereafter should be admitted and made free of the company; and, after the first master, wardens, and assistants, provided for the election of masters, wardens, and assistants, in a meet-house or hall to be by them for use purchased or provided in *London*, or within three miles thereof. The charter also gave the master, wardens, and assistants power to assemble in any hall or place, and make bye-laws, for the rule and government of the masters, wardens, and assistants, and society, and every member thereof, and every person using the art or mystery of making tobacco pipes in *London* or *Westminster*, or any other parts of *England* or *Wales*. Two objections were made to this charter; one, that it was to bind all the tobacco pipe makers in the kingdom, which nothing short of an act of parliament could do; *and the other, that it was confined to no part in particular of the kingdom, and that every corporation ought to be of some place. But we think it an answer to the first of these objections, that though the charter be inadequate to bind all the tobacco pipe makers in the kingdom, it may be and is competent to bind such of them as think fit to become members of the company; and we think an answer to the second objection, that this charter, by fixing the place of meeting for the company to *London* or *Westminster*, or within three miles thereof, establishes such local limits as are requisite upon such a charter.

The next question then is, upon the validity of the bye-laws. The first is to compel an attendance at corporate meetings (a): the tenth, to compel acceptance of a corporate officer (b); and to the subject-matter of these bye-laws no legal exception can be made. Attendance at corporate assemblies, and acceptance of a corporate office, is a duty each member owes to the corporation which he belongs. Is there any objection, then, to the manner in which these bye-laws are worded? The fifth is so framed as to be free from exception, it requires the attendance of master, wardens, and assistants by those surnames. The tenth is more generally worded. "If any person, who shall be chosen a warden, shall refuse to accept the office and take the oath, he

(a) See *Lutw.* 1320. *Ld. Raym.* 113.

(b) See *Lutw.* 402. *Ld. Raym.* 496. 2 *Lev.* 252.

forfeit 6*l.* 13*s.* 4*d.*” And it may be said, that the word *person* is indefinite, and would include persons not properly eligible to the office. And this very objection was certainly allowed in *The *Mayor of Oxford v. Wildgoose* (a). *653] That case, however, is not to be found in any contemporaneous reporter; it does not appear to have been much discussed or considered; and we think it cannot be supported. In that case, as well as this, we think the condition of eligibility is from the subject-matter necessarily implied, and that the word *person* must be considered as confined to *eligible* persons. The only remaining question is, as to the quarterages; and it seems to us, that as the amount of these contributions is not confined to what the proper demands of the company may require, but is uniformly the same, let the company's expenditure be little or great, and as there is no statement from which we can collect that the right expenditure of the company requires any such contribution, this, which is in the nature of a tax upon the company, cannot be supported. We are aware of the *Innholders' case* (b), which is reported in Mr. Ford's MSS. vol. v., by the name of *The Innholders' Company v. Harrison*, where a bye-law that every innholder, being a brother of the company, should pay 2*s.* per quarter, to be applied to *particular purposes for the benefit of the company*, was held good; but the purposes to which those payments were to be applied might be commensurate with those payments, and might, on that account, remove all objection to the amount of those payments; whereas here, there is nothing to show that a quarterage to such an extent, or to any extent, is necessary for the company; and, for any thing which appears to the contrary, the company may have sufficient funds of its own from other sources, for all the purposes of the company. *854] We are, therefore, of opinion, *that the verdict should stand for the 2*l.* 8*s.*, and the 6*l.* 13*s.* 4*d.*, and should be annulled as to the 2*l.* 16*s.*

Judgment for the plaintiff. (c)

(a) 3 *Lev.* 293.

(b) 1 *Wils.* 281.

(c) This case was argued at the sittings in banc, after *Michaelmas* term, 1825, and judgment was delivered in *Trinity* term, 1826, but the papers having been mislaid, the editors were unable to publish it at an earlier period.



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Where a prebendary, having the advowson of a rectory in right of his prebend, dies whilst the church is vacant, his personal representative has the right of presentation for that turn. *Per Bayley, Holroyd, and Littledale, Js. Lord Tenison, C. J., diss. Rennell, Administratrix of T. Rennell, Clerk, v. The Bishop of Lincoln and others, T. 8 G. 4.*

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ANNUITY.

1. The agent for the grantee of several annuities delivered him four accounts in the course of eighteen months, and gave him credit for all the half-yearly instalments of the several annuities then due, but stated that some of them had not been received. He charged commission on all the instalments, and paid the balance of the accounts as if they had been received, and in the later accounts never brought forward those sums, nor intimated that he expected them to be repaid: Held, upon a bill of exceptions, that upon this evidence the jury were properly told by the Judge, that they might infer an agreement whereby the agent made himself personally responsible for the payment of those annuity-instalments in default of payment by the grantors. *Show and others, Assignees of Howard and Gibbs, v. Woodcock, T. 8 G. 4.* 73
2. Where a party who by writing obligatory (without any penal sum), had bound himself to pay to *A. B.* an annuity of 20*l.* a year for her life, devised his estates to trustees upon certain trusts, until his son should attain the age of twenty-one years: Held, that the estate of the trustees ceased upon the death of the son under the age of twenty-one, all the purposes of the trust being then at an end; and that the trustees were only liable to pay to *A. B.* such arrears of the annuity as became due before the son's death. *Morant v. Gough and another, T. 8 G. 4.* 206

APPEAL.

See COUNTY RATE. HIGHWAY, 6.

1. Where a county rate was made under a local act, 54 G. 3, c. 103, giving a certain right of appeal: Held, that nevertheless a party aggrieved had the larger right of appeal given by the 55 G. 3, c. 51, s. 14, which applies to all acts relating to county rates theretofore passed, whether local or

general. *Rez v. The Justices of Buckinghamshire*, T. 8 G. 4. 3

2. By a local act certain trustees of roads were authorized to make an order for stopping up part of certain old highways, and a right of appeal was given to any person or persons who might be aggrieved by the making of any such order: Held, that in a notice of appeal against an order of trustees for stopping up a highway, it was necessary to state that the party intending to appeal was aggrieved by the order. *Rez v. The Justices of the West Riding of Yorkshire*, H. 8 & 9 G. 4. 678

3. A notice of appeal against overseer's accounts, merely stating that the party intended to try his appeal against the accounts on the grounds and for the reasons therein after set forth, and then specifying the items against which he intended to appeal, and the objection which he intended to make to each item, was held to be sufficient, although it was not stated that the party intending to appeal was a rated inhabitant of the parish, or a party aggrieved. *Rez v. The Justices of Somersetshire*, H. 8 & 9 G. 4. 681 n. (a)

4. Where an appeal against an order of removal was dismissed on the ground that the appellant had not given the notice required by the rules of the justices, this Court, thinking it reasonable that the appeal should be heard, granted a mandamus to the justices to enter continuances and hear the appeal. *Rez v. The Justices of Lancashire*, H. 8 & 9 G. 4. 691

ARBITREMENT.

See AWARD. BANKRUPT, 1.

1. A verdict having been found for the defendant, and a rule for a new trial obtained, the cause was referred to a barrister, and the costs of the cause were to be in his discretion. He found that the plaintiffs were entitled to recover, and ordered the defendants to pay the costs of the cause: Held, that the plaintiffs were not entitled to the costs of the first trial. *Rigby and others, Assignees, v. Okell and others*, T. 8 G. 4. 57

2. Where an award directed that one of the two parties to the submission should pay the expenses of the reference, and that the other should repay them on demand; and the former having paid them, made an affidavit of debt against the other party, alleging such payment, but not stating any demand of repayment: Held, that this was not sufficient. *Driver v. Hood*, M. 8 G. 4. 494

3. Where a cause and all matters in difference were referred at Nisi Prius to an arbitrator, and he found that a sum of money was due from the plaintiff to the defendant, and ordered that sum to be paid to the latter; and between the time of making the order of reference and taxing costs, and signing judgment, the plaintiff became bankrupt: Held, that the amount of the taxed costs

did not constitute a debt provable in the commission, and that the bankrupt was not discharged as to that debt by his certificate. *Haswell v. Thorogood*, E. 8 G. 4.

ARREST.

1. By the 12 G. 1, c. 29, s. 2, it is provided that before arrest by an inferior officer an affidavit of debt shall be made by an officer who issues the process, or by a justice of the peace: Held, that the deputy must be a justice of the peace for issuing process, and not merely a clerk taking affidavits. *Rogers v. Jones*, E. 8 G. 4.
2. An Irish peer cannot be arrested for debt. *Coates and another, Assignees, v. Hawarden*, M. 8 G. 4.

ASSUMPSIT.

1. By the statute 3 G. 4, c. 46, the quarter sessions are empowered to charge a forfeited recognizance in cases only where the party has been committed to gaol, or has given security to appear at the sessions, and, therefore, a party, whose recognizance had been forfeited for not appearing to a trial, and against whom process was issued, paid to the sheriff the sum required in the recognizance, in order to purchase his goods, and the justice of the sessions afterwards by an order mitigated the recognizance to a small sum, and the sheriff to discharge the residue of the recognizance: it was held, that the order was void, and that the party was entitled to recover from the sheriff the sum which the justices had ordered to be charged. *Haynes v. Hayton*, E. 8 G. 4.
2. An action at law for a distribution of an intestate's property cannot be maintained against the administrator; nor against his executor, although he may have expressly promised to pay. *Jones v. Escentor*, M. 8 G. 4.

ATTORNEY.

See JOINT STOCK COMPANY, 1.

1. The statute 1 G. 4, c. 119, s. 1, provides that no suit in law be proceeded in by a creditor against an insolvent, more than an arrest on mesne process by a signee of an insolvent's estate without the consent of creditors and approbation of the commissioners of the insolvent court: Held, in an action brought by an insolvent to recover his bill of costs incurred in an action at the suit of such an assignee, it was incumbent on the attorney to show that the consent of creditors and the approbation of one of the commissioners of the insolvent court had been obtained: Held, that the events that he had informed his client of such consent was necessary. *Allison v. one, &c. v. Rayner*, M. 8 G. 4.
2. An attorney, upon receiving the a

- his bill, is bound to deliver up to his client, not only original deeds, &c. belonging to him, but also the drafts and copies. *Ex parte E. Horfull, M. 8 G. 4.* 528
3. By custom in a corporate town, all persons having served an apprenticeship for seven years to a free burgess, carrying on trade there, were entitled to be admitted to the office of free burgess: Held, that a person who had served under articles of clerkship to an attorney, a free burgess of the borough, and residing within the same, was not entitled to be admitted to his freedom. *Rea v. The Mayor, &c., of Doncaster, H. 8 & 9 G. 4.* 630
4. An attorney suing by *latitat*, and not by attachment of privilege, loses his right to retain the venue in *Middlesex*. *Mounsey v. Watson, H. 8 & 9 G. 4.* 683

AWARD.

See ARBITREMENT.

In debt on an award, the execution of the submission by all the parties must be proved. *Ferrer v. Owen, M. 8 G. 4.* 427

BAIL.

See PRACTICE, 6, 10, 14, 16, 17.

BANKRUPT.

1. Where a commission of bankrupt was sued out on the petition of *A. B.*, founded on an act of bankruptcy in *December*, and it appeared that in the preceding *October*, the bankrupt, by a deed, to which *A. B.* was a party, assigned all his property: Held, that the assignees (although *A. B.* was not one of them) could not avail themselves of this deed as an act of bankruptcy in order to recover money subsequently paid by the bankrupt, inasmuch as the creditors represented by the assignees derived all their rights under the commission from the petitioning creditor, who was a party to the deed.
- The money sought to be recovered had been deposited by the bankrupt in the hands of an arbitrator, who was to decide to whom it belonged. The arbitrator, before the commission issued, and without knowledge of any act of bankruptcy having been committed, paid the money over to the person whom he thought entitled to receive it: Held, that the assignees could not recover it from the arbitrator. *Tope and another, Assignees, v. Hockin, Gent., one, &c., T. 8 G. 4.* 101
2. The assignees of a bankrupt having once affirmed the acts of a person who wrongfully sold the property of the bankrupt, cannot afterwards treat him as a wrongdoer, and maintain trover. *Brewer and another, Assignees, v. Sparrow, T. 8 G. 4.* 310
3. The sheriff having, under a *fiery facias*, issued at the suit of a judgment-creditor, seized the goods of a bankrupt, which the

assignees claimed, the Court stayed the return of the *fiery facias* until the sheriff should be indemnified. The assignees of the bankrupt, in their own name, and not in their character of assignees, brought trespass against the sheriff and execution-creditor for seizing the goods, which consisted of the stock on a farm, which had belonged to the bankrupt. On the issuing of the commission, the assignees took possession of the farm, managed it for the benefit of the creditors, and purchased additional stock and farming utensils, and they had continued in possession several months before the goods were seized by the sheriff under the *fiery facias*. The Court refused to stay the proceedings in the action of trespass. *Bernasconi and others v. Fairbrother and another, Sheriffs of Middlesex, and another, T. 8 G. 4.* 379

4. Where a verdict in trover was obtained in vacation against a trader, who, after the first day of the next term, but before final judgment was signed, became bankrupt: Held, that final judgment signed afterwards during the same term, related to the first day of the term, and that the debt thereby created was barred by the bankrupt's certificate. *Greenway and another v. Fisher, M. 8 G. 4.* 436

5. Where a trader, in embarrassed circumstances, gave a bill of sale of part of his property to a particular creditor: Held, that, upon a question, whether this was an act of bankruptcy within the 6 G. 4, c. 16, s. 3, it was properly left to the jury to say, whether it was a voluntary deed, and given in contemplation of bankruptcy. *Gibbins and another, Assignees, v. Phillips, M. 8 G. 4.* 529

6. Where a party examined before commissioners of bankrupt, admitted that he had received a sum of money on account of the bankrupt after an act of bankruptcy, but not that it was a subsisting debt: Held, that this was not evidence sufficient to support a count on an account stated with the assignees. Query, whether an admission obtained by such compulsory examination can be used as evidence in such an action? *Tucker and another, Assignees, v. Barrow, H. 8 & 9 G. 4.* 623

7. Where a party, brought before commissioners of bankrupt, and examined by them with a view to ascertain whether the bankruptcy had been concerted between him and the bankrupt, and how the stock of the latter had been disposed of, was asked with what intention he believed the bankrupt had come to him on a certain day before the docket was struck? to which he answered, that he did not know the bankrupt's intention, and did not know what to say as to his belief: Held, that the question was not material, and that, therefore, although the answer might not be satisfactory, the commissioners had not authority to commit the party. *Ex parte Charles Baxter, H. 8 & 9 G. 4.* 673

8. A second commission issued against a trader, before a former commission has

been disposed of, is a nullity; and where a bankrupt obtained his certificate under a second commission, issued under such circumstances: Held, that he was not entitled to be discharged out of custody, although the debt for which he was detained was contracted before the issuing of that commission. *Till and another, Assignees, v. Wilson, H. 8 & 9 G. 4.* 684

3. Where a cause and all matters in difference were referred to Nisi Prius to an arbitrator, and he found that a sum of money was due from the plaintiff to the defendant, and ordered that sum to be paid to the latter, and between the time of making the order of reference, and taxing costs and signing judgment, the plaintiff became bankrupt: Held, that the amount of the taxed costs did not constitute a debt provable under the commission, and that the bankrupt was not discharged as to that debt by his certificate. *Haswell v. Thorogood, H. 8 & 9 G. 4.* 705

BILL OF EXCHANGE.

The holder of a bill of exchange cannot by the custom of merchants insist upon payment by the acceptor, without producing and offering to deliver up the bill; and, therefore, it was held that the indorsee of a bill having lost it, could not in an action at law recover the amount from the acceptor, although the loss was after the bill became due, and the indorsee offered an indemnity. *Hansard v. Robinson, T. 8 G. 4.* 90

1. A. was employed as storekeeper by B. and C., who were joint adventurers in a mine, and he was authorized to draw bills on B. for money laid out on account of the mining company. The bills were discounted by a banker, and the payment of them was guaranteed to him by B. and C. B. having been arrested, A., in order to provide funds to procure B.'s discharge, drew on B. a bill purporting to be on account of the mining company. The banker discounted the bill, and paid the amount to B. C. was afterwards compelled to take up the same in consequence of his guaranty. In an action brought by A. against B. and C. for his salary, it was held that C. could not set off the amount of the bill. *Jones v. Fleming and Jones, T. 8 G. 4.* 217

3. A. B., who carried on business on his own account, and also in partnership, went abroad, and gave to certain persons in this country two powers of attorney; by the first of which, authority was given for him, and in his name, and to his use, to do certain specific acts, (and, amongst others, to indorse bills, &c.) and generally to act for him, as he might do if he were present; and by the second, authority was given "for him and on his behalf, to accept bills drawn on him by his agents or correspondents." C. D., one of A. B.'s partners (and who acted as his agent), in order to raise money for payment of the creditors of the joint concern, drew a bill, which the attorney accepted in A. B.'s name by *procura-*

tion. In an action against A. indorsee of the bill: Held, first, right of the indorsee depended on authority given to the attorney; that the powers applied only to a individual and not to his partnership; thirdly, that the special power extended only to bills drawn by him in that capacity, and that C. D. draw the bill in question as agent for partner; and, lastly, that the powers in the powers of attorney were construed at large, but as giving powers for the carrying into effect special purposes for which they were given. *Attwood and others v. Munnings*

1. A customer deposited a sum of money with a banker, and received a bill of exchange, on which the banker promised to pay the principal at ten days' sight, with three per cent. interest to the day of acceptance. The banker paid interest on the note, at the same time told the customer, that he would, in future, pay more than half per cent., and in his present terms of the note by striking out and inserting *two and a half*: Held, that the word "acceptance" meant that it need not be left without interest for acceptance; secondly, that the amount of interest was evidence to a principal sum was due, and that the banker was admissible in evidence to show terms on which the deposit was made. *Newton v. Toomer, M. 8 G. 4.*

5. Where a bill of exchange, payable at sight, having been presented for acceptance and refused, and duly protested eight days afterwards accepted by a person for the honour of the drawer when at maturity, according to the protest, and was presented for payment to the drawee and the acceptor: Held, in actions against the latter and drawer, that these presentments were made at a proper time.

But it was held necessary that the presentment to the drawee for payment be averred in the declaration: and that, in case of such averment judgment was given for the drawer. *Williams v. Germaine, M. 8 G. 4.*

6. Where A. B. agreed to take a bill payable to pay C., the former occupier, of a house, by bills at three months afterwards, without the knowledge of A., took from B. a bill for the amount, payable at six and twelve months, accepted by himself in his own name: Held, that the latter could not sue on the bills. *Greenlade and Colman, H. 8 & 9 G. 4.*

BOND.

See ANNUITY, 2.

An overseer has not, by virtue of any authority to borrow money, an action against a surety, on a bond conditioned for the overseer's faithful

ing for all sums received by him by virtue of his office, the surety is not liable for a sum lent to the overseer and applied by him to parochial purposes. *Leigh v. Taylor*, M. 8 G. 4. 491

BROKER.

See PRINCIPAL AND AGENT.

In an action against a sworn broker of the city of London for negligence in making a contract, the Court will, on motion, compel him to produce his books, in order to enable the plaintiff to inspect and take a copy of the contract. *Browning and another v. Aylwin and another*, T. 8 G. 4. 204

BYE-LAW.

See CORPORATION, 6.

CANAL ACT.

By a canal act the company of proprietors were authorized to make the canal, and to do all other acts which they might think necessary and convenient for the making, improving, and using the canal; and the profit of the company, on the money expended in making and completing the navigation, was not to exceed 8 per cent. per annum; and in order to ascertain the clear amount of the profits of the navigation, the company were required to keep an account of the money laid out in making the canal, and of all charges incurred before the canal was completed; and also to make out an annual account, balanced to the 29th of September, of the rates, and of the charges attending the supporting, maintaining, and using the said navigation, and these accounts were to be laid before the justices at quarter sessions, and they were to reduce the rates whenever the clear profits of the navigation exceeded 8 per cent. upon the money laid out: Held, that the company were authorized to widen and deepen the canal, after it had been once completed, (that being beneficial to the public,) and that the charge of such widening and deepening was a charge attending the using of the canal. *The King v. The Justices of Glamorganshire*, H. 8 & 9 G. 4. 722

CHARTER.

See CORPORATION, 2, 5, 6.

COMMITMENT.

A commitment of an insane person, under the 39 & 40 G. 3, c. 94, s. 3, is not a commitment in execution, and is not, therefore, to be construed with the same strictness; and, therefore, a warrant stating that A. B. had been discovered and apprehended under circumstances that denoted a derangement of mind, and a purpose of committing some crime, for which, if committed, he would be liable to be indicted, to wit, an assault, and that the said A. B. being brought be-

fore the justice, he committed him, was held to be sufficient, although it did not state the name of the person whom the prisoner intended to assault; and it did not appear that the committing magistrate received any evidence on oath. *The King v. Gourlay*, H. 8 & 9 G. 4. 669

COMMON.

1. Trespass for breaking and entering the plaintiff's close, and treading down the grass, &c. and breaking and destroying the hedges and fences of the plaintiff, &c. The defendant, as to all the trespasses, pleaded that the plaintiff's close was parcel of the manor of C., and that a certain messuage and four acres of land was parcel, and a customary tenement of that manor, and that there is, and from time whereof, &c. there hath been a custom within the manor, that the customary tenant of that tenement shall have common of pasture upon the plaintiff's close. That J. S., being seised of the said customary tenement, having occasion to use his common of pasture, entered the close in which, &c. and put his cattle in, and because the hedges and fences had been improperly erected, defendant threw them down. The plaintiff, in his replication, took issue upon the custom, and new assigned that the defendant entered for other purposes than those mentioned in the plea: Held, first, that upon the issue joined upon the replication, the plaintiff was at liberty to prove a custom for the lord of the manor to inclose parcels of the waste, and a grant to him of the locus in quo under such custom, and that it was not necessary that that custom should be specially replied.

Held, secondly, that a custom for the lord of a manor to inclose the waste without limit or restriction, being inconsistent with the rights of the commoners, was bad in point of law, but that a custom to inclose (even as against common of turbary) parcels of the waste, leaving a sufficiency of common, was good, and that it lay on the lord, or his grantee, to show that a sufficiency of common was left.

When the lord or his grantee erects fences upon the common, the commoner may by law destroy the fences, and, therefore, the fact of the defendant's having entered upon the plaintiff's close, and thrown down the whole of the fences which he had erected, when they might have entered upon the close without throwing down any part of the fences, was held not to be evidence that they entered for other purposes than those mentioned in the plea, and did not warrant the jury in finding a verdict for the plaintiff on the new assignment. *Arlett v. Ellis and others*, T. 8 G. 4. 346

CONVICTION.

Where, in trespass against two magistrates for breaking and entering the plaintiff's

had elected so many persons to be burgesses as to them seemed fit. The plea then (after setting out a charter, by which the king granted that there should be a mayor, ten aldermen, and ten capital burgesses, and that they should be the common council for all things touching the government of the borough) stated, that from thenceforth there had been, and still were within the borough, a mayor, ten aldermen, and ten capital burgesses, and an indefinite number of burgesses, and a common council; that on, &c., the then mayor, and divers, to wit, nine of the aldermen of the borough, being the major part of the aldermen, and nine of the capital burgesses, being the major part of such ten capital burgesses, so granted by the charter, being the major part of the common council of the borough for the time being, duly assembled and met together as such common council, for the purpose of electing a Burgess, and being so assembled, it seemed fit to them to elect, and they did elect, the defendant to be a Burgess. Replication, that notice of the purpose for which the supposed assembly of the common council was to be held, was not at any time before the said assembly was held given to the aldermen or capital burgesses of the borough, or any or either of them: Held, upon demurrer, that the replication was bad, because it assumed, as a general proposition of law, that there could not be any lawful assembly for the purpose of electing a Burgess without previous notice of the purpose of the meeting having been given to every member of each select body of the common council; whereas, if all the members of such select body were present at, and concurred in the election, such notice would have been unnecessary. *Rea v. Sir G. Chetwynd, Bart., H. 8 & 9 G. 4.* 695

Where a new charter was granted to an old corporation, the mayor and burgesses of S., whereby it was granted, that there should be certain definite bodies, and an indefinite body of burgesses; and the definite bodies, and a majority of the burgesses, signified their desire to accept the charter either by acting under it, or by a written declaration of their assent: Held, that this was a valid acceptance.

Quere, Whether it was necessary that the charter should be accepted by a majority of the burgesses? *Rea v. Hughes, H. 8 & 9 G. 4.* 708

6. By charter, the king incorporated the Tobacco Pipe Makers in London and Westminster, England and Wales; and after naming the first master, wardens, and assistants, provided for the future election of officers, and the transaction of other corporate business at meetings to be holden in a hall in London, or within three miles thereof, and that the master, wardens, and assistants should there yearly elect out of the assistants four to be wardens of the society; and it then authorized the master, wardens, and assistants to make bye-laws

for the government of the society, and every member thereof, and every person using the art or mystery of making tobacco pipes in London and Westminster, and any other part or places in England or Wales: Held, that although the charter might be inadequate to bind all the tobacco pipe makers in the kingdom, it was competent to bind such of them as became members of the corporate company. Secondly, that the charter, by fixing the place of meeting to London or Westminster, or within three miles thereof, sufficiently established local limits for the corporation. Thirdly, that a bye-law, which imposed a fine on every master, warden, or assistant who should not attend all courts to be holden, was a valid bye-law. Fourthly, that a bye-law, "that if any person chosen to be warden should refuse to accept the office of warden, he should forfeit to the company 6*l.* 13*s.* 4*d.*," was good, the words any person applying to persons eligible by the terms of the charter to the office of warden. Fifthly, that a bye-law, that every freeman, using or not using the said art, mystery, or trade, should pay yearly to the company 8*s.*, to be paid quarterly, and every journeyman of the company 4*s.* yearly, to be paid quarterly, and that every person refusing should forfeit twice the sum, was bad, inasmuch as it did not appear that any rightful expenditure of the company required such a contribution. *The Master, &c. of the London, &c. Tobacco Pipe Makers' Company v. Woodroffe, H. 8 & 9 G. 4.* 838

COSTS.

See BANKRUPT, 9.

1. A verdict having been found for the defendant, and a rule for a new trial obtained, the cause was referred to a barrister, and the costs of the cause were to be in his discretion. He found, that the plaintiffs were entitled to recover, and ordered the defendants to pay the costs of the cause: Held, that the plaintiffs were not entitled to the costs of the first trial. *Righty and others, Assignees, v. Okell and others, T. 8 G. 4.* 57
2. The plaintiff, in an action on the statute 9 Anne, c. 14, s. 2, recovered treble the value of money lost at play, the loser not having sued within the time prescribed by the statute. A writ of error was brought by the defendant, and judgment was affirmed without costs: Held, that the poor of the parish where the offence was committed were entitled to one moiety of the sum recovered, without deducting costs. *Willan v. Taylor, T. 8 G. 4.* 111
3. In an action for mesne profits, the plaintiff may recover by way of damages, costs incurred by him in a court of error in reversing a judgment in ejectment obtained by the defendant. *Newell v. Roake, M. 8 G. 4.* 404

COUNTY RATE.

See APPEAL, 1. POOR RATE, 5.

Where a county rate was made under a local act, 54 G. 3, c. 103, giving a certain right of appeal: Held, that nevertheless a party aggrieved had the larger right of appeal given by the 55 G. 3, c. 51, s. 14, which applies to all acts relating to county rates theretofore passed, whether local or general. *Rex v. The Justices of Buckinghamshire*, T. 8 G. 4. 3

COVENANT.

See LANDLORD AND TENANT, 2, 5, 6.

CUSTOM.

See COMMON.

A custom, that there shall be a select vestry of an indefinite number of persons, continued by election of new members made by itself, and not by the parishioners, is valid in law.

Semble. That it must be part of such custom that there should always be a reasonable number, and that the reasonableness of the number must be decided with reference to long-established usage, and to the population of the parish; such a custom having existed from time immemorial in a parish.

In the year 1662, by a faculty granted by the Bishop of London, forty-nine persons, together with the vicar and churchwardens, were named as a select vestry; and that number was to be kept up by elections, to be made by ten at least of those forty-nine, together with the vicar and churchwardens. In the year 1673 this number of ten was, by another faculty, reduced to seven; and those faculties were acted upon ever afterwards. Ten out of the fourteen vestrymen, exclusive of the vicar and churchwardens, who were present at the vestry holden next before the promulgation of the first faculty, were part of the forty-nine named in that faculty: Held, that as the vestry appointed by the faculty, and since continued, was not inconsistent with the vestry previously existing by the custom, the custom was not destroyed by the parish having accepted the faculty, and acted upon it ever since, the faculty not being binding in law, and the vestry having power at any time to depart from its directions. *Golding and others v. Fenn*, H. 8 & 9 G. 4. 765

DAMAGES.

See COSTS, 3.

DEED.

1. Where the owner of certain lands, by deed, describing them as in the possession of himself and A. B., granted, assigned, trans-

ferred, and set over, directed, appointed the same to C. D. no livery of seisin was made the deed operated as a valid reversion of that part of the occupation of A. B. *Doe Cole*, T. 8 G. 4.

2. A. kept cash with K. and Co. who held securities for any bill might become due to them, advanced to A., or on bills drawn, accepted, or indorsed of exchange, accepted by A. for accommodation of E., H. and Co., held in the hands of K. and Co. as security for his promise that A. became bankrupt, and E. entered into a deed of composition with the several creditors (the assignees as well as K. and Co., being creditors by deed). The deed recited that K. and Co. had become indebted to several persons, and that several of the bills of the copartnership were held by K. and Co. in exchange, as securities for bills drawn by the said K. and Co. which were drawn by, or on behalf of, or indorsed by A., and that the deed proposed to be made should be approved by the creditors of the copartnership in satisfaction of their debts, as against E., H. and Co. as against the copartnership in respect of the said bills drawn, accepted, or indorsed by A. A clause in the deed, the creditors released to E., H. and Co., and his sureties therein named (being all bills of exchange, and all bills delivered up into the hands of the assignees (named in the deed) all bills of exchange drawn, accepted, or indorsed by the copartnership of E., H. and Co., and all such other bills of exchange of the respective creditors, payable then held for the several debts owing to them respectively from the copartnership of E., H. and Co. in pursuance of the deed, the trustees named in the deed, the bills of exchange drawn by E., H. and Co. accepted for their accommodation by E., H. and Co., in settling the accounts of the assignees of A., delivered up to them. The claims which K. and Co. had on A.'s estate, for cash advanced to them, were satisfied out of the proceeds of the securities deposited by him in the deed, and there remained in their hands the balance due to them, plus, after satisfying those claims, the balance due to them, which the composition-deed directed to be paid to K. and Co. to discharge the debt due and owing to them by K. and Co. upon the bills, and K. and Co. were released, and K. and Co. might retain, in satisfaction of their claim against A. upon the surplus of the proceeds of the bills, the balance due to them, which remained in their hands, and they were to satisfy the balance due to them out of the proceeds advanced. *Maltby and another v. Carstairs and others*, H. 8 & 9 G. 4. 765

DEVISE.

1. Where a party, who, by writing obligatory (without any penal sum), had bound himself to pay to A. B. an annuity of 20*l.* a year for her life, devised his estate to trustees upon certain trusts, until his son should attain the age of twenty-one years: Held, that the estate of the trustees ceased upon the death of the son under the age of twenty-one, all the purposes of the trust being then at an end; and that the trustees were only liable to pay to A. B. such arrears of the annuity as became due before the son's death. *Morvant and Ann his Wife v. Gough and another*, T. 8 G. 4. 206
2. A. B., seized of a moiety of several estates, the whole of which had been her father's (but of which she took one part as heir of her father, and the remainder as heir of a niece, her father's granddaughter), devised "all her moiety of and in all her late father's messuages," &c.: Held, that the devisee took, as well the estates which descended from the niece, as those which descended immediately from the testatrix's father. *Doe on the demise of Newton v. Taylor*, M. 8 G. 4. 384

DISTRIBUTIVE SHARE.

See EXECUTOR, 2.

EJECTMENT.

See LANDLORD AND TENANT.

EVIDENCE.

1. The fact of a pauper's remembering himself, when four years of age, in the parish of A., is no evidence that he was born there. *Rex v. The Inhabitants of Trovebridge*, T. 8 G. 4. 252
2. An acknowledgment of a debt made by a debtor after arrest, but before an escape, is evidence against the marshal, in an action for the escape. *Per Hayley, J. Rogers v. Jones*, T. 8 G. 4. 86
3. Where a party declared upon two written agreements, by the second of which variations were made in the first, and there were also counts upon each separately; and it appeared, when the instruments were produced in evidence by the plaintiff, that the first only was stamped: Held, that the second could not be read in evidence to support the plaintiff's case, but might be looked at in order to ascertain whether the first was altered by it, and that, therefore, the plaintiff could not exclude the second agreement and proceed upon the counts setting out the first only. *Reeds v. Deers*, T. 8 G. 4. 261
4. Where, in case the declaration stated that plaintiff delivered a trunk to the defendant, to be put into a coach at Chester, in the county of Chester, to wit, at, &c., and safely carried to Shrewsbury, and that

through defendant's negligence it was lost; and it appeared in evidence that the trunk was delivered to the defendant at the city of Chester, which is a county of itself, separate from the county of Chester at large, but within its ambit: Held, that this was not a material variance, but that the declaration was supported by the evidence, as no evidence was given of the existence of any other place called Chester. *Woodward v. Booth*, T. 8 G. 4. 301

5. The presumption is, that waste land, which adjoins to a road, belongs to the owner of the adjoining inclosed land, whether he be a freeholder, leaseholder, or copyholder, and not to the lord of the manor. *Doe on the demise of Pring and another v. Pearson*, T. 8 G. 4. 304
6. Trespass for breaking and entering the plaintiff's close, and treading down the grass, &c. and breaking and destroying the hedges and fences of the plaintiff, &c. The defendant, as to all the trespasses, pleaded that the plaintiff's close was parcel of the manor of C., and that a certain messuage and four acres of land was parcel, and a customary tenement of that manor, and that there is, and from time whereof, &c. there hath been a custom within the manor, that the customary tenant of that tenement shall have common of pasture upon the plaintiff's close. That J. S., being seized of the said customary tenement, having occasion to use his common of pasture, entered the close in which, &c. and put his cattle in, and because the hedges and fences had been improperly erected, defendant threw them down. The plaintiff, in his replication, took issue upon the custom, and new assigned that the defendant entered for other purposes than those mentioned in the plea: Held, first, that upon the issue joined upon the replication, the plaintiff was at liberty to prove a custom for the lord of the manor to inclose parcels of the waste, and a grant to him of the locus in quo under such custom, and that it was not necessary that that custom should be specially replied.

Held, secondly, that a custom for the lord of a manor to inclose the waste without limit or restriction, being inconsistent with the rights of the commoners, was bad in point of law, but that a custom to inclose (even as against common of turbary) parcels of the waste, leaving a sufficiency of common, was good, and that it lay on the lord, or his grantee, to show that a sufficiency of common was left.

When the lord or his grantee erects fences upon the common, the commoner may by law destroy the fences, and, therefore, the fact of the defendant's having entered upon the plaintiff's close, and thrown down the whole of the fences which he had erected, when they might have entered upon the close without throwing down any part of the fences, was held not to be evidence that they entered for other purposes than those mentioned in the plea, and did not warrant the jury in finding a verdict for the plain-

- tit on the new assignment. *Arlott v. Ellis and others*, T. 8 G. 4. 346
7. Where an agreement referred to a clause in a former agreement, and provided that it should extend to the new agreement as if it had been repeated therein: Held, that the clause referred to could not be considered as annexed to the new agreement so as to make an additional stamp necessary, on the ground of the agreement, with the clause containing more than 1080 words. *Attwood v. Small and others*, M. 8 G. 4. 390
8. By the special memorandum of a declaration, it was stated, that the plaintiff, administratrix, on the 20th of January, brought her bill into the office of the clerk of the declarations of K. B., according to the course and practice of the court, and filed the same as of Michaelmas term. Plea, that at the time of exhibiting the bill, the plaintiff was not administratrix, upon which issue was joined. It appeared that the defendant was neither an attorney, nor a prisoner in the custody of the marshal. The bill was delivered on the 20th of January. The letters of administration were granted on the 10th of January: Held, that, upon the issue joined, the verdict was properly found for the plaintiff, the latter having been administratrix at the time when the bill was exhibited. *Woodridge, Administratrix, v. Bishop*, M. 8 G. 4. 406
9. A customer deposited a sum of money with a banker, and received a note, by which the banker promised to pay the principal at ten days' sight, with three per cent. interest to the day of acceptance. The banker paid interest on the note, but at the same time told the customer, that he would not, in future, pay more than two and a half per cent., and in his presence altered the terms of the note by striking out *three* and inserting *two and a half*: Held, first, that the word "acceptance" meant *sight*, and that it need not be left with the maker for acceptance; secondly, that the payment of interest was evidence to show that a principal sum was due, and that the note was admissible in evidence to show the terms on which the deposit was made. *Sutton v. Toomer*, M. 8 G. 4. 416
10. In debt on an award, the execution of the submission by all the parties must be proved. *Ferrer v. Owen*, M. 8 G. 4. 427
11. The statute 1 G. 4, c. 119, s. 11, enacts that no suit in law be proceeded in further than an arrest on mesne process, by any assignee of an insolvent's estate, without the consent of creditors and approbation of one of the commissioners of the insolvent court: Held, in an action brought by an attorney to recover his bill of costs incurred in an action at the suit of such an assignee, that it was incumbent on the attorney to prove that the consent of creditors and the approbation of one of the commissioners of the insolvent court had been obtained, or at all events that he had informed his client that such consent was necessary. *Allison, Gent., and others, v. Rayner*, M. 8 G. 4. 441
12. Where a high constable presents persons for a nuisance in a highway, before the grand jury, and give him on oath. *Rex v. Bridgewater and Canal Company*, M. 8 G. 4.
13. In an action of trover against the plaintiff for goods taken in execution, it is for the plaintiff to give in evidence a warrant issued by the under-sheriff, with the sheriff's seal of office, and bound to prove the writ. *Gibbins v. Lips*, M. 8 G. 4.
14. A parish certificate, dated the 7th of September 1758, purported, in the 1st clause, to have been granted to a pauper family by two churchwardens and two overseers. It was signed and sealed by two churchwardens and two overseers, and by one churchwarden and two overseers. The churchwardens for the year ended at Easter, and were nominated at Easter, and were sworn into office on the 1st of September, at the visitation. But no direct evidence of their having been sworn into office before that time, was given. It was contended, that the parish, after the date of the certificate, had frequently relieved the pauper, and different members of his family were residing in other parishes, that in favour of such an ancient custom, which had been treated by the parish as valid, the Court would hold that the churchwarden who executed the certificate was sworn before he executed it, and, therefore, that it was duly executed by him as churchwarden: Held, that the execution by two overseers and one churchwarden was an execution of the major part of the churchwardens and overseers within the statute 8 & 9 W. 3. *Rex v. The Inhabitants of Whitechapel*, M. 8 G. 4.
15. Parol evidence of the fact of the execution of a certificate is not admissible, although the tenant has executed a written agreement. *Rex v. The Inhabitants of Holy Trinity, Hull*, M. 8 G. 4.
16. It was proved by a pauper, that he had been bound apprentice twenty-four years ago to A. B.; that indentures were made and sealed, and that he served A. B. and that A. B. had the indentures when the apprenticeship expired. The pauper asked A. B. for the indentures, and said the parish officers had the indentures: Held, that the declarations of A. B., who had been called as a witness, were admissible in evidence, and that the fact of the contents was not a question of law. *Rex v. The Inhabitants of Dagenham*, M. 8 G. 4.
17. Where a party examined before the commissioners of bankrupt, admitted that he had received a sum of money on account of a bankrupt after an act of bankruptcy, and that it was a subsisting debt, it was held that this was not evidence to support a count on an account against the assignees.
- Query, whether an admission by such compulsory examination can be used as evidence in such an action. *Rex v. The Inhabitants of Dagenham*, M. 8 G. 4.

Where a parol agreement was made between A. and B., that the former should let, and the latter take, certain premises, upon terms and conditions contained in a lease the same premises granted by A. to C.: Held, that in an action by A. against B. for not and non-repair, the lease could not be read in evidence, unless duly stamped. *Turner v. Power*, H. 8 & 9 G. 4. 625

In an action for not returning bills deposited with defendant, the following unimpeached memorandum, signed by defendant, was held to be admissible in evidence: "I have in my hands three bills which amount to 120*l*. 10*s*. 6*d*., which I have to discount, or return on demand." *Mulder v. Hurkison*, H. 8 & 9 G. 4. 639

Where an examination of a soldier, taken before two magistrates, was tendered in evidence to prove his settlement, but it did not appear by the examination itself, or by other proof, that the soldier, at the time when he was examined, was quartered in the place where the justices had jurisdiction: Held, that it was not admissible. *Rex v. The Inhabitants of All Saints, Southampton*, 8 & 9 G. 4. 785

Upon an issue whether a certain messuage is situated within a chapelry, a person who occupies rateable property within a chapelry is a competent witness to prove that it is. *Marsden and another v. Mansfield*, H. 8 & 9 G. 4. 815

EXECUTOR.

A count in assumpsit for money had and received by the defendant, as executor, to the use of the plaintiff, cannot be joined with a count for money due to plaintiff from defendant, as executor, upon an account stated with him of money due from him as executor.

It is not a count for money paid by plaintiff to the use of the defendant, as executor, may be joined with such a count upon an account stated. *Ashby v. Ashby and another*, M. 8 G. 4. 444

In an action at law for a distributive share of an intestate's property cannot be maintained against the administrator; nor against his executor, although he may have expressly promised to pay. *Jones v. Tanner*, M. 8 G. 4. 542

FACTOR.

See PRINCIPAL AND AGENT.

FEME COVERT.

Where a married woman, separated from her husband, lived with her father, and acted as his servant: Held, that he might maintain an action against a person by whom she was debauched, and had a child. *Harvey v. Luffkin*, M. 8 G. 4. 387

FIERI FACIAS.

Where A. B. executed a warrant of attorney in the name of C. B., and judgment was entered up, and a h. fa. issued against him by that name: Held, that this was right, and that the sheriff was bound to execute it. *Reeves v. Slater*, M. 8 G. 4. 486

FOREIGN ATTACHMENT.

Where one of several defendants, in a proceeding by foreign attachment in the Mayor's Court of London, removes it by certiorari, he must put in bail in K. B. for all the defendants, otherwise a procedendo will be granted. *Kent and another v. Goldstein and Castles*, M. 8 G. 4. 525

GAME.

Grouse are not birds of warren. *The Duke of Devonshire v. Lodge*, T. 8 G. 4. 36

GAMING.

The plaintiff, in an action on the statute 9 Anne, c. 14, s. 2, recovered treble the value of money lost at play, the loser not having sued within the time prescribed by the statute. A writ of error was brought by the defendant, and judgment was affirmed without costs: Held, that the poor of the parish where the offence was committed were entitled to one moiety of the sum recovered, without deducting costs. *Willan v. Taylor*, T. 8 G. 4. 111

GAOL RATE.

See POOR RATE, 5.

GROUSE.

Grouse are not birds of warren. *The Duke of Devonshire v. Lodge*, T. 8 G. 4. 36

HIGH CONSTABLE.

See HIGHWAY, 5.

Where the high constable of a borough, by the direction of the justices, employed and paid a number of special constables to suppress riots at an election, and the ordinary constables were also constantly employed by him during the same period in endeavouring to keep the peace, for which service he made them a compensation: Held, that the justices were warranted in considering the monies so expended as "extraordinary expenses incurred by the high constable in case of riot," within the meaning of the 41 G. 3, c. 78, s. 2, and in making an order upon the treasurer to reimburse him those expenses. *Rex v. The Justices of the Borough of Leicester*, T. 8 G. 4. 6

HIGHWAY.

1. Where a land-owner suffered the public to use, for several years, a road through his estate for all purposes, except that of carrying coals: Held, that this was either a

limited dedication of the road to the public or no dedication at all, but only a licence revocable; and that a person carrying coals along the road after notice not to do so, was a trespasser.

Semble, That there may be a limited dedication of a highway to the public. *The Marquis of Stafford v. Coyne*, T. 8 G. 4. 257

2. By the general turnpike act, stat. 3 G. 4, c. 126, s. 16, it is enacted, "That after any new road shall be completed, the lands or grounds constituting any former roads or road, or so much and such part or parts thereof, as in the judgment of the trustees may thereby become useless or unnecessary, shall and may be stopped up, and discontinued as public highways (unless leading over some moor, heath, common, uncultivated land, or waste ground, or to some church, mill, village, town or place, lands or tenements, to which such new road does not immediately lead, and which may therefore be deemed proper to be kept open, either as a public or private way or ways, for the use of any inhabitant at large, or any individual or individuals):" Held, that the exception did not take away from the trustees the power of stopping up the roads therein mentioned, but left them at their discretion to do so or not, and, therefore, that the trustees might stop up, and give up to the owner of the adjoining land an old road leading to a church, &c, to which the new road did not immediately lead. *De Beauvoir v. Welch and another*, T. 8 G. 4. 266

3. Where, in trespass against two magistrates for breaking and entering the plaintiff's close in the parish of A. and seizing his sheep, it appeared that the defendants, upon the complaint of the surveyor of the highways appointed for the whole parish, convicted the plaintiff of neglecting to do statute duty, and issued a warrant to levy the penalty under which the act complained of was done: Held, that the conviction being good upon the face of it, was a sufficient defence, and that the plaintiff could not, in this action, try the question, whether the land which he occupied was exempt from the burthen of repairing the roads in other parts of the parish. *Fawcett v. Fowles and another*, M. 8 G. 4. 394

4. Where a magistrate presented a road in the township of P., "upon the information upon oath of A. B., surveyor of the highways for the township of C., which is thirty-five miles distant from the township of P.," &c.: Held, in arrest of judgment, that this presentment was bad; for that it did not appear that the information upon oath was given to the presenting magistrate, and the surveyor of the highways in C. had no authority under the 13 G. 3, c. 78. s. 21, to give information as to the road in P. *Re v. The Inhabitants of Fylingdale*, M. 8 G. 4. 438

5. Where a high constable presents persons for a nuisance in a highway, he must go

before the grand jury, and give his oath. *Re v. Bridgewater and Canal Company*, M. 8 G. 4.

6. By a local act certain trustees were authorized to make an order stopping up part of certain old highways: a right of appeal was given to any persons who might be aggrieved by making of any such order: Held, that a notice of appeal against an order of trustees for stopping up a highway was necessary to state that the party to appeal was aggrieved by the order. *The Justices of West Riding shire*, H. 8 & 9 G. 4.

INCLOSURE ACT.

Where an inclosure act gave the commissioners power to award lands to others in an adjoining parish for others in an adjoining parish to award lands to those who bore of persons entitled to allotment that they might award lands given change partly for other lands and money, and that the award needed an ad valorem stamp upon the consideration. *Do v. the demise of field v. Preston*, M. 8 G. 4.

INDICTMENT.

1. Indictment charged that defendant removed a culvert in the parish of S. to a mill there, in a highway leading from S. to H.: Held, on arrest of judgment, that it sufficed that the culvert removed was in the parish of S. *Re v. Knight and another*, M. 8 G. 4.

2. An indictment charged that A. B. being the servant of J. H., on the 1st day, &c. one gold ring, &c. then being in the possession of J. H., his goods and chattels, feloniously stole the same: Held, that the fair import of the charge was that A. B. was the servant of J. H. at the time when the theft was committed: that the indictment therefore was good for judgment of transportation for seven years. *Re v. Mary Somerton*, M. 8 G. 4.

INSOLVENT DEBTORS' ACT.

The statute 1 G. 4, c. 119, s. 1, provides that no suit in law be proceeded with against an insolvent debtor, after an arrest on mesne process, without the assent or signature of the assignee of an insolvent's estate, or the consent of creditors and approbation of the commissioners of the insolvent court: Held, in an action brought by a creditor to recover his bill of costs incurred in an action at the suit of such assignee, that it was incumbent on the attorney to shew that the consent of creditors and approbation of one of the commissioners of the insolvent court had been obtained: Held, that the defendant, who had informed his

such consent was necessary. *Allison, Gent., vs., &c. v. Rayner, M. 8 G. 4.* 441

INSURANCE.

A policy, in the usual form, was effected on pearl ashes on a voyage at and from *Liverpool to London*. The captain took in goods at *Liverpool* for *Southampton* as well as *London*, intending to go first to the former place. He accordingly went into *Southampton*, and delivered the goods shipped for that place, and afterwards proceeded to *London*. The termini of the voyage being the same as those described in the policy, it was held to be the same voyage until the vessel reached the dividing point, and that the policy attached, although putting into *Southampton* was a deviation.

The goods insured received considerable damage from sea-water. But they were not examined at *Southampton*, nor until they reached *London*, when the damage was found to amount to 60 per cent. Before the vessel reached the dividing point of the two voyages she had met with bad weather, and had made much water, and on one occasion, the water pumped up appeared to hold the pearl ashes in solution. On the voyage from *Southampton* to *London* there were no heavy seas, and the weather was tolerably fair. Under these circumstances, it was held, that it was a question for the jury, whether the pearl ashes had sustained damage to the amount of 3 per cent. before the deviation; and they having found that they had sustained damage to that amount, the court refused to disturb the verdict. *Hare v. Travis, T. 8 G. 4.* 14

A ship having goods on board which were insured, but warranted free from average, unless general, or the ship should be stranded, was compelled in the course of her voyage to put into a tide-harbour, and was there moored alongside a quay, in the usual place for ships of her burden. It became necessary, in addition to the usual moorings, to fasten her by tackle to posts on the shore, to prevent her falling over upon the tide leaving her. The rope with which she was so fastened, not being of sufficient strength, broke when the tide left the vessel, and she fell over upon her side, and was thereby stove in and greatly injured: Held, that this was a stranding within the meaning of that word in the policy, and that the underwriters were liable for a partial loss, although the stranding might have been occasioned remotely by the negligence of the crew in not providing a rope of sufficient strength to fasten the vessel to the shore. *Bishop and another v. Pentland, T. 8 G. 4.* 219

Where a ship, being in a very leaky state, was deserted at sea by her crew, acting bona fide for the preservation of their lives, and was on the following day, found and taken possession of by the crew of another vessel, who succeeded in taking her into port, where she was repaired, and afterwards

sent to this country, but subject to claims for salvage and repairs equal to or exceeding her value: Held, that the owners having given notice of abandonment before they received any tidings of the ship's safety, were entitled to recover against the underwriters as for a total loss. *Holdsworth and another v. Wise and others, H. 8 & 9 G. 4.* 794

IRISH PEER.

See ARREST, 2.

IRISHMAN.

See SETTLEMENT, 1.

JOINT STOCK COMPANY.

1. Where in an action for goods supplied for the purpose of working a mine, it appeared that the defendant had paid money for certain shares, and received a certificate that she was a proprietor of those shares; and that she had acknowledged that she was a shareholder; but no assignment of any interest in the mine had been made to her: Held, that the action could not be maintained. *Vire v. Lady Anson, M. 8 G. 4.* 409
2. A., an attorney, and B. and C. had been members of a trading company. After the dissolution of that company, B. and C. were sued by creditors of the company, and retained A. to defend the actions, and in the course of making that defence a bill of costs was incurred: Held, that A., as a member of the company, being jointly liable to contribute to the expense of defending those actions, could not maintain any action against B. and C. for his bill of costs. *Milburns v. Codd and another, M. 8 G. 4.* 419

JUDGMENT.

See TROVER, 3.

JUDGMENT OF NON PROS.

See PRACTICE, 7.

JUSTICES.

1. Where the high constable of a borough, by the direction of the justices, employed and paid a number of special constables to suppress riots at an election, and the ordinary constables were also constantly employed by him during the same period in endeavouring to keep the peace, for which service he made them a compensation: Held, that the justices were warranted in considering the monies so expended as "extraordinary expenses incurred by the high constable in case of riot," within the meaning of the 41 G. 3, c. 78, s. 2, and in making an order upon the treasurer to reimburse him those expenses. *Rez v. The Justices of the Borough of Leicester, T. 8 G. 4.* 6

2. Where, in trespass against two magistrates for breaking and entering the plaintiff's close in the parish of A. and seizing his sheep, it appeared that the defendants, upon the complaint of the surveyor of the highways appointed for the whole parish, convicted the plaintiff of neglecting to do statute duty, and issued a warrant to levy the penalty under which the act complained of was done: Held, that the conviction being good upon the face of it, was a sufficient defence, and that the plaintiff could not, in this action, try the question, whether the land which he occupied was exempt from the burthen of repairing the roads in other parts of the parish. *Fawcett v. Fowles and another*, M. 8 G. 4. 394
3. Where a magistrate presented a road in the township of F., "upon the information upon oath of A. B., surveyor of the highways for the township of C., which is thirty-five miles distant from the township of F.," &c.: Held, in arrest of judgment, that this presentment was bad; for that it did not appear that the information upon oath was given to the presenting magistrate, and the surveyor of the highways in C. had no authority under the 13 G. 3, c. 78, s. 24, to give information as to the road in F. *Rez v. The Inhabitants of Fylingdales*, M. 8 G. 4. 438
4. Where a person employed by an attorney to keep possession of goods seized under a fieri facias, made complaint to a magistrate, that he could not obtain payment for his services, and the magistrate having summoned the party, and heard the complaint, proceeded under the 20 G. 2, c. 19, and made an order upon the attorney for payment of a certain sum, which was afterwards levied on his goods: Held, that the magistrate was liable to an action of trespass, for that the service performed was not of such a nature as to give him jurisdiction under the 20 G. 2, c. 19. *Branswell v. Pennock*, M. 8 G. 4. 536

LABOURER.

See JUSTICES, 4.

LANDLORD AND TENANT.

1. A tenancy for years, determinable on lives, is not a holding for "any term or number of years certain" within the 1 G. 4, c. 78, s. 1. *Doos on the demise of Pemberton and others v. Roe*, T. 5 G. 4. 2
2. By lease, the lessor demised for a term of years a piece of ground at a fixed annual rent. The tenant covenanted not to build on the land without the licence of the lessor. The lessor covenanted to pay all taxes already charged or to be charged upon or in respect of the demised piece of ground during the continuance of the term. At the time when the lease was executed, the lessor gave a licence to the lessee to build on the land demised. The lessee did

build, and thereby increased the value of the premises: Held, that the lord was liable upon his covenant to the taxes in proportion to the rent reserved and not to the improved value.

The tenant compounded for his under the provisions of a local act, consequence of such composition, his premises were assessed at a less annual value than the improved annual value: Held, the tenant paid taxes in respect of the whole improved annual value, and the landlord was to pay that proportion of taxes paid which the rent bore to such improved annual value. *Watson v. Holt*, 8 G. 4.

3. Parol evidence of the fact of tenancy is admissible, although the tenant holds by a written agreement. *Rez v. The Inhabitants of Holy Trinity, Hull*, M. 8 G. 4.
4. Where a parol agreement was made between A. and B., that the former should and the latter take, certain premises on the terms and conditions contained in a lease of the same premises granted by A. to B.: Held, that in an action by A. against B. for rent and non-repair, the lease could be read in evidence, unless duly stated. *Turner v. Power*, H. 8 & 9 G. 4.
5. A party contracted for an assignment of a lease of a public-house, which was described as holden at a certain net rent upon usual and common covenants. The lease contained a covenant by the tenant to pay land-tax, sewers-rate, and all other taxes, and a proviso for re-entry, in case of business but that of a victualler should be carried on in the house, and it was provided that a considerable majority of public-house leases contained such a proviso: Held, that the covenant to pay land-tax, &c. was a common covenant in a lease reserved net rent; and that the proviso for re-entry, with reference to a lease of a public-house, also be considered usual and common. *Bennett v. Womack*, H. 8 & 9 G. 4.

6. In construing acts of parliament, the court must take into consideration not only the language of the preamble, or of any particular clause, but of the whole act; and if some of the enacting clauses express a more extensive import than others, or than in the preamble, the Court will give effect to those more extensive expressions, if, upon a view of the whole act, it appears to have been the intention of the legislature that they should have effect.

Upon this ground, where a lease of certain waggon-ways was granted to a tenant under the authority of an act of parliament, in which, as well as in the lease, there was a proviso for re-entry, in case he neglected in any one year to bring a certain quantity of coals to C. for the use of the inhabitant of L., and sell them there at a certain price; and by a subsequent act, the preamble of which recited that the price was inadequate, and that the inhabitants

ould sustain great inconvenience if *A. B.* used to supply them with coals, it was acted, first, that the former act, confirming the lease (except such parts as were thereby altered or repealed), should continue; that *A. B.* might sell his coals brought to and deposited at *C.*, or at any other place near thereto, to be used as a repository for coals instead thereof, at a certain increased price; and another section provided that if *A. B.* neglected to bring the stipulated quantity of coals to *C.*, or to any other place near thereto, to be used as repository for coals instead thereof, and sell them there at the price fixed by that act, his interest in the waggon-ways should cease: Held, that although the preamble did not recite an intention to give *A. B.* the right to change the place used as a repository for coals, and although it was not expressly enacted that he might do so, yet at the intention of the legislature to give him that privilege was clear, and that he might do so without forfeiting his interest in the waggon-ways. *Doe dem. Bywater Brandling and others, H. 8 & 9 G. 4.* 643

LATITAT.

See PRACTICE, 11.

LEASE.

See LANDLORD AND TENANT, 2, 4, 5, 6.
STAMP, 5.

LIBEL.

Declaration stated, that defendant, contriving, &c. did print and publish of and concerning the plaintiff a libel containing the false and scandalous matter following, without alleging that that matter was of and concerning the plaintiff, and then set out the libel, which, on the face of it, did not manifestly appear to relate to the plaintiff, and there was no innuendo to connect it with the plaintiff: Held, upon writ of error, that the count was bad. *Clement v. Fisher (in error), M. 8 G. 4.* 459

LICENCE.

See TROVER, 4.

LIEN.

A wharfinger at *Hull* claimed a general lien for wharfage, labourage (comprising loading, weighing, and delivery), and warehouse rent. The claim for wharfage was admitted; but as to the residue, upon a case, stating that in *Hull* such claim had, in great majority of instances, been acquiesced in, but in others had been rejected, and that the right had long been, and still was, a disputed point there: Held, that the claim could not be supported, as the right

of general lien arises out of an express or implied contract, of which the former had not been made, and the latter could not be inferred from the circumstances stated in the case. *Holderness and another, Assignees, v. Collinson, T. 8 G. 4.* 212

2. Where a broker, having accepted bills for his principal on the security of goods then in his hands, pledged the goods with a person who had notice of the agency, but did not inform the principal of this transaction: Held, that under the 6 G. 4, c. 94, s. 5, the broker could only transfer such right as he had, which was a right to be indemnified against the bills which he had accepted; and that the principal having satisfied those bills, was entitled to have back his goods from the pawnee, without paying the amount for which they were pledged. *Fletcher v. Heath and others, M. 8 G. 4.* 517

MANDAMUS.

Where an appeal against an order of removal was dismissed on the ground that the appellant had not given the notice required by the rules of the justices, this Court, thinking it reasonable that the appeal should be heard, granted a mandamus to the justices to enter continuances and hear the appeal. *Rex v. The Justices of Lancashire, H. 8 & 9 G. 4.* 691

MARKET.

The lord of an ancient market may, by law, have a right to prevent other persons from selling goods in their private houses situated within the limits of his franchise.

Where such a market had been from ancient times held in a public street, but in consequence of the increased population and traffic, persons frequenting the market-place were subjected to inconvenience and danger, and the lord had permitted part of the market-place to be used for other purposes than for the sale of articles usually sold there; in an action brought by the lord against the owner of a house adjoining to the market-place for there opening a shop and selling goods, but who, at the time when he sold the goods, had a stall in the market-place, which he might have occupied; it was held, that it was properly submitted to the jury to find whether, from the state of the market-place, the defendant had a reasonable cause for selling in his private house; and a verdict having been found for the plaintiff, the Court refused to grant a new trial. *Mosley v. Walker, T. 8 G. 4.* 40

MARSHAL.

See PRACTICE, 15.

MASTER AND SERVANT.

Where a person employed by an attorney to keep possession of goods seized under

a fieri facias, made complaint to a magistrate, that he could not obtain payment for his services, and the magistrate having summoned the party, and heard the complaint, proceeded under the 20 G. 2, c. 19, and made an order upon the attorney for payment of a certain sum, which was afterwards levied on his goods: Held, that the magistrate was liable to an action of trespass, for that the service performed was not of such a nature as to give him jurisdiction under the 20 G. 2, c. 19. *Branwell v. Pennock*, M. 8 G. 4. 536

MESNE PROFITS.

See COSTS, 3.

MONEY HAD AND RECEIVED.

See PLEADING, 7.

MORTGAGOR AND MORTGAGEE.

Where A., the managing owner of a ship, mortgaged his share to B., who procured the transfer to be duly indorsed on the certificate of registry, but A. continued in the management as before, and B. did not take possession or interfere in the concerns of the ship: Held, that he was not liable for repairs and necessaries done and supplied in pursuance of A.'s orders. *Briggs v. Wilkinson and others*, T. 8 G. 4. 30

NOTICE OF APPEAL.

See APPEAL, 2, 3, 4.

OVERSEER.

See APPEAL, 3. POOR RATE, 5.

1. An overseer has not, by virtue of his office, any authority to borrow money; and, in an action against a surety on a bond conditioned for the overseer's faithfully accounting for all sums received by him by virtue of his office, the surety is not liable for a sum lent to the overseer, and applied by him to parochial purposes. *Leigh and another v. Taylor*, M. 8 G. 4. 491
2. By statute 17 G. 2, c. 3, s. 2, it is enacted, "that overseers of the poor shall permit inhabitants of the parish to inspect rates at all reasonable times;" and by sect. 3, "if any overseer shall not permit an inhabitant to inspect the rate, such overseer, for every such offence, shall forfeit and pay to the party aggrieved the sum of 20*l*." Held, first, that a demand to inspect a rate made on the overseer by a rated inhabitant in the presence of his attorney, was a lawful demand.

Secondly, that the refusal to produce the rate upon a lawful demand, constitutes the inhabitant a party grieved within the meaning of the statute.

Thirdly, that a notice that a rate much in the pound would be collected with, was a good publication of the rate, although it was not stated that it had been allowed by the justices.

Fourthly, that a demand to see the rate" was sufficiently specific, though only one rate in esse at that time.

Fifthly, that the overseer, by refusing to show the rate, and referring the inhabitant to the select vestry as a place where he might be allowed to inspect it, incurred a penalty imposed by the 17 G. 2, c. 3, s. 3.

Sixthly, that an assistant overseer appointed by a select vestry under the provisions of the 59 G. 3, c. 12, s. 9, is liable to the penalties imposed by the 17 G. 2, c. 3, s. 3, upon overseers not permitted to inspect the rate, unless he can prove that the select vestry have upon such assistant overseer the authority to produce the rate to the inhabitant. *Watt v. Edwards*, M. 8 G. 4.

3. Where a demand to inspect a rate was made upon an overseer on his own premises, not far from his house, and he refused to allow the inspection, but not on the ground that it was inconvenient to go to his house for that purpose: Held, in an action against him for the refusal, that there was no reasonable demand. *Parker v. Edwards*, M. 8 G. 4.

PARTNERSHIP.

See POOR RATE, 1. POWER OF ATTORNEY, 1.

1. Where in an action for goods supplied for the purpose of working a mine, it was proved that the defendant had paid money for shares, and received a certificate that she was proprietor of those shares, but that she had acknowledged that she was not a shareholder; but no assignment of interest in the mine had been made: Held, that the action could not be maintained. *Vire v. Lady Anson*, M. 8 G. 4.
2. A., an attorney, and B. and C. were members of a trading company. A. dissolved that company, B. and C. were sued by creditors of the company, and retained A. to defend the action. In the course of making that defence, costs were incurred: Held, that A. was liable to contribute to the expense of those actions, could not maintain an action against B. and C. for his costs. *Milburne v. Codd and another*, M. 8 G. 4.
3. Where A. and B. agreed to take a farm, and pay C., the former occupier, for certain bills, by bills at three months, and afterwards, without the knowledge of C., took from B. bills for the same payable at six and twelve months, and by himself in his own name: Held, that the latter could not be liable for the bills. *Greenslade v. Dower and another*, H. 8 & 9 G. 4.

PAYMENT.

Where the seller of goods received from the purchaser an order upon his banker for the price, and the latter (with whom money had been deposited to meet that and certain other demands) offered to pay in cash, deducting discount for the period of credit, or a bill upon a third person, which the seller elected to take: Held, that although the bill was afterwards dishonoured, he could not sue the purchaser for the price of the goods. *Smith and others v. Parrand*, 8 G. 4. 19

payment, made in order to obtain possession of goods or property to which a party is entitled, and of which he cannot otherwise obtain possession at the time, is compulsory, and not a voluntary payment, and may be recovered back.

The agent for the grantee of several annuities delivered him four accounts in the course of eighteen months, and gave him credit for all the half-yearly instalments of several annuities then due, but stated that some of them had not been received. He charged commission on all the instalments, and paid the balance of the accounts if they had been received, and in the other accounts, never brought forward those annuities, nor intimated that he expected them to be repaid: Held, upon a bill of exceptions, that upon this evidence, the jury were properly told by the Judge, that they might infer an agreement whereby the agent made himself personally responsible for the payment of those annuity instalments, in default of payment by the grantors. *Shaw and others, As assignees of Howard and Gibbs, Woodcock*, T. 8 G. 4. 73

PENAL ACTION.

See OVERSEER, 2.

plaintiff, in an action on the statute 9 Anne, c. 14, s. 2, recovered treble the value of money lost at play, the loser not having sued within the time prescribed by the statute. A writ of error was brought by the defendant, and judgment was affirmed without costs: Held, that the poor of the parish where the offence was committed were entitled to one moiety of the sum recovered, without deducting costs. *Wilson v. Taylor*, T. 8 G. 4. 111

PLEADING.

Where a party declared upon two written agreements, by the second of which various counts were made in the first, and there were so counts upon each separately; and it appeared, when the instruments were produced in evidence by the plaintiff, that the first only was stamped: Held, that the second could not be read in evidence to support the plaintiff's case, but might be looked to in order to ascertain whether the first was altered by it, and that, therefore, the

plaintiff could not exclude the second agreement and proceed upon the counts setting out the first only. *Reade v. Doore*, T. 8 G. 4. 261

2. Where, in case the declaration stated that the plaintiff delivered a trunk to the defendant, to be put into a coach at *Chester*, in the county of *Chester*, to wit, at, &c., and safely carried to *Shrewsbury*, and that through defendant's negligence it was lost; and it appeared in evidence that the trunk was delivered to the defendant at the city of *Chester*, which is a county of itself, separate from the county of *Chester* at large, but within its ambit: Held, that this was not a material variance, but that the declaration was supported by the evidence, as no evidence was given of the existence of any other place called *Chester*. *Woodward v. Booth*, T. 8 G. 4. 301

3. Trespass for breaking and entering the plaintiff's close, and treading down the grass, &c. and breaking and destroying the hedges and fences of the plaintiff, &c. The defendant, as to all the trespasses, pleaded that the plaintiff's close was parcel of the manor of C., and that a certain messuage and four acres of land was parcel, and a customary tenement of that manor, and that there is, and from time whereof, &c. there hath been a custom within the manor, that the customary tenant of that tenement shall have common of pasture upon the plaintiff's close. That J. S., being seised of the said customary tenement, having occasion to use his common of pasture, entered the close in which, &c. and put his cattle in, and because the hedges and fences had been improperly erected. defendant threw them down. The plaintiff, in his replication, took issue upon the custom, and new assigned that the defendant entered for other purposes than those mentioned in the plea: Held, first, that upon the issue joined upon the replication, the plaintiff was at liberty to prove a custom for the lord of the manor to inclose parcels of the waste, and a grant to him of the locus in quo under such custom, and that it was not necessary that that custom should be specially replied.

Held, secondly, that a custom for the lord of a manor to inclose the waste without limit or restriction, being inconsistent with the rights of the commoners, was bad in point of law, but that a custom to inclose (even as against common of turbary) parcels of the waste, leaving a sufficiency of common, was good, and that it lay on the lord, or his grantee, to show that a sufficiency of common was left.

When the lord or his grantee erects fences upon the common, the commoner may by law destroy the fences, and, therefore, the fact of the defendant's having entered upon the plaintiff's close, and thrown down the whole of the fences which he had erected, when they might have entered upon the close without throwing down any part of the fences, was held not to be evidence that

- they entered for other purposes than those mentioned in the plea, and did not warrant the jury in finding a verdict for the plaintiff on the new assignment. *Arlett v. Ellis and others*, T. 8 G. 4. 346
4. By the special memorandum of a declaration, it was stated, that the plaintiff, administratrix, on the 20th of *January*, brought her bill into the office of the clerk of the declarations of K. B., according to the course and practice of the court, and filed the same as of *Michaelmas* term. Plea, that at the time of exhibiting the bill, the plaintiff was not administratrix, upon which issue was joined. It appeared that the defendant was neither an attorney, nor a prisoner in the custody of the marshal. The bill was delivered on the 20th of *January*. The letters of administration were granted on the 10th of *January*: Held, that, upon the issue joined, the verdict was properly found for the plaintiff, the latter having been administratrix at the time when the bill was exhibited. *Woodbridge, Administratrix, v. Bishop*, M. 8 G. 4. 406
6. Assumpsit, in consideration that the plaintiff, at the request of the defendant, would consent to suspend proceedings against A. on a cognovit, defendant promised to pay 30*l.* on account of the debt (for which the cognovit was given) on the 1st of *April* then next. Averment, that the plaintiff did suspend proceedings on the cognovit. The plaintiff, at the trial, proved the following agreement in writing: "The plaintiff having, at my request, consented to suspend proceedings against A., I do hereby, in consideration thereof, personally promise to pay 30*l.* on account of the debt on the 1st day of *April*:" Held, that, as the request must have preceded the consent to suspend proceedings, the contract might be declared on as an executory contract, and consequently, that there was not any variance. Secondly, that the consideration for the promise was sufficient, because it must be taken as a consent to suspend proceedings, at least, until the 1st of *April*. Thirdly, that, after verdict, the averment that "plaintiff had suspended proceedings" was sufficient, without specifying for what period. *Payne v. Wilson, Gent., one, &c.* M. 8 G. 4. 423
8. Where a magistrate presented a road in the township of F., "upon the information upon oath of A. B., surveyor of the highways for the township of C., which is thirty-five miles distant from the township of F.," &c.: Held, in arrest of judgment, that this presentment was bad; for that it did not appear that the information upon oath was given to the presenting magistrate, and the surveyor of the highways in C. had no authority under the 13 G. 3, c. 78, s. 24, to give information as to the road in F. *Re v. The Inhabitants of Fylingdales*, M. 8 G. 4. 438
7. A count in assumpsit for money had and received by the defendant, as executor, to the use of the plaintiff, cannot be joined with a count for money due to plaintiff from defendant, as executor, upon an account stated with him of money due from him as executor.
- Semble, That a count for money paid by the plaintiff to the use of the defendant, as executor, may be joined with such a count on an account stated. *Ashby v. Ashby and another*, M. 8 G. 4. 444
8. Declaration stated, that defendant, contriving, &c. did print and publish of and concerning the plaintiff a libel containing the false and scandalous matter following, without alleging that that matter was of and concerning the plaintiff, and then set out the libel, which, on the face of it, did not manifestly appear to relate to the plaintiff, and there was no innuendo to connect it with the plaintiff: Held, upon writ of error, that the count was bad. *Clement v. Fisher (in error)*, M. 8 G. 4. 459
9. An indictment charged that A. B., on, &c. being the servant of J. H., on the same day, &c. one gold ring, &c. then and there being in the possession of J. H., and being his goods and chattels, feloniously did steal: Held, that the fair import of the charge was, that A. B. was the servant of J. H. at the time when the theft was committed, and that the indictment therefore warranted judgment of transportation for fourteen years. *Re v. Mary Somerton*, M. 8 G. 4. 463
10. Where a bill of exchange, payable after sight, having been presented for acceptance and refused, and duly protested, was eight days afterwards accepted by a third person for the honour of the drawer, and when at maturity, according to that acceptance, was presented for payment, both to the drawee and the acceptor for honour: Held, in actions against the latter and the drawer, that these presentments for payment were made at a proper time. But it was held necessary that the presentment to the drawee for payment should be averred in the declaration: and for want of such averment judgment was arrested. *Williams v. Gormaine*, M. 8 G. 4. 468
11. Information for usurping the office of Burgess of the borough of S. Plea, that the burgesses were a body corporate by prescription as well as by charter, and that the common council, or the major part of them, being duly assembled as such common council for such purpose within the borough, from time to time, and as often as it had seemed fit and convenient to them, had elected so many persons to be burgesses as to them seemed fit. The plea then (after setting out a charter, by which the king granted that there should be a mayor, ten aldermen, and ten capital burgesses, and that they should be the common council for all things touching the government of the borough) stated, that from thenceforth there had been, and still were within the borough, a mayor, ten aldermen, and ten capital burgesses, and an indefinite number of burgesses, and a common coun-

oil; that on, &c., the then mayor, and divers, to wit, nine of the aldermen of the borough, being the major part of the aldermen, and nine of the capital burgesses, being the major part of such ten capital burgesses, so granted by the charter, being the major part of the common council of the borough for the time being, duly assembled and met together as such common council, for the purpose of electing a burgess, and being so assembled, it seemed fit to them to elect, and they did elect, the defendant to be a burgess. Replication, that notice of the purpose for which the supposed assembly of the common council was to be held, was not at any time before the said assembly was held given to the aldermen or capital burgesses of the borough, or any or either of them: Held, upon demurrer, that the replication was bad, because it assumed, as a general proposition of law, that there could not be any lawful assembly for the purpose of electing a burgess without previous notice of the purpose of the meeting having been given to every member of each select body of the common council; whereas, if all the members of such select body were present at, and concurred in the election, such notice would have been unnecessary. *Rez v. Sir G. Chetwynd, Bart., H. 8 & 9 G. 4.* 695

1. *Scire facias* on recognizance of bail. Plea, no ca. sa. duly issued, lodged, and returned. Replication, ca. sa. issued and returned non est inventus. Rejoinder, that the ca. sa. did not lie in the sheriff's office four days exclusive of the day it was lodged, the return day and an intervening Sunday. Demurrer: Held, upon demurrer, that the rejoinder was bail. *Sandon v. Proctor and another, H. 8 & 9 G. 4.* 800

3. Debt on bond. Plea, after craving oyer of the bond and condition, which was, that A. B. should faithfully account for all monies received by him as collecting clerk, that A. B. did account. Replication, that A. B. received divers sums, amounting to 2000*l.*, for which he did not account. Rejoinder, that the sums mentioned in the replication were three sums of 1000*l.*, 500*l.*, and 500*l.*, received by A. B. of C. D. and F. and G., and that A. B. accounted for those sums. Surrejoinder, that the sums mentioned in the replication were other and different sums than those alleged in the rejoinder to have been received and accounted for by A. B., and concluding to the country: Held, upon special demurrer, that the surrejoinder was good. *Calvert and another v. Gordon, Executrix, H. 8 & 9 G. 4.* 809

POOR.

See PENAL ACTION.

POOR RATE.

See OVERSEER, 2.

1. Where only one of several partners was resident in a parish: Held, that he could
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not be rated to the relief of the poor in respect of more than his share of the partnership personal property. *Rez v. Gosse, T. 8 G. 4.* 60

2. Where, by act of parliament, certain persons were empowered to make a dock, and take certain rates and duties from ships resorting to it, and the same statute provided that those rates should be applied to paying off the debt incurred in making the dock and to keeping it in repair, and that then the rates should be lowered, reserving sufficient to keep the dock, &c. in repair: Held, that the Dock Company were not rateable to the relief of the poor in respect of the dock dues received by them, nor of the premises purchased or hired, and used by them for the purposes of the dock, no individual having any beneficial occupation of those premises. *Rez v. The Inhabitants of the Parish of Liverpool, T. 8 G. 4.* 61

3. Where the surplus tolls of a navigation were directed by act of parliament to be expended in repairing public bridges and highways: Held, that they were not rateable to the relief of the poor. *Rez v. The Trustees of the River Weaver Navigation, T. 8 G. 4.* 70 n. (c).

4. A canal company is rateable to the relief of the poor in every parish through which the canal passes, in proportion to the profits which the land occupied by them in such parish yields, and, therefore, where a canal passed through several parishes, in which the tonnage dues payable varied, it was held, that the company were rateable to the relief of the poor of each parish for the amount of tonnage dues actually earned there, and not for a part of the whole amount earned along the whole line of the canal, in proportion to the length of the canal in that parish. *Rez v. The Inhabitants of Kingswinford, T. 8 G. 4.* 236

5. By a local act for the relief of the poor, certain commissioners were enabled to make rates upon all and every person or persons who held, occupied, or possessed land in the parish: it was held, that a corporation was liable to be rated, although by a clause, giving an appeal to the quarter sessions to any party aggrieved, such party was bound to enter into a recognizance.

The act of parliament required that, before any action should be brought to recover any rates, there should be a personal demand of the same, or a demand in writing left at the place of abode of the persons charged, or on the premises charged: Held by *Bayley, J.*, that a demand made at a meeting of the corporate body duly convened was sufficient; and by *Littledale, J.*, that a demand fixed on the premises charged under the rate was sufficient.

The act directed all actions to be brought in the name of the treasurer. An order was made by the commissioners, that an action should be brought to recover certain rates. At the time when this order was made A. was treasurer, but when the action was commenced B. was treasurer: Held, that the latter had authority to pro-

ecute the action in his name for the benefit of the commissioners, and was entitled to recover the rates due to the commissioners before he was appointed treasurer: Held, also, that it was not competent to the defendant in such action to object to the rates on the ground that the property rated was not sufficiently described in them, that being a ground of appeal to the quarter sessions.

By an act of parliament, authorizing the levying of a gaol-rate, it was enacted, that the overseer of the poor of every parish should levy such gaol-rate by such ways and means as any poor-rate is by law collected: Held, that, as the power to make and levy rates had been taken from the overseers and given to certain commissioners, they were to be considered as overseers of the poor for the purpose of collecting the gaol-rate within the meaning of the act of parliament.

The commissioners under the first mentioned act were to settle and ascertain the sums of money respectively necessary to be raised for the relief of the poor, and paving, &c. the streets, and make and sign rate or rates not exceeding the amount of the sum so settled and ascertained. At a meeting of the commissioners duly convened, it was adjudged necessary to raise a sum not exceeding 1300*l.* for the use of the poor, and a sum not exceeding 500*l.* for paving, &c. the streets: Held, that the fair import of that resolution was, that those two sums were the smallest sum necessary to be raised for the purposes required, and, therefore, that those were the sums fixed and ascertained by the commissioners.

The commissioners ordered that the sum of 1300*l.* should be raised by a rate of 11*d.* in the pound, and the sum of 500*l.* by a rate of 3*d.* in the pound. If these rates had been collected upon the whole rental of the parish, they would have produced less than 1800*l.*, but the poor-rate would have produced more than 1300*l.*: Held, that as the act of parliament did not require separate rates to be made for the poor and for the highways, and as the entire sum directed to be raised would not exceed the sum required, the rate was good.

By the act for building the gaol, the justices at sessions were authorized to assess a special county rate upon every parish, for the payment of the expenses of building such gaol, and that rate was made payable out of the monies collected in the parishes for the relief of the poor; and there was a proviso, that every tenant might deduct out of his rent one half the amount of the rate: Held, that under the local act, the commissioners could not make a retrospective rate in order to reimburse themselves in one year money which they had paid in a former year on account of the gaol-rate. *Curtis v. The Company of Proprietors of the Kent Water Works*, T. 8 G. 4. 314

POWER OF ATTORNEY.

A. B., who carried on business on his own

account, and also in partnership, went abroad, and gave to certain persons in this country two powers of attorney; by the first of which, authority was given for him, and in his name, and to his use, to do certain specific acts, (and, amongst others, to indorse bills, &c.) and generally to act for him, as he might do if he were present; and by the second, authority was given "for him and on his behalf, to accept bills drawn on him by his agents or correspondents." C. D., one of A. B.'s partners (and who acted as his agent), in order to raise money for payment of the creditors of the joint concern, drew a bill, which the attorney accepted in A. B.'s name by *procuration*. In an action against A. B. by the indorsee of the bill: Held, first, that the right of the indorsee depended upon the authority given to the attorney; secondly, that the powers applied only to A. B.'s individual and not to his partnership affairs; thirdly, that the special power to accept extended only to bills drawn by an agent in that capacity, and that C. D. did not draw the bill in question as agent, but as partner; and, lastly, that the general words in the powers of attorney were not to be construed at large, but as giving general powers for the carrying into effect the special purposes for which they were given. *Attwood and others v. Munnings*, T. 8 G. 4. 278

PRACTICE.

1. A verdict having been found for the defendant, and a rule for a new trial obtained, the cause was referred to a barrister, and the costs of the cause were to be in his discretion. He found, that the plaintiffs were entitled to recover, and ordered the defendants to pay the costs of the first cause: Held, that the plaintiffs were not entitled to the costs of the first trial. *Rigby and others, Assignees, v. Okell and others*, T. 8 G. 4. 57
2. In an action against a sworn broker of the city of London for negligence in making a contract, the Court will, on motion, compel him to produce his books, in order to enable the plaintiff to inspect and take a copy of the contract. *Browning and another v. Aylwin and another*, T. 8 G. 4. 204
3. The sheriff having, under a *fieri facias* issued at the suit of a judgment creditor, seized the goods of a bankrupt, which the assignees claimed, the Court stayed the return of the *fieri facias* until the sheriff should be indemnified. The assignees of the bankrupt, in their own name, and not in their character of assignees, brought trespass against the sheriff and execution creditor, for seizing the goods, which consisted of the stock on a farm, which had belonged to the bankrupt. On the issuing of the commission, the assignees took possession of the farm, managed it for the benefit of the creditors, and purchased additional stock and farming utensils, and they had continued in possession several months before the goods were seized by the sheriff

- under the *ieri facias*. The Court refused to stay the proceedings in the action of trespass. *Bernasconi and others v. Fairbrother and Winchester, Sheriffs of Middlesex and Wilton*, T. 8 G. 4. 379
4. An Irish peer cannot be arrested for a debt. *Coates and another, Assignees, v. Lord Hawarden*, M. 8 G. 4. 388
5. Where a verdict in trover was obtained in vacation against a trader, who, after the first day of the next term, but before final judgment was signed, became bankrupt: Held, that final judgment, signed afterwards during the same term, related to the first day of the term, and that the debt thereby created was barred by the bankrupt's certificate. *Greenway v. Fisher*, M. 8 G. 4. 436
6. When the sheriff is ruled to bring in the body, proceedings cannot be taken on the bail-bond until that rule has expired; and if bail above are justified before that time, the bail below may, in an action on the bond, plead *comperuit ad diem*, and that plea is satisfied by the production of the recognizance roll, containing an entry of the defendant's appearance generally. Such roll may be made up at any time before the day given for producing it. *Whittle, Assignee, v. Oldaker and others*, M. 8 G. 4. 478
7. The defendant, having obtained a judge's order for delivery of particulars of the plaintiff's demand, and for staying proceedings until they were delivered, cannot sign judgment of non pros against the plaintiff for not declaring. *Burgess v. Swayne*, M. 8 G. 4. 485
8. Where A. B. executed a warrant of attorney in the name of C. B., and judgment was entered up, and a *fi. fa.* issued against him by that name: Held, that this was right, and that the sheriff was bound to execute it. *Reeves v. Slater*, M. 8 G. 4. 486
9. Where an award directed that one of the two parties to the submission should pay the expenses of the reference, and that the other should repay them on demand; and the former having paid them, made an affidavit of debt against the other party, alleging such payment, but not stating any demand of repayment: Held, that this was not sufficient. *Driver v. Hood*, M. 8 G. 4. 494
10. Where one of several defendants, in a proceeding by foreign attachment in the Mayor's Court of London, removes it by certiorari, he must put in bail in K. B. for all the defendants, otherwise a procedendo will be granted. *Keat and another v. Goldstein and Castles*, M. 8 G. 4. 525
11. Where a bill of *Middlesex* issued upon an affidavit of debt duly sworn, and that was followed up by a latitat into *Surrey*, upon which the party was arrested: Held, that the latitat was only a continuance of the former process, and that it was not necessary that a fresh affidavit of debt should be made. *Baker v. Allen*, M. 8 G. 4. 526
12. An attorney, upon receiving the amount of his bill, is bound to deliver up to his client, not only original deeds, &c. belonging to him, but also the drafts and copies. *Ex parte Horsfall*, M. 8 G. 4. 528
13. An attorney suing by latitat, and not by attachment of privilege, loses his right to retain the venue in *Middlesex*. *Mounsey v. Watson*, H. 8 & 9 G. 4. 683
14. In order to charge the bail a ca. sa. against the original defendant must be in the sheriff's office four days before the return day, exclusive of the day when it is lodged and of the return day, and an intervening *Sunday* is not to be reckoned one of the four days. *Furnell v. S. Smith and another*, H. 8 & 9 G. 4. 693
15. The Court, in an action brought against the Marshal for an escape, compelled him or his officer to permit the attorney of the plaintiff to inspect the writ of *habeas corpus*, and return, and the committitur indorsed thereon. *Fox and others v. Jones*, H. 8 & 9 G. 4. 732
16. An affidavit to hold to bail, purporting to be sworn "at the King's Bench office, *Inner Temple*, before T. C." was held to be sufficient. *Howell v. Wilkins*, H. 8 & 9 G. 4. 783
17. Scire facias on recognizance of bail. Plea, no ca. sa. duly issued, lodged, and returned. Replication, ca. sa. issued and returned non est inventus. Rejoinder, that the ca. sa. did not lie in the sheriff's office four days exclusive of the day it was lodged, the return day and an intervening *Sunday*. Demurrer: Held, upon demurrer, that the rejoinder was bad. *Sandon v. Proctor and another*, H. 8 G. 4. 800
18. A general verdict was given for the plaintiff on a declaration consisting of several counts, some of which were bad in point of law. The evidence applied to all the counts. The Court of Common Pleas, after writ of error brought, and after argument in the court of error, amended the postea by entering the verdict for the plaintiff on the first count, and for the defendant on the others; and amended the judgment-roll remaining in that court by the amended postea, after the judgment had been reversed by the King's Bench. Semble, That the court of King's Bench is bound to amend the record by the amended record of the court of Common Pleas. *Mellish v. Richardson (in error)* H. 8 & 9 G. 4. 819

PRESENTATION.

See ADVOWSON.

PRESENTMENT.

See HIGHWAY, 4, 5.

PRINCIPAL AND AGENT.

1. A. B., who carried on business on his own account, and also in partnership, went

abroad, and gave to certain persons in this country two powers of attorney; by the first of which, authority was given *for him, and in his name, and to his use*, to do certain specific acts, (and, amongst others, to indorse bills, &c.) and generally to act for him, as he might do if he were present; and by the second, authority was given "for him and on his behalf, to accept bills drawn on him by his agents or correspondents." *C. D.*, one of *A. B.*'s partners (and who acted as his agent), in order to raise money for payment of the creditors of the joint concern, drew a bill, which the attorney accepted in *A. B.*'s name by *procuration*. In an action against *A. B.* by the indorsee of the bill: Held, first, that the right of the indorsee depended upon the authority given to the attorney; secondly, that the powers applied only to *A. B.*'s individual and not to his partnership affairs; thirdly, that the special power to accept extended only to bills drawn by an agent in that capacity, and that *C. D.* did not draw the bill in question as agent, but as partner; and, lastly, that the general words in the powers of attorney were not to be construed at large, but as giving general powers for the carrying into effect the special purposes for which they were given. *Attwood and others v. Munnings*, T. 8 G. 4.

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2. Where a broker, having accepted bills for his principal on the security of goods then in his hands, pledged the goods with a person who had notice of the agency, but did not inform the principal of this transaction: Held, that under the 6 G. 4, c. 94, s. 5, the broker could only transfer such right as he had, which was a right to be indemnified against the bills which he had accepted; and that the principal having satisfied those bills, was entitled to have back his goods from the pawnee, without paying the amount for which they were pledged. *Fletcher v. Heath and others*, M. 8 G. 4.

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PROBATE.

An act for making a navigable canal, provided that the shares were to be deemed personal estate, and to be transmissible as such. The canal passed through parishes in the diocese of Worcester, and other parishes in the diocese of Lichfield and Coventry. The transfers of shares in the canal were filed at the public office of the company in the diocese of Lichfield and Coventry, where the dividends were also paid and books of account kept: Held, that for the purposes of probate, the right of a shareholder to a share of the profits, being personal property, might be considered as locally situate in the diocese of Lichfield and Coventry, and that a probate granted by the Consistorial Court of the Bishop of that diocese was sufficient. *Ex parte Horne*, H. 8 & 9 G. 4.

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PROMISSORY NOTE.

See BILL OF EXCHANGE, 4.

PROMOTIONS.

Page 1, 206, 383, 623.

QUARE IMPEDIT.

See ADVOWSON.

RATE.

See POOR RATE, 5.

RECOGNIZANCE.

See ASSUMPSIT, 1. JUSTICES, 2.

RIOT.

See HIGH CONSTABLE.

RULE OF COURT.

Page 642.

SELECT VESTRY.

A custom, that there shall be a select vestry of an indefinite number of persons, continued by election of new members made by itself, and not by the parishioners, is valid in law.

Semble, That it must be part of such custom that there should always be a reasonable number, and that the reasonableness of the number must be decided with reference to long-established usage, and to the population of the parish; such a custom having existed from time immemorial in a parish.

In the year 1662, by a faculty granted by the Bishop of London, forty-nine persons, together with the vicar and churchwardens, were named as the select vestry; and that number was to be kept up by elections, to be made by ten at least of those forty-nine, together with the vicar and churchwardens. In the year 1673 this number of ten was, by another faculty, reduced to seven; and these faculties were acted upon ever afterwards. Ten out of the fourteen vestrymen, exclusive of the vicar and churchwardens, who were present at the vestry holden next before the promulgation of the first faculty, were part of the forty-nine named in that faculty: Held, that as the vestry appointed by the faculty, and since continued, was not inconsistent with the vestry previously existing by the custom, the custom was not destroyed by the parish having accepted the faculty, and acted upon it ever since, the faculty not being binding in law, and the vestry having power at any time to depart from its directions. *Golding and others v. Fenn*, H. 8 & 9 G. 4.

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SESSIONS.

See ASSUMPSIT.

The 54 G. 3, c. 84, which enacted, that the

Michaelmas quarter sessions shall be holden in the week next after the 11th of *October*, is merely directory, and those sessions may notwithstanding that enactment be legally holden at another time. *Rez v. The Justices of the Borough of Leicester*, T. 8 G. 4. 6

SET-OFF.

A. was employed as storekeeper by B. and C., who were joint adventurers in a mine, and he was authorized to draw bills on B. for money laid out on account of the mining company. The bills were discounted by a banker, and the payment of them was guaranteed to him by B. and C. B. having been arrested, A., in order to provide funds to procure B.'s discharge, drew on B. a bill purporting to be on account of the mining company. The banker discounted the bill, and paid the amount to B. C. was afterwards compelled to take up the same in consequence of his guaranty. In an action brought by A. against B. and C. for his salary, it was held that C. could not set off the amount of the bill. *Jones v. Florming and Jones*, T. 8 G. 4. 217

SETTLEMENT.

The wife of an *Irishman* who has no settlement in *England*, may, if deserted by him, be removed to her maiden settlement. *Rez v. The Inhabitants of Cottingham*, M. 8 G. 4. 615

Where an examination of a soldier, taken before two magistrates, was tendered in evidence to prove his settlement, but it did not appear by the examination itself, or by other proof, that the soldier, at the time when he was examined, was quartered in the place where the justices had jurisdiction: Held, that it was not admissible. *Rez v. The Inhabitants of All Saints, Southampton*, H. 8 & 9 G. 4. 785

SETTLEMENT—By Apprenticeship.

1. The 56 G. 3, c. 139, s. 11 recited, that the salutary provisions enacted by the 43 *Eliz.* were frequently evaded in the binding out of poor children, and that the premium of apprenticeship was clandestinely provided by parish officers, who were thus enabled to bind out poor children without the sanction of justices of the peace, and then enacted, "That no indenture of apprenticeship, by reason of which any expense whatever shall at any time be incurred by the public parochial funds, shall be valid and effectual, unless approved of by two justices of the peace under their hands and seals, according to the provisions of the said act and of this act:" Held, that in order to make an indenture by reason of which any expense had been incurred by the public parochial funds valid and effectual, the approval of two justices should be under their hands and seals, and that such an inden-

ture, approved of by two justices under their hands only, was void and not voidable, and that no settlement was gained by serving under it. *Rez v. The Inhabitants of Stoke Damerel*, M. 8 G. 4. 563

2. It was proved by a pauper, that he had been bound apprentice twenty-three years ago to A. B.; that indentures were signed and sealed, and that he served seven years, and that A. B. had the indentures; that when the apprenticeship expired, the pauper asked A. B. for the indentures, and he said the parish officers had them: Held, that the declarations of A. B., who might have been called as a witness, were not admissible in evidence, and that parol evidence of the contents was not admissible. *Rez v. The Inhabitants of Denio*, M. 8 G. 4. 620

SETTLEMENT—By Birth.

A pauper first recollected himself in the workhouse of the parish of A., when he was about four years of age. He remained there till he was thirteen or fourteen years of age. He afterwards married, and lived in another parish, but when out of work, he returned on two different occasions to the parish of A., and was not only relieved by the officers of that parish, but received money from them to enable him to return to the parish where he lived. The sessions having found that he was not settled in the parish of A., the Court affirmed their decision.

The fact of the pauper's remembering himself, when four years of age, in the parish of A., is no evidence that he was born there. *Rez v. The Inhabitants of Trowbridge*, T. 8 G. 4. 252

SETTLEMENT—By Certificate.

A parish certificate, dated the 7th of *September* 1758, purported, in the body of it, to have been granted to a pauper and his family by two churchwardens and two overseers. It was signed and sealed by two overseers, and by one churchwarden only. The churchwardens for the year 1758 were nominated at *Easter*, and were proved to have been sworn into office on the 15th of *September*, at the visitation. But there was no direct evidence of their having been sworn into office before that time. The certifying parish, after the date of the certificate, had frequently relieved the pauper, and different members of his family, while they were residing in other parishes: Held, that in favour of such an ancient certificate, which had been treated by the certifying parish as valid, the Court would presume that the churchwarden who executed the certificate was sworn before he executed it, and, therefore, that it was duly executed by him as churchwarden: Held, secondly, that the execution by two overseers and one churchwarden was an execution by the major part of the churchwardens and over-

seers within the statute 8 & 9 W. 3, c. 30.
Rez v. The Inhabitants of Whitchurch, M.
 8 G. 4. 573

SETTLEMENT—By Estate.

1. A man, by marrying a woman who was a yearly tenant of premises under the annual value of 10*l.*, held to gain a settlement.
Rez v. The Inhabitants of Ynyscynhanaw, T. 8 G. 4. 233
2. A woman seized of a messuage, &c. in the parish of *A.*, as tenant in common with her three sisters, married, and resided for some years with her husband in the parish of *B.*, where he was legally settled. The husband was transported, and the wife, sometime afterwards, went with her daughter to live in the messuage in *A.*, in which one of her sisters resided: Held, that she was irremovable; and the sessions having quashed an order removing her and her daughter, it was presumed that the latter was within the age of nurture, and therefore irremovable. *Rez v. The Inhabitants of Brington, M.* 8 G. 4. 546
3. The sum paid by the purchaser of a copyhold estate to his attorney for the surrender, is no part of the consideration for the purchase within the meaning of the statute 9 G. 1, c. 7, s. 5. *Rez v. The Inhabitants of Cottingham, M.* 8 G. 4. 603

SETTLEMENT—By Hiring and Service.

1. Upon a special case, the court of quarter sessions found, that a pauper hired himself as ostler to an innkeeper; that no earnest or wages were given, but he was to have what he could get, as ostler, and he lodged and boarded in his master's house, and that either the master or servant might have determined the service when they pleased: it was held, that, upon this finding, this latter stipulation must be taken to have been part of the contract between the parties, and, consequently, that there was not any general or yearly hiring, and that no settlement was gained by serving under it. *Rez v. The Inhabitants of Great Bowden, T.* 8 G. 4. 249
2. A pauper was hired by the commanding officer of a royal military college to act as a servant in that establishment. By the terms of the hiring, he was to obey all orders of the officers of the institution, and to be allowed weekly wages, and if he wished to quit the college he was to give one month's notice; but should the college be dissatisfied with his conduct, it retained the power of dismissing him at a moment's notice: Held, first, that this was a good hiring for a year, although either party might determine it before the expiration of the year; secondly, that a settlement was gained by such hiring, although it was not to a private person, the statute 3 W. & M. c. 11, s. 7, only requiring a lawful hiring, and a service under it. *Rez v. The Inhabitants of Sandhurst, M.* 8 G. 4. 557

3. The statute 29 Car. 2, c. 7, s. 3, enacts, that no tradesman, artificer, workman, labourer, or any person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary calling on the Lord's day, and subjects parties offending to a penalty: Held that this statute only prohibits labour, business, or work done in the course of a man's ordinary calling, and, therefore, that a contract of hiring made on a Sunday between a farmer and a labourer for a year, was valid, and that a service under it conferred a settlement. *Rez v. The Inhabitants of Whitnash, M.* 8 G. 4. 596

SETTLEMENT—By Parentage.

A pauper, twenty years of age, whose father was settled in the parish of *A.*, contracted to serve the captain of a ship two summers and a winter. He continued in the service until he attained twenty-one years of age; but before that time his father acquired a settlement in another parish: Held, that the pauper was not emancipated before he attained the age of twenty-one, and consequently, that his settlement followed that of his father. *Rez v. The Inhabitants of Lytchet Matravers, T.* 8 G. 4. 226

SETTLEMENT—By Payment of Parochial Taxes.

The being charged with, and paying parochial taxes, did not before the stat. 6 G. 4, c. 57, s. 2, confer any settlement until the party charged with, and paying the same, had resided within the parish forty days after he had been so charged, and since that statute passed, no person can acquire a settlement by reason of renting or paying parochial taxes for any tenement, unless it be of a certain description; and, therefore, where a pauper had rented a tenement (insufficient to confer a settlement under the 6 G. 4), and in respect thereof had been rated and paid parochial taxes, but had not resided thereon after such rating and payment forty days before the passing of the 6 G. 4, it was held, that he did not thereby acquire any settlement. *Rez v. The Inhabitants of Ringstead, M.* 8 G. 4. 607

SETTLEMENT—By Renting a Tenement.

1. In December 1825 a house was hired at twenty guineas a year, the rent to be paid weekly, and either landlord or tenant to be at liberty to determine the tenancy at three months' notice from any quarter-day: Held, that this was a renting of a tenement for one whole year, within the meaning of the stat. 6 G. 4, c. 57, and that the pauper, having occupied the same, and paid the rent for a year, gained a settlement. *Rez v. The Inhabitants of Hermonesau, M.* 8 G. 4. 551
2. Where a pauper bona fide hired a house and garden in *A.* for a year at the rent of

W., and occupied it for a year, and the whole rent was paid to the landlord, but not by the pauper: Held, that he nevertheless gained a settlement in *A.*, inasmuch as the statute 6 *G.* 4, c. 57, did not require that the rent should be paid by him. *Rae v. The Inhabitants of Kibworth Harcourt*, *H.* 8 & 9 *G.* 4. 790

SHARES IN A NAVIGABLE CANAL.

See PROBATE.

SHERIFF.

1. The sheriff having, under a fieri facias issued at the suit of a judgment creditor, seized the goods of a bankrupt, which the assignees claimed, the Court stayed the return of the fieri facias until the sheriff should be indemnified. The assignees of the bankrupt, in their own name, and not in their character of assignees, brought trespass against the sheriff and execution creditor, for seizing the goods, which consisted of the stock on a farm, which had belonged to the bankrupt. On the issuing of the commission, the assignees took possession of the farm, managed it for the benefit of the creditors, and purchased additional stock and farming utensils, and they had continued in possession several months before the goods were seized by the sheriff under the fieri facias. The Court refused to stay the proceedings in the action of trespass. *Bernasconi and others v. Fairbrother and Winchester, Sheriffs of Middlesex and Wilton*, *T.* 8 *G.* 4. 379
2. Where *A. B.* executed a warrant of attorney in the name of *C. B.*, and judgment was entered up, and a fi. fa. issued against him by that name: Held, that this was right, and that the sheriff was bound to execute it. *Reeves v. Slater*, *M.* 8 *G.* 4. 486
3. In an action of trover against the sheriff, for goods taken in execution, it is sufficient for the plaintiff to give in evidence the warrant issued by the under-sheriff, under the sheriff's seal of office, and he is not bound to prove the writ. *Gibbins v. Phillips*, *M.* 8 *G.* 4. 535 n. (a)

SHIP-OWNER.

Where *A.*, the managing owner of a ship, mortgaged his share to *B.*, who procured the transfer to be duly indorsed on the certificate of registry, but *A.* continued in the management as before, and *B.* did not take possession or interfere in the concerns of the ship: Held, that he was not liable for repairs and necessaries done and supplied in pursuance of *A.*'s orders. *Briggs v. Wilkinson and others*, *T.* 8 *G.* 4. 30

SOLDIER.

See SETTLEMENT, 2.

STAGE COACHES.

The statutes 3 *Car.* 1, c. 1, and 29 *Car.* 2, c. 7, do not make it illegal for stage-coaches to travel on the Lord's day. *Sandiman v. Breach*, *T.* 8 *G.* 4. 94

STAMP.

1. Where a party declared upon two written agreements, by the second of which variations were made in the first, and there were also counts upon each separately; and it appeared, when the instruments were produced in evidence by the plaintiff, that the first only was stamped: Held, that the second could not be read in evidence to support the plaintiff's case, but might be looked at in order to ascertain whether the first was altered by it, and that, therefore, the plaintiff could not exclude the second agreement and proceed upon the counts setting out the first only. *Roads v. Deere*, *T.* 8 *G.* 4. 261
2. Where an agreement referred to a clause in a former agreement, and provided that it should extend to the new agreement as if it had been repeated therein: Held, that the clause referred to could not be considered as annexed to the new agreement so as to make an additional stamp necessary, on the ground of the agreement, with the clause, containing more than 1080 words. *Attwood v. Small and others*, *M.* 8 *G.* 4. 390
3. Where an inclosure act gave the commissioners power to award lands in exchange for others in an adjoining parish, and also to award lands to those who bought them of persons entitled to allotments: Held, that they might award lands given in exchange partly for other lands and partly for money, and that the award need not have an ad valorem stamp upon the money consideration. *Doos on the demise of Lord Suffolk v. Preston*, *M.* 8 *G.* 4. 392
4. Articles of agreement, whereby one party agreed to pay the other a fixed salary, and the other agreed not to set up a chemist's shop within a certain distance, and the parties were mutually bound in a penalty of 600*l.* to perform the agreement: Held, to require a stamp of 1*l.* 15*s.* *Mounsey v. Stephenson*, *M.* 8 *G.* 4. 403
5. Where a parol agreement was made between *A.* and *B.*, that the former should let, and the latter take, certain premises, upon the terms and conditions contained in a lease of the same premises granted by *A.* to *C.*: Held, that in an action by *A.* against *B.* for rent and non-repair, the lease could not be read in evidence, unless duly stamped. *Turner v. Power*, *H.* 8 & 9 *G.* 4. 625
6. In an action for not returning bills deposited with defendant, the following unstamped memorandum, signed by the defendant, was held to be admissible in evidence: "I have in my hands three bills which amount to 120*l.* 10*s.* 6*d.*, which I have to get discounted, or return on demand." *Mullett v. Hutchison*, *H.* 8 & 9 *G.* 4. 639

counting interest at the rate of 5*l*. per cent. per annum, and in addition, 1*l*. per cent. on the amount of the bills towards the payment of a debt due from a third person, but which the broker thought himself bound in honour to pay, and the broker accounted to his principals for the whole amount of the bills, minus lawful discount and commission: Held, that the transaction was not usurious. *Solaris and others, Assignees, v. Melville and another*, M. 8 G. 4.

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2. Where a contract was made for the sale of an estate at a certain price, and it was agreed that this should be paid by instalments at certain future days, with interest, calculated at 6*l*. per cent. per annum; and promissory notes were given for these sums, compounded of the instalments, and that which was called interest: Held, that the whole must be considered as the purchase-money of the estate, and that the bargain was not usurious. *Beeto v. Bidgood*, M. 8 G. 4.

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VARIANCE.

See PLEADING, 1, 2.

Where, in case the declaration stated that plaintiff delivered a trunk to the defendant to be put into a coach at *Chester* in the county of *Chester*, to wit, at, &c., and safely carried to *Shrewsbury*, and that through defendant's negligence it was lost: and it appeared in evidence that the trunk was delivered to the defendant at the city of *Chester*, which is a county of itself, separate from the county of *Chester* at large, but within its ambit: Held, that this was not a material variance, but that the declaration was supported by the evidence, as no evidence was given of the existence of any other place called *Chester*. *Woodward v. Booth*, T. 8 G. 4.

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VENDOR AND VENDEE.

Where the seller of goods received from the purchaser an order upon his banker for the price, and the latter (with whom money had been deposited to meet that and certain other demands) offered to pay in cash, deducting discount for the period of credit, or by a bill upon a third person, which the

seller elected to take: Held, that although the bill was afterwards dishonoured, he could not sue the purchaser for the price of the goods. *Smith and others v. Ferrand*, T. 8 G. 4.

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2. A. agreed with B. to make a gig for a given price. The body of the gig and wheels were selected by B., and A. promised to deliver it in a few days. The full price was paid. Before it was finished, it was seized by the sheriff under a fi. fa. issued against A. The gig was afterwards finished, and delivered to B. with the assent of the judgment-creditor. The sheriff afterwards retook it to secure his poundage: Held, that he had no right to do so, and that B. might maintain trover for the gig.

Query, Whether the property in the gig vested in the purchaser before delivery? *Goode v. Langley and others*, T. 8 G. 4.

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VENUE.

See PRACTICE, 12.

WARRANT OF ATTORNEY.

Where A. B. executed a warrant of attorney in the name of C. B., and judgment was entered up, and a fi. fa. issued against him by that name: Held, that this was right, and that the sheriff was bound to execute it. *Reeves v. Slater*, M. 8 G. 4.

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WARREN.

Grouse are not birds of warren. *The Duke of Devonshire v. Lodge*, T. 8 G. 4

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WASTE LAND.

See COPYHOLDER.

WHARFINGER.

See LIEN, 1.

WITNESS.

See EVIDENCE, 21.

WRIT OF ERROR.

See PRACTICE, 18.

END OF VOL. VII.

REPORTS

OF

CASES

ARGUED AND RULED

AT

NISI PRIUS,

IN THE COURTS OF

KING'S BENCH AND COMMON PLEAS,

AND ON

THE CIRCUIT:

FROM THE SITTINGS AFTER TRINITY TERM, 1827, TO THE SITTINGS AFTER
EASTER TERM, 1829.

BY

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CASES

AT

NISI PRIUS.

COURT OF KING'S BENCH.

ADJOURNED SITTINGS IN LONDON, AFTER TRINITY TERM, 1837.

BEFORE LORD TENTERDEN, C. J.

SENTANCE v. POOLE. July 17.

If a person, perfectly imbecile in mind, is imposed upon, and induced to sign a promissory note, which is drawn in an unusual form, such note is bad, even in the hands of an indorsee.

ASSUMPSIT by the plaintiff as indorsee, against the defendant, as one of the makers of a promissory note, which was in the following form:

"To Mr. William Carless,
High Street, Southwark.

March 4th, 1826.

"Sir,—We jointly and severally agree, five months after date, to pay to your order the sum of 220*l.* for value received.
£220.

JOHN CORNISH.
JAMES POOLE.

"Payable at Garraway's Coffee-house,
Change Alley, London."

This note was indorsed, "William Carless."

It appeared, that when the defendant signed the note, it *was not addressed to any particular person as payee*, and that Cornish, the other maker, afterwards *2] inserted the direction, "To Mr. William Carless, High-Street, *Southwark (a);" to whom he paid the note in part liquidation of a previous

(a) If a bill or note be altered in a material part (though by consent of all parties,) after it is issued, it requires a new stamp: and Mr. Justice Bayley lays down (Bills of Exchange, 99) that "such alteration not only makes a new stamp necessary, but vacates the bill or note, independently of the stamp laws), except as between the parties consenting to such alteration." In the case of *Kershaw v. Cox*, 3 Esp. 246, the words "or order" were omitted in the bill. This was discovered after the bill had been indorsed, and the words added by the drawer, with the consent of all parties. *Le Blanc, J.*, held, that the bill did not require a new stamp, as this was the mere correction of a mistake, and was in furtherance of the original intention. But in the case of *Knill v. Williams*, 10 East, 431, the Court held, that an alteration of the term *value received*, by the addition of the words, *for the goodwill of the lease and trade of Mr. F. Knill*,

debt, due from himself, for the purchase of goods; and that Mr. Carless subsequently indorsed it to the plaintiff.

The witness for the defendant stated, that he had been wholly incapable of transacting the most ordinary affairs of life for some years past, and that at the time he signed the note he was of perfectly imbecile mind, and as helpless as a child four years old.

For the plaintiff, to show a consideration, there was evidence given, that the plaintiff was accustomed to discount bills, and that he had given a check for the amount of the note in question, deducting only the discount; and it was contended by his counsel that he had acted *bonâ fide* in the transaction.

Lord TENTERDEN, C. J., (to the Jury). The question in this case is, whether the defendant, John Poole, at the time he put his name to this note, which is drawn in an unusual form, it being "to your order," and not addressed to any one, was or was not conscious of what he *was doing; for, if he was, [23 there must be a verdict for the plaintiff; but, should you be satisfied that he was not conscious of what he was doing, and that he was imposed upon by reason of his imbecility of mind, you ought to find for the defendant. It is a hard case either way, but it is very important that Courts of justice should afford protection to those individuals who are unfortunately unable to be their own guardians.

Verdict for the defendant (a).

Marryatt and *C. Shepherd*, for the plaintiff.

Scarlett, A. G., and *Malkin*, for the defendant.

[Attornies—*Whiting* and *Brown*.]

deceased, was such an alteration as to require a new stamp, it being made after the issuing of the bill; *Le Blanc*, J., saying, that his opinion in the case of *Kershaw v. Cox* could only be supported on the ground, that the alteration there made was merely the correction of a mistake. See also the case of *Atwood v. Griffin*, *ante*, Vol. 2, p. 368.

(a) See the cases of *Baxter v. Earl of Portsmouth*, *ante*, Vol. 2, p. 178, and 8 D. & R. 614; and the case of *Brown v. Jedrell*, *post*, p. 30. An agreement signed by a person in a state of complete intoxication, is void. *Pitt v. Smith*, 3 Camp. 33.

TRAIN v. BENNETT. July 18.

If a seaman's claim for wages is resisted, on the ground that he would not do his work, which, by the ship's articles, is to cause a forfeiture of wages; it is a good answer to this defence, to show that the refusal to work was caused by the misconduct of the captain, which went to induce the men to incur such forfeitures.—If seamen have incurred a forfeiture of their wages, and, in a time of distress, when the ship is aground, the captain call on those seamen to assist in getting her off, this is no waiver of the forfeiture; but if the captain continues them in their work, after the peril is over, it is otherwise.

DEBT for seaman's wages. The first count of the declaration was special, and framed on the ship's articles, under seal, dated January 4th, 1823, between the defendant as owner, and the plaintiff and others of the master and crew of the whale ship, *Phoenix*. The declaration also contained the common money counts. Plea—*Nil debet* to the whole declaration.

The articles were read. They were executed by the defendant as owner, and by the plaintiff as a seaman of the *Phoenix*; and by these it was agreed that the *plaintiff should act as a seaman on board the ship, which was to proceed to the Southern whale fishery, and receive a hundred and thirty-fifth [24 share of the cargo. By one of the clauses of the articles, it was agreed that the seamen should forfeit their shares, in case they neglected their duty, or refused to obey the lawful commands of their superiors.

The defence was, that the plaintiff and several of the other seamen, repeatedly refused to work ; and it appeared, that, on the voyage homeward, a man named Kebby, who did not wash a part of the ship as he ought to have done, was ordered to go below, and was not suffered to do his duty as usual ; and it appeared that many of the other men refused to work unless Kebby was set to work also ; and the captain said, that he would knock off several of them (meaning that he would report them as disobedient, to deprive them of their shares of the cargo), but he did not say who in particular he would knock off. This occurred on the 7th October, 1826. However, a few days after this, the crew sent the captain the following letter :—

“ Sunday Morning, 16th.

“ We are willing to go to work, if you will turn Kebby to, or if you have no intention of knocking any one else off, or if you will tell us who they are. For an answer, we should be obliged to you.”

This letter was not signed ; and the captain never gave any answer to it ; and the plaintiff and the other men did no work, and were not ordered to do any for several weeks ; by reason of which the captain, surgeon, and passengers all had to work occasionally at the pumps. However, subsequently to this, the ship ran aground near Margate, and the captain called on the plaintiff and the other seamen to assist in getting her off, which they did ; and after this the plaintiff and the other seamen worked the ship into dock, which occupied a period of four days, during which the plaintiff and the other seamen did all their work as seamen on board the ship.

*5] *Scarlett*, A. G., in his reply, contended, that, as the captain called the men up, and set them to work in a time of distress, and did not send them below again as soon as the distress was over, there was a dispensation of any previous forfeiture that might have occurred : and if it were not so, every man who was put in irons for half an hour, and then returned to his duty, would incur a forfeiture of his wages.

Lord TENTERDEN, C. J., (in summing up to the Jury.) In these fisheries, it is usual for the men to have certain shares of the net proceeds of the voyage to stimulate them to get as large a cargo as they can ; and, by one of the clauses contained in the articles, it is here agreed, that if any of the officers, seamen, &c., shall break or neglect their engagements, one of which is, that they shall obey their superior officers, or, if they shall neglect their duty, they shall incur a forfeiture of their respective shares. Now it is here charged, that the plaintiff disobeyed the orders of the captain, and refused to do his duty. That he did not, in fact, do his duty, is quite clear. But this is answered on two grounds : *first*, that the captain acted improperly ; and, *secondly*, that the captain set the plaintiff to work again, and kept him at work under such circumstances as waived any previous forfeiture. I take it to be clear, that when the ship had got aground, the captain might call for the assistance of the men to get her off, without any waiver of his owner's rights : but this case goes much further ; for, after the ship is got off, he continues them in employ till the ship is got into dock. On the second ground, it appears, that the men sent the captain a letter, to which he returned no answer ; and that he did not inform them whom he was going to knock off. Now, a master of a ship is not, by his own conduct, to induce a forfeiture of the men's wages ; and if you think that the captain acted improperly in refusing to say whom he would knock off, or in obscurely saying *6] that he would knock several of them off, and that the plaintiff *and other men in consequence refused to work, I think that then, in point of law, the wages are not forfeited. But if you should think that the master did not act improperly, I am of opinion that you ought to find for the defendant.

Verdict for the plaintiff—Damages, 43*l*.

Scarlett, A. G., and Comyn, for the plaintiff.
Gurney and Steer, for the defendant.

[Attornies—*Jones & H., and West & M.*]

"Desertion from the ship is held to be a forfeiture of wages previously earned, in all maritime states; and in conformity to this principle of maritime law, the Legislature of this country, in the reign of King William the Third, for the prevention of seamen deserting of ships abroad, enacted, (11 & 12 W. 3, c. 7.) 'that all such seamen, officers, or sailors, who shall desert the ships or vessels wherein they are hired to serve for that voyage, shall, for such offence, forfeit all such wages as shall be due to him or them.' And by the subsequent stat. (2 Geo. 2, c. 36), if a seaman shall desert or refuse to proceed on the voyage on board any ship bound to parts beyond the seas, or shall desert from the ship to which he belongs, *in parts beyond the seas*, after he shall have signed the contract, he shall forfeit to the owners the wages due to him at the time of his deserting or refusing to proceed on the voyage."—*Abbott on Shipping*, 463.

"It is, however, of great importance to understand, that the forfeiture of wages for desertion does not arise out of these provisions of the Legislature, but depends, as I have already intimated, upon a general rule of maritime law." *Id.* 468. It seems also that neglect of duty, disobedience of orders, habitual drunkenness, or any cause which will justify a master in discharging a seaman during a voyage, will also deprive the seaman of his wages. *Id.* 472. And in the case of *Robinet v. The Ship Exeter*, 2 Rob. Adm. Rep. 263, Sir W. Scott lays down, that drunkenness, neglect of duty, and disobedience in an officer of an Indiaman, are offences of a high nature, fully sufficient to justify his discharge, if proved; and that, "with respect to the negligence, it would not be necessary to show that it was wilful; but that it would be sufficient, if it amounted to habitual inattention to the ordinary duties of his station, which might expose the ship to danger; for a person in the station of an officer stipulates against such negligence." In the case of *Müller v. Brant*, 2 Camp. 590, the plaintiff, a seaman, had, under the articles, incurred a forfeiture of his wages by being absent without "leave; but it being proved, that on his return the captain took him again, and that he worked as the other men did, Lord Ellenborough held, that this waived the forfeiture, and said, that the captain might have refused to receive him, or, insisting on the forfeiture, have made a new agreement with him; but that, by permitting the plaintiff to return to work, he must be taken to have pardoned the offence, and could not afterwards revert to the forfeiture.

In the case of *Evans v. Bennett*, 1 Camp. 300, where the plaintiff had executed articles under seal, by which, in consideration of his serving on board a South Sea whaler, the defendant, as the owner, was to pay him a share of the proceeds of the cargo: it was held, that to entitle him to recover on a count for money had and received, he must not only prove that the proceeds of the cargo came to the defendant's hands, but that the defendant had *acknowledged* that he had duly served, and was entitled to the share of the proceeds; and that if the plaintiff could not prove such an acknowledgment, his proper mode was to declare specially on the articles.

COLBY et al. v. HUNTER, Esq., Secretary to the St. Patrick's Assurance Company. July 18.

If a policy of insurance at and from H. to V. contain the following warranty, "warranted in port on the 19th October, 1825;" this warranty applies to the port of H. only, and not to any other port.
 Cuxhaven is no part of the port of Hamburg.

ASSUMPSIT on a policy of insurance on the ship *Arethusa*, at and from Hamburg to Vigo, and at and from thence to a port in the Mediterranean, &c. There was a count for money had and received. Plea—General Issue.

The loss by perils of the seas was admitted, and it was also admitted, that the policy was duly executed, that the defendant was the secretary of the Company, and that the plaintiffs were owners and had an interest.

The only question was, as to the meaning of the following warranty, "warranted in port on the 19th October, 1825."

The case as opened by the plaintiffs' counsel was, that there had been a great deal of bad weather, in the month of October, 1825, and that the underwriters therefore required a warranty that the ship was in port at the time mentioned. The ship was in fact at Cuxhaven, a place situate in the territory of the free town of Ham-

*8] burgh; and the plaintiffs' *counsel contended that the words, "warranted *in port*," did not of necessity mean the port of departure; and that, even if it did, evidence would be adduced to show, that Cuxhaven was considered a part of the port of Hamburg. It was, no doubt, at some distance from the town; but still, if a vessel were warranted in the port of London, this warranty would be satisfied by the ship's lying at Gravesend (a). The amount of the loss claimed was 95*l.* 8*s.* 11*d.* if the plaintiffs' construction of the warranty was right; but if not, the plaintiffs went for a verdict for 30*l.*, which was the amount of the premium, on the ground that, if the warranty was not complied with, the policy never attached, and they were entitled to a return of premium.

The admissions were read; and it was proved that the ship was at Cuxhaven from the 19th to the 24th of October.

*9] To show that Cuxhaven was a part of the port of *Hamburg, a witness proved that Cuxhaven is situated at the mouth of the river Elbe, and is a part of the Hamburg territory; and that the port regulations of Hamburg extend to it; and that vessels do quarantine there; and that there is no separate custom-house at Cuxhaven, but the custom-house officers come there from Hamburg. However, on his cross-examination, he stated, that Cuxhaven is ninety miles distant from Hamburg, and that the two places are not continuously in the same territory, as a great deal of Hanoverian territory intervenes; and also that Luckstadt, a port belonging to the king of Denmark, is situated between Hamburg and Cuxhaven.

Lord TENTERDEN, C. J. I am of opinion that Cuxhaven is no part of Hamburg; and I am also of opinion, that, on the construction of this policy, which is, at and from Hamburg, the warranty applies to the port of Hamburg.

Parke cited the case of *Keyser v. Scott* (b).

Lord TENTERDEN, C. J. If this had been a warranty, "free from seizure in port," and the ship had been a voyage, and had been seized at Cuxhaven, that might have been a seizure in port within the case cited; ships being, at the time of that decision, safer at sea than in port, as that case was decided at the time of the Northern seizures. The plaintiffs are, however, entitled to recover the amount of the premium.

Verdict for the plaintiffs, for the amount of the premium (c).

*10] *Scarlett, A. G., and Parke, for the plaintiffs.
F. Pollock and Justice, for the defendant.

[Attornies—*Butterfield*, and *White & B.*]

(a) Mr. Justice Park (*Law of Insurance*, 495) observes that "in insurances at and from London, warranted to depart on or before a particular day, it has long been a question, what shall be a departure from the port of London, or rather what is the port of London? and it is singular, that this point has never yet been judicially determined. On the one hand, it is said, that the moment a ship is cleared out at the Custom House, and has all her cargo on board, if she quit her moorings in the river on or before the day warranted, that the warranty is complied with. On the other side it is contended, with great appearance of reason, that a ship is not ready for sea, till she has got her Custom House cocket on board, which is the final clearance, and which she cannot have till she arrive at Gravesend; that till this cocket is received, the ship dare not proceed to sea, under a penalty, and till then is not entitled to the drawbacks; and that Gravesend is always considered as the limits of the port of London, and unless the ship sailed from thence, on or before the day limited, there is no inception of the voyage, and the policy is forfeited." But in the case of *Williams v. Marshall*, 6 Taunt. 390, it was held, that a ship was not to be considered as having "exported from the port of London," on clearing at the Custom House here, nor until she clears at Gravesend. Therefore, a licence to remain in force for the exportation of the cargo, till the 10th September, was not complied with, by clearing at the Custom House, on the 9th, and at Gravesend on the 12th September.

(b) 4 Taunt. 660.

(c) It is rather singular, considering the line of defence adopted, that the premium should not have been paid into Court; for if, in *assumpsit* on a policy of insurance, with a count for money had and received, the defendant pay no money into Court, and establish, as a defence, that the risk never commenced; the plaintiff is entitled to a verdict for the premium, on the count for money had and received. *Penson v. Lee*, 2 B. & P. 330. As to the propriety of paying money into Court on particular counts only, see *ante*, Vol. 1, p. 20, n. (1).

CRERER v. SODO. July 19.

If a party, having failed and assigned his property to trustees for the benefit of his creditors, be sued for work done, a creditor of such party is not a competent witness in his favour, if he has not received 20s. in the pound on his debt, and swears that it is doubtful whether the estate will produce so much.

ASSUMPSIT for work and labour by the plaintiff, as an accountant. Plea—General Issue. A sum of 50*l.* had been paid into Court.

It appeared that the defendant, having failed in business, had assigned his effects to trustees, for the benefit of his creditors. The present action was brought by the plaintiff for business done by him for the defendant, before his failure. The plaintiff claimed 87*l.*; and the defendant's trustees (who defended the action) contended, that 30*l.* was an agreed price for part of the work; and that the sum paid into Court was therefore sufficient.

To prove this agreement for a sum of 30*l.* for part of the work, a witness was called, who was a creditor of the defendant; and he stated, that he had not been paid 20s. in the pound, and that it was doubtful whether the estate would yield that sum.

Campbell, for the plaintiff, objected that the witness was incompetent, as it was his interest to decrease the defendant's liabilities.

Lord **TENTERDEN**, C. J. I think he is incompetent.

The defendant's counsel adduced other evidence, and there was a

Verdict for the defendant.

**Campbell* and *R. V. Richards*, for the plaintiffs.

Scarlett, A. G., and *Kelly*, for the defendant.

[*11]

[Attornies—*Vansandau & T.*, and *Brutton*.]

DANDRIDGE v. CORDEN. July 26.

In an action on a bill of exchange, if a person, called to prove the consideration, say that the bill was accepted for value received, but refuse to say of what that value consisted, on the ground that it might render him liable to a *qui tam* action, he cannot be compelled to answer; but if he persist in refusing, it will stand upon the evidence that there was no consideration.

ASSUMPSIT on a bill of exchange.

On the part of the plaintiff, a stock-broker was called to prove the discounting of the bill. He was asked by *Gurney*, for the defendant, whether the bill was accepted for a valuable consideration. He answered, that it was accepted for value received, but declined saying what the consideration was, as he might make himself liable to a *qui tam* action (a).

Gurney submitted, that the witness having answered in part, was bound to continue his evidence; and having said that the bill was accepted for value received, he was bound to explain of what that value consisted.

Lord **TENTERDEN**, C. J. I cannot make him answer if he does not think proper. The effect of it will be, that if he does not state what the consideration was, it will stand as if there was no consideration at all (b).

Brougham and *Chitty*, for the plaintiff.

Gurney, for the defendant.

[Attornies—*W. O. Tucker*, and *Lockett*.]

(a) It was suggested, that the consideration was stock-jobbing differences.

(b) See the case of *East v. Chapman*, Vol. 2, p. 570, of these Reports.

*HELLEN v. ARDLEY. July 26.

In an action of debt on a bond to secure the repayment of money with interest, the plaintiff can only recover to the amount of the penalty, with 1s. for detention of the debt.

DEBT on a bond dated June 11th, 1788, in a penalty of 400*l.* to secure the repayment of 200*l.* with interest, at 5*l. per cent.* The damages were laid at 500*l.* Pleas—*Non est factum*, and payment. The cause was undefended.

It appeared that the plaintiff and defendant met at the office of an attorney on the 8th of July, 1826, examined into the state of the accounts between them, and signed a document in the following terms:—

"We, the under-signed, Daniel Ardley, of Birch, in the county of Essex, farmer, and James Hellen of the same place, farmer, having this day examined the various outstanding and unsettled accounts hitherto subsisting between us, and balanced the same, do hereby mutually acknowledge and declare that the sum of 489*l.* 3*s.* 10½*d.* is now justly due and owing from the said Daniel Ardley to the said James Hellen, upon and by virtue of a certain bond, bearing date the 11th day of June, 1788, given by the said Daniel Ardley to the said James Hellen, for securing the payment of 200*l.* and interest, and that all other accounts and transactions between them have been settled, adjusted, and balanced; and that neither of them, the said Daniel Ardley and James Hellen, have any other claim or demand whatever against each other, than and except the said sum of 489*l.* 3*s.* 10½*d.* so due from the said Daniel Ardley upon the said bond. As witness our hands, this 8th day of July, 1826."

(Witness) EDGER CHURCH.

(Signed) D. ARDLEY.

ELLIS WRING.

JAMES HELLEN."

F. Pollock, for the plaintiff, submitted, that, on the authority of this document, he was entitled to recover the sum mentioned in it, instead of the penalty of the bond, and a shilling as damages for the detention of the debt.

*13] *Lord TENTERDEN, C. J.—You cannot have more than the penalty. *Starkie*, for the plaintiff, mentioned the cases of *Lord Lonsdale v. Church* (a), and *Eastmond v. Hall* (b).

Lord TENTERDEN, C. J. My present opinion is, that you can only have damages to the amount of 1*s.*, for the detention. But you may move to increase the damages, if you find on looking into the authorities, that you can support such a motion.

Verdict for the plaintiff—Damages, 1*s.*

F. Pollock and *Starkie*, for the plaintiff.

[Attornies—*Peachey*, and *Hanson*.]

(a) 2 T. R. 338.

(b) Price, 219.

In the case of *Elliott v. Davis*, Bumb. 23, interest on a bond was decreed, though beyond the penalty: and in *Hardres*, 136, the same course was followed; and in *Holdipp v. Otway*, 2 Saund. 106, a sum of 50*l.* was given as damages in an action of debt on a bill obligatory for 68*l.*; but in the case of *Steward v. Rumball*, 2 Vern. 509, Lord Keeper *Wright* held, that a party could not go beyond the penalty of the bond. In *Brangwin v. Parrott*, 2 Black. 1190 (*Elisley's Ed.*), and *White v. Sealey*, Doug. 49, the Court held that the plaintiff could not recover interest on a bond beyond the penalty. However, in the case of *Lord Lonsdale v. Church*, 2 T. R. 388, Mr. Justice *Buller* laid down, that interest beyond the penalty of a bond might be recovered in a Court of law in the shape of damages; but that decision appears to be overruled, and the contrary doctrine, viz.—that upon a bond for the payment of a sum of money with interest, the plaintiff cannot recover more than the penalty of the bond, was laid down in the following cases:—*Wild v. Clarkson*, 6 T. R. 303; *Gibson v. Egerton*, Dick. 409; *Kettleby v. Kettleby*, Id. 519; *Trow v. Earl of Winterton*, 3 Bro. C. C. 489; *Knight v. Maclean*, Id. 496. And in the case of *Clark v. Seton*, 5 Ves. 415, Sir W. Grant, M. R., says, "I take it to be perfectly ascertained at this day, that the penalty of the bond is the debt; and the uniform rule in equity is, never to go beyond the penalty. In *Lord Lonsdale v. Church*, Mr. Justice *Buller* said, the old cases were not founded upon principle, and that at law the

penalty is not to be considered the debt, but interest in the shape of damages may be recovered beyond the penalty. If that was established to be so at *law, I should think it would almost have followed, that, in equity, interest should be calculated in the same manner; and accordingly Mr. Justice *Buller* did not conceive that there would be any difference in that respect at law and in equity; for in *Knight v. Maclean*, sitting in this Court, he held, that in equity the interest ought to go beyond the penalty. Lord *Thurlow* dissented from that, and decided accordingly, both in *Tew v. Lord Winterton*, and *Knight v. Maclean*; and in *Wild v. Clarkson*, the Court of King's Bench dissented entirely from the case of Lord *Lonsdale v. Church*; and in *M'Clure v. Dunkin*, 1 Ea. 436, Lord *Kenyon* was quite clear, that if the action had been upon the bond, nothing more could have been recovered than the penalty; but the action being upon a judgment, it was determined that the plaintiff might go beyond the penalty. It is clear, therefore, that both at law and in equity the penalty is the debt." However, his Honour appears to consider, that, under very special circumstances, a Court of equity might go beyond the penalty.

The case of *M'Clure v. Dunkin*, 1 East, 436, was an action on an Irish judgment; and the Court held, that this being an action on a judgment, it was competent to the Jury to allow interest to the amount of what was due, although it exceeded the penalty of the bond on which the action was originally brought; and that in this respect there was no difference between a foreign judgment, and a judgment in a Court of record here. However, in the case of *Deschamps v. Vaneck*, 2 Ves. jun. 719, Lord *Eldon*, C., says, "I had a clear opinion on this question, but I have made inquiry, and find, that all the Masters allow no interest on a judgment. I have also found, upon inquiry, that no interest is computed upon a judgment in an action upon a judgment at law."

In equity, interest beyond the penalty of the bond was allowed to a judgment creditor, trustee in possession, under the will of his debtor, and as such applying the whole of the rents in the discharge of other debts, and not retaining any part for his own debt. *Atkinson v. Atkinson*, 1 Ball & Bea. 238. So, if the party be by injunction prevented from recovering his debt at law, while the demand was under the penalty; *Duwall v. Terry*, Show. P. C. 15; 6 Ves. 79; or if an *elegit* creditor be called to an account in equity, the principal and interest may be recovered, although the interest carries the debt beyond the penalty. These instances are exceptions to the rule in equity, that a party shall not, in the Master's office, be allowed interest beyond the penalty, against the assets of a deceased debtor. 1 Ball & Bea. 239. Where a bond is only a collateral security, interest may be carried beyond the penalty, *Kerwin v. Blake*, 14 Vin. Abr. 460, pl. 4. So, interest will be given beyond the penalty of a bond, upon a mortgage for the same debt, though by a surety. *Clarke v. Lord Abingdon*, 17 Ves. 106. (See *Lloyd v. Hatchett*, 2 Anstr. 527, *contra*.) Therefore, if a bond creditor also takes a promissory note with interest, he may recover interest beyond the penalty of the bond. 2 Ves. jun. 718. So, if an obligor goes into a Court of equity for relief as plaintiff, although he submits to nothing, yet, by the mere circumstance of filing the bill, he would be taken to submit to every thing conscience and justice require: and upon that principle, before granting the relief prayed for, the Court would compel him to pay the principal, interest, and costs occasioned by his delay. *Pulteney v. Warren*, 6 Ves. 92. But equity will never carry interest beyond the penalty, where there has been no demand for many years. *Galwey v. Russell*, 14 Vin. Abr. 460, pl. 2.

The most recent case upon the subject is that of *Eastmond v. Hall*, 3 Price, 219, where the plaintiff had obtained a verdict in debt on bond for the principal and interest, which exceeded the penalty; and the Court there refused to refer it to the Master to take an account of what was actually due, on the ground that the application was made too late.

ADJOURNED SITTINGS IN LONDON, AFTER TRINITY TERM, 1827.

CLIFFORD v. LATON, Esq. Oct. 16.

If an action is brought against a husband, for the price of goods supplied to his wife, who is living with him, it lies on the husband to show, that the goods were furnished under such circumstances that he is not liable to pay for them. But if the goods be supplied to his wife, when she is living separate and apart from the husband, it is incumbent on the tradesman to prove that the separation occurred under such circumstances as will make the husband liable.

Goods sold and delivered. Plea—General Issue.

It appeared that the plaintiff, who was a linen draper, had supplied goods to

the wife of the defendant, Colonel Laton, to the amount of 51*l.*, but that Mrs. Laton had, for some years, lived separate and apart from her husband. It was also proved, that, after the separation, Colonel Laton's father allowed Mrs. Laton 120*l.* a year, but that on her becoming entitled to an annuity of about 200*l.* a year, in her own right, this allowance by the Colonel's father was discontinued.

*16] *Lord TENTERDEN, C. J. If goods are furnished to a married woman who is living with her husband, it must be taken, *prima facie*, that those goods are supplied to her by his authority, and it lies on the husband to show that the goods were supplied under such circumstances as make him not liable to pay for them. But if a married woman be living separate and apart from her husband, it is the duty of tradesmen to inquire under what circumstances the separation took place, before they part with their goods; and if a tradesman do part with his goods to a woman living apart from her husband, the *onus* lies on him to prove that the separation took place under such circumstances as will entitle him to recover the price of those goods against the husband. There is no such proof here, and if a tradesman will trust any woman that comes into his shop, he must do so at his peril.

Verdict for the defendant.

Gurney and ——— for the plaintiff.

Scarlett, A. G., and Brodrick, for the defendant.

[Attornies—T. N. Williams, and Weymouth.]

See the case of *Montagu v. Espinasse*, Esq. *ante*, Vol. 1, p. 356, 502; and 5 D. & R. 532; and the authorities there mentioned; and also *Houlston v. Smith*, *ante*, Vol. 2, p. 22. *Mainwaring v. Leslie*, Id. 507; and *Hindley v. Marquis of Westmeath*, 6 B. & C. 200.

CLIFFORD v. HUNTER. Oct. 17.

The question, whether a ship, on a voyage from Madras to London, is not seaworthy, if she have no person on board her besides the captain who is capable of navigating her, is a question of fact for the Jury, and not a question of law to be determined by the Judge.

If the plaintiff's counsel call "Captain S." and Captain Hugh S. answer, and is sworn, and the plaintiff's counsel, after asking him a few questions, ascertain that it was Captain Francis S. whom they meant to examine, this does not give the other side a right to cross-examine Captain Hugh S., as he was only examined by mistake.

ASSUMPSIT on a policy of insurance on goods on board the ship Holly Latonamy, at and from Madras or Columbo, and from thence to London. The loss was by peril of the seas. Plea—General Issue.

The plaintiff's counsel called "Captain Stewart," and Captain Hugh Stewart *17] answered, and was sworn; and *after the plaintiff's counsel had put three questions to him, they ascertained that he was not the Captain Stewart they wanted, and they declined asking him anything further.

Scarlett, A. G., submitted, that as the plaintiff's counsel had asked questions of the witness, he had a right to cross-examine him; and he cited the case of *Phillips v. Eamer* (a).

(a) 1 Esp. N. P. C. 357. There, Lord Kenyon held, that if a witness was called, the opposite party had a right to cross-examine him, though the counsel who had called him, had put no question to him in chief.

However, it frequently happens at *Guildhall*, that counsel will call a witness, but, before he is sworn, will tell him that he is not wanted; and in such cases, the person so called, is, in point of practice, never cross-examined by the opposite party.

Lord TENTERDEN, C. J. As this witness was called by mistake, he cannot be cross-examined. In the case cited, there was no mistake as to the person called as a witness.

"Captain Stewart" was again called, when Captain Francis Stewart answering, he was sworn and examined.

The only material question in the case was, whether the ship was seaworthy: and to show that she was not, it was proved, by the cross-examination of the plaintiff's witnesses, that there was no person on board, capable of navigating her to England, except the Captain.

Scarlett, A. G. I submit that the plaintiff must be called. The ship was not seaworthy, because the captain was the only person on board who was capable of navigating her. The owners were bound to send out a sufficient number of competent persons; so that, if the captain either became sick, or died, there might be some one else able to navigate the ship. I submit that it was their bounden duty, especially on a voyage of this length, to have at least one other person besides the captain, who could navigate the ship, in case of his illness or death; and as they had not, the ship was not seaworthy. [*18]

Lord TENTERDEN, C. J. The question is, whether a ship is capable of an India voyage, with no one on board capable of taking the command except the captain. I certainly think not; but I must leave it to the Jury, as it appears to me to be a question of fact and not of law. It is quite clear, that a ship cannot be deemed seaworthy, unless she has on board her a captain and crew competent to the voyage she has to perform; and if the Jury shall be of opinion that she ought to have had on board her another person besides the captain, capable of taking the command in case of his illness or death, then the defendant is entitled to a verdict (a).

The Jury were of that opinion, and found a

Verdict for the defendant.

Gurney, E. Lawes, Serjts., and Parke, for the plaintiff.

Scarlett, A. G., and Campbell, for the defendant.

[Attornies—Clark & F., and Oliverson & D.]

(a) On the subject of seaworthiness, Lord Kenyon lays down, in the case of *Law v. Hollingsworth*, 7 T. R. 161, "that the assured cannot recover on a policy of assurance, unless they equip the ship with every thing necessary to her navigation during the voyage. The ship herself must be seaworthy, she must have a sufficient crew, and a captain and pilot of competent skill." The ship in that case was lost in the Thames, having no pilot on board: and it was held, that the plaintiffs could not recover on the policy.

*VICE v. Dowager Viscountess ANSON. Oct. 17.

[*19]

If a person purchase certain parchments, purporting to be share certificates of a certain mine, and conceives himself to be a shareholder in such mine: if it appear that those parchments gave no legal interest in the mine, such person is not liable to pay for goods furnished for the working of such mine, unless they were furnished on his personal credit.

A witness who is subpoenaed in London in August, to attend a trial at the adjourned sittings in October, and who is at the time of the service on the eve of his departure for the continent, is entitled to his expenses in coming from the continent to attend the trial.

Notice served on the attorney at 9 o'clock on Saturday night to produce papers at a trial in London on Wednesday, his client being absent in Scotland, is too late.

The rule that all papers relating to the cause must be presumed to be put into the hands of the attorney, must be confined to the attornies of persons residing abroad while the cause is going on in England, and does not apply to cases where the party is resident in England; and in no case does it extend to any but such papers as might be reasonably expected to be put into the hands of the attorney for the purposes of the cause.

DEBT for work and labour. *Plea—Nil debet.* The plaintiff was a person in the habit of supplying coal, iron, and timber for the use of mines; and he now sought to charge the defendant, as a shareholder in certain mines, called the Wheal Concord mine and the Wheal Prudence mine; with the price of certain goods furnished by him for the use of those mines.

A lady named Blackwell was called; she stated that she was a relation of Lady Anson, and that she was served with a subpoena to attend this trial as a witness, on the part of the plaintiff, in August last, she being then in London, but on the eve of going abroad; and that having gone abroad, she had come from Boulogne on purpose to attend the trial: she therefore asked for her expenses in coming from Boulogne.

Lord TENTERDEN, C. J. I think the witness is entitled to be paid her expenses incurred in coming from Boulogne; you cannot expect a witness to remain in London from the beginning of August, merely to wait for the trial of a cause in October.

Fifteen pounds were paid to the witness, and she was examined; she stated, that she had heard from Lady Anson, that she had bought shares in the Wheal Concord and Wheal Prudence Mining Companies, as the witness herself had done; and that they had bought these shares through a Mr. Alderson, who was called the Treasurer of the Company; but that they had no deeds or any thing to give them a title to any part of the mines, except certain pieces of parchment. In her cross-examination she said, that she had no reason to believe that Lady Anson had attended any meeting, or done any act respecting the mines, except paying her money for these parchments.

One of the parchments alluded to was put in, it was in the following form:—

“Wheal Concord Tin and Copper Mine Company.

“No. 133.

“These are to certify that the Viscountess Dowager Anson is a proprietor of the share or number 133; being one share of the Wheal Concord mine, situate in the parish of St. Agnes, in the county of Cornwall; and that her name is duly registered in the cost book of the said mine, subject to the rules, regulations, and orders, of the said Company; and that the said Viscountess Dowager Anson, her executors, administrators, and assigns, are entitled to the profits and advantages of such share.

“(By order of the Directors),

“As witness my hand this 14th day of June, in the year of our Lord, 1822.

CHRIS. VAUX,

Secretary to the said mine.”

“500 Shares.

“Established 1822.”

“This share is not transferrable without the consent of the Directors, and a record thereof being made in the Company’s books.”

A letter of Lady Anson, written to a person named Denham, was put in; and in this letter she spoke of the money her shares in these mines would have produced; and complained that the shares were likely to be unprofitable to her, by reason of the total number of shares in the concern being increased.

Mr. Alderson, the late treasurer of the Company, was called to produce Lady Anderson’s letters to him; but he stated that he had returned them to her Ladyship.

Notice to produce them had been served on her Ladyship’s attorney (she being in Scotland), at nine o’clock in the evening of the Saturday previous to the trial (which took place on a Wednesday).

*It was conceded, that the defendant’s attornies could have had no communication with her Ladyship after this notice to produce. But the plaintiff’s counsel relied upon the case of *Bryan v. Wagstaff* (a), and con-

tended, that these letters must be presumed to be in the hands of her Ladyship's attornies.

Lord TENTERDEN, C. J. I feel no doubt as to that case, and I should decide so again; all papers relating to the transaction must be expected to be put into the hands of an attorney, who was to conduct the case for one residing abroad: but I am not sure that I should say that it would be so if the party were resident here; and I would always confine it to papers which would be reasonably expected to be put into the hands of the attorney, with a view to the conduct of the cause; and I do not think that Lady Anson's letters to Mr. Alderson are papers of that kind. I don't think that the notice is sufficient.

Mr. Alderson, in answer to further questions, stated, that her Ladyship resided in May-fair, London.

Lord TENTERDEN, C. J. Private papers in her house in London, cannot be within the reach of her attorney.

Mr. Alderson in his cross-examination stated, that the mines in question were in the possession of a person named Thomas, who was spoken of as the lessee of them.

Scarlett, A. G., for the defendant. If the question was, whether Lady Anson *thought* she had an interest in the mines, the case would be clear against her, as undoubtedly she did think so, but that is not the question. The thing that must be shown here, is, that she had an interest in these mines. It is proved that a person named Thomas ^{*}was in possession of the mines, and pro-^[22] fessed to have a lease of them. I take it, that he says, he will assign the mines to a number of persons, still, he never in fact does so; and the most that appears, is, that some person, named Vaux, has signed and issued certain parchments in a form that has been produced. The only way in which Lady Anson could have any right in the mines, was, by her executing some deed, or having an assignment executed to her. These shares are sold every week from A. to B. and from B. to C., and if the possession of these parchments made the party liable, the plaintiff would have to sue every one of the persons for the week during which he was the holder of the parchments. These parchments at most only amount to an undertaking to give a share, but it is quite clear that they will give the holder no title to the mine or any part of it.

Lord TENTERDEN, C. J. (to the Jury.) In this case it does not appear that at the time the plaintiff supplied the goods, he knew, or had any reason to believe, that the defendant had any interest or concern in these mines; therefore, there was not a supply on her credit. As Lady Anson has never held herself out to the world as a partner in the mines, it only remains to consider, whether she was in reality a partner in them. These goods, it should be observed, were for mines; and, therefore, this was, if any thing, a partnership relating to real property, and not to personal property only. It is clear, that Lady Anson considered herself to be a partner; but if she was really not so, that will not prejudice her, especially as it was never communicated to the plaintiff. The history of these mines is in considerable obscurity, but it seems that a person named Thomas had the management of them; one of the witnesses calls him a lessee, but the exact nature of his interest does not appear. Then, did he communicate any interest to Lady Anson? If he himself had none, he could not give her any; and, besides, his name does not appear ^{*}in the parchment; nor is it shown to have been issued by his authority: ^[23] and if Lady Anson had sued Mr. Thomas for the profits, a great deal more must have been shown than is disclosed by this parchment, before she would be entitled to recover. The parchment is signed Christ. Vaux, and is stated to be signed by order of the directors; but who those directors are does not appear, nor what right they had to issue this parchment, nor does it appear who Christ. Vaux is. Under these circumstances, you are to say, whether it is made out that Lady Anson has an interest in the mines. I own that, upon this evidence, I think she has none.

F. Pollock, for the plaintiff. Will not your Lordship reserve the point? Lord TENTERDEN, C. J. I feel no doubt about it, and it is not usual for a Judge to reserve a point, unless he feels some doubt. However, you have a right to be nonsuited, if you don't wish to have a verdict against you.

The plaintiff's counsel elected to be

Nonsuited.

F. Pollock and *Chitty*, for the plaintiff.

Scarlett, A. G., and *Brougham*, for the defendant.

[Attornies—*Tilleard*, and *Anderton & W.*]

BEFORE LORD TENTERDEN, C. J., BAYLEY, HOLROYD, & LITLEDALE, JS.

In Banc.

F. Pollock now moved to set aside the nonsuit, and contended, that mining adventurers have no title in the land, but only a license to work; *Doe dem. Hanley v. Wood* (a). And he submitted, that, although the Lord Chief Justice *24] at the trial had held, that unless Lady Anson had a legal interest in something connected with the freehold, it would not be sufficient; yet it was enough to show that she was one of the adventurers, contributing funds, and looking for profits.

BAYLEY, J. The rule of law is this, you must either prove that the party held himself out to the world as a partner, or that he really was so.

F. Pollock. It was considered, that there must be such a conveyance as would give an interest in land. Now the evidence showed that there was an adventure, and that Lady Anson was a partner. In her letter, she speaks of her shares.

LORD TENTERDEN, C. J. What she calls her shares were produced, and they are not shares.

F. Pollock. Mines are in more numerous shares than ships, and what would be better evidence against a partner, than a letter to the ship's husband, by a party speaking of his shares in the ship. It was, I submit, proved, that Lady Anson had bought shares.

BAYLEY, J. If the letter had been written to your client, she would have held herself out as a partner, and you would have had a right to charge her; but this is a private letter to a third party.

F. Pollock. If Lady Anson had said to any one that she had shares, and was reluctant to have the number of shares in the concern increased: would it not then lie on her to show what her interest was? She could call Mr. Vaux, and show that he had no authority to issue the shares. How much fairer is it, that the proof should be on the defendant? She has the possession of the *25] shares, and about these shares she corresponds with Mr. Alderson; should it not be taken as against her, that the parchment is a good share; and should it not be taken that she has inquired into its validity, and found it good. I submit it is upon Lady Anson to prove that she has no share. The plaintiff deals with the adventurers, and he ought not to be tied down to the strictest proof.

BAYLEY, J. Suppose Thomas to be a lessee, and that the shareholders are to have a portion of the royalty, would they be liable for the materials?

F. Pollock. Certainly not, my Lord; but the presumption is, that the per-

sons liable are those who are sharers in the indefinite profits; and I therefore submit that this is a fit case to go to another trial.

Lord TENTERDEN, C. J. (after having stated the evidence.) At the trial, I took a distinction between a partnership relating to real property, and one relating to trade. Taking Lady Anson's letter *alone*, it speaks of shares, but then it refers to the shares themselves, which do not show the slightest authority in those who issued them, and there was nothing to show that Lady Anson had any legal interest whatever in the mine.

BAYLEY, J. Lady Anson considered herself interested in this mine, and had pieces of parchment which, when produced, do not show any right. Now, where you want to charge a party, it is because he has an interest, and not merely because he fancies so. You might have called the persons who actually carried on the mine, and they could have shown for whom all this was done.

HOLROYD and LITLEDAL, Js., concurred.

Rule refused (a).

(a) See the case of *Rex v. Mott*, ante, Vol. 2, p. 511.

*ADJOURNED SITTINGS AT WESTMINSTER AFTER TRINITY TERM, 1827. [*26

Lord Viscount DUDLEY and WARD v. ROBINS. Oct. 29.

If, when a written agreement is put in, the opposite party object that it contains a greater number of words than the stamp is proper for, and call a witness who has counted the words in the counterpart: the Judge will direct the officer of the Court to count the words in the original.

Figures are to be counted as words, but an indorsement on the back, and a page of the particulars of sale, containing mere repetition of the description of the property, which was described in another page of the same particulars, are not to be counted.

The Judge will not call on another cause, to allow the agreement to be sent to the Stamp Office, to be properly stamped, and the plaintiff must therefore be nonsuited.

ASSUMPSIT to recover back a deposit made on the purchase of an estate in Shropshire.

The first count of the declaration was on a written agreement, by which, in consideration of 6000*l.* paid by the plaintiff, he agreed to purchase, and the defendant to sell the manor and estate therein described, at 47,350*l.* subject to annexed conditions of sale, and the defendant agreed to make out a good title before Christmas then next ensuing. The breach was in not making out a good title. Plea—General Issue.

The written agreement was put in, it was written on the back of a printed particular of sale, which contained also the conditions of sale.

Campbell, for the defendant. This agreement bears a 1*l.* 15*s.* stamp, and two stamps of 1*l.* 5*s.* I am prepared to show, that it contains seventy folios, and by the stat. 55 Geo. 3, c. 184, the stamp on every agreement is, "where the same shall not contain more than 1080 words (being the amount of fifteen common law folios, or sheets of seventy-two words each) 1*l.*; and where the same shall contain more than 1080 words, 1*l.* 15*s.*; and for every entire quantity of 1080 words contained therein, over and above the first 1080 words, a

further progressive duty of 1*l.* 5*s.*” Therefore, if this agreement contains not more than thrice 1030 words, it would be right; now I am informed, that it contains more than four times that number.

*27] A witness was called on the part of the defendant, who *stated that he had counted the counterpart, and that it contained more than four times 1050 words (*a*).

Scarlett, A. G. Counting that, does not prove how many words the original may contain.

Lord TENTERDEN, C. J. As reasonable evidence is given, that it does contain more than three times 1080 words, I shall wait till the officer of the Court, Mr. Bellamy, has counted the words in the original agreement.

Scarlett, A. G. I submit that the first page of the particular of sale, which is a mere title-page, and also that the indorsement, ought not to be counted.

Lord TENTERDEN, C. J. I must take either the first page or the third, as, without one of them, there is no mention of the manor. The Attorney-General may insist on the words being counted, and I shall direct Mr. Bellamy to count the words, omitting the third page, and the indorsement.

Mr. Bellamy. My Lord, are figures to be counted as words?

Lord TENTERDEN, C. J. Yes. I shall call another cause, while Mr. Bellamy counts.

Scarlett, A. G. If your Lordship will call another cause, we can send to the Stamp Office, and get it properly stamped. This objection is a great hardship on the plaintiff, as the paper has had the present stamps put on it at the Stamp Office, upon payment of the penalty.

*28] Lord TENTERDEN, C. J. I remember my Lord **Kenyon* once stating, that when in a cause it was discovered that a paper was not duly stamped, his Lordship called on another cause to allow it to be stamped.

Campbell. My Lord, that was a solitary instance one way, against a thousand instances the other; for, if that were to be the practice, there never would be a nonsuit for want of a proper stamp, in either London or Middlesex; because, if the learned Judge would allow another cause to be called, the proper stamp might always be affixed.

Lord TENTERDEN, C. J. I must not allow this paper to be stamped, by stopping the cause, it is too dangerous a precedent.

The plaintiff's counsel did not insist on the words being counted by the officer of the Court, and the plaintiff was

Nonsuited.

Scarlett, A. G., *Brougham*, C. F. *Williams*, and *Kelly*, for the plaintiff.
Campbell and *Abraham*, for the defendant.

[Attornies—*Benbow & Co.* and *Lys*.]

(a) See the case of *Bowring v. Stevens*, ante, Vol. 2, p. 337.

In the ensuing Term, the Court granted a new trial, it appearing by the affidavits of three witnesses, that the person called at the trial had miscounted the number of words, and that there were not in fact so many as three times 1080 words.

*BERNASCONI et al., Assignees of CHAMBERS et al., Bankrupts, v. The Duke of ARGYLE. Oct. 29.

If a declaration on a bill of exchange, indorsee against acceptor, state that it was indorsed to the plaintiffs as the surviving assignees of A. B. after his bankruptcy; the plaintiffs must prove that the bill was indorsed to them after the bankruptcy, and in their capacity of surviving assignees.

ASSUMPSIT on two bills of exchange, drawn by Mr. John Ebers on the defendant and accepted by him. The plaintiffs sued as the surviving assignees of Chambers & Co., who had become bankrupt; and the declaration stated that the bills were indorsed after the bankruptcy to the plaintiffs, as the surviving assignees of Chambers and Co.

A witness proved the handwriting of Mr. Ebers and of the Duke of Argyle to the acceptance and indorsement; and the commission of bankrupt against Chambers & Co. and the proceedings thereon were put in.

LORD TENTERDEN, C. J. You have no proof that these bills were indorsed to the plaintiffs as surviving assignees. If you had declared generally in the names of the plaintiffs, the possession of the bills by them would have done, but here you state specially that they were indorsed after the bankruptcy to them, as surviving assignees, and you have given no evidence of either of those circumstances.

Hutchinson. The bills are dated after the bankruptcy.

LORD TENTERDEN, C. J. That alters the case, but you must still show the plaintiffs to be surviving assignees, and that the bills were indorsed to them as such.

The death of a person named Fawcett, who was one of the assignees, was proved to have occurred before the date of the bills; and the witness who proved the handwriting, stated that they were indorsed to the plaintiffs, as the surviving assignees of Messrs. Chambers, in part of the rent of the King's Theatre.

LORD TENTERDEN, C. J., directed a

Verdict for the plaintiffs.

*Scarlett, A. G., and *Hutchinson*, for the plaintiffs.

[*30]

[Attornies—*Mayhew*, and *Hicks & B.*]

BROWN v. JODRELL, Esq. Oct. 30.

No person can, in defending an action, be allowed to stultify himself; and, therefore, a defendant cannot, in an action for work and labour, set up his own insanity as a defence, unless he has been imposed upon by the plaintiff in consequence of his mental imbecility.

ASSUMPSIT for work and labour. Plea—General Issue. The plaintiff sought to recover for the value of certain work done by him, in rooms belonging to a society called the Athenaeon, of which the defendant was the chairman. A resolution of the society, signed by the defendant as chairman, directing the work to be done, was put in; and it was also proved that the defendant saw the work going on, and gave directions about it while in progress.

Gurney, for the defendant, opened—That he was in a condition to prove his client insane from the year 1822.

LORD TENTERDEN, C. J.—I think that this defence cannot be allowed, and that no person can be suffered to stultify himself, and to set up his own lunacy

as a defence. If, indeed, it can be shown that the defendant has been imposed upon by the plaintiff, in consequence of his mental imbecility, it might be otherwise, and such a defence might be admitted.

Gurney, for the defendant, admitted that no fraud could be imputed to the plaintiff.

Verdict for the plaintiff.

Scarlett, A. G., and *Comyn*, for the plaintiff.

Gurney, *Presland*, and *Abraham*, for the defendant.

[Attornies—*Rogers & Son*, and *Slaney*.]

See the case of *Faulder v. Silk*, 3 Camp. 126, where, to an action of debt on bond, the executors of the obligor having pleaded *non est factum*, went into evidence of his insanity. The bond was dated 28 July, 1808, and they offered in evidence an inquisition taken under a commission of lunacy, which found him a lunatic without any lucid interval from February, 1808. It was objected, that this was *res inter alios acta*; but Lord *Ellenborough* held it to be admissible in evidence, though by no means conclusive. On the subject of lunacy, see the cases of *Baxter v. Earl of Portsmouth, ante*, Vol. 2, p. 178, and the notes to that case; *S. C.* 7 D. & R. 614; and *Sentance v. Poole, ante*, p. 1.

REX v. MITTON. Nov. 1.

Excise Officers went with a search warrant, and at the desire of the party gave it to him for his perusal, when he refused to return it: Held, that they had a right to take it from him, and even to coerce his person to obtain the possession of it, provided they used no more violence than was necessary.

INFORMATION by the Attorney-General against the defendant, for assaulting Thomas Dean, an officer of excise, in the execution of his duty. It appeared that the defendant kept the Northumberland Arms public-house at Pentonville, and that Dean and other excise officers had a warrant to search his house for a private still; no still was found in the house; and when the officers had completed their search, the defendant asked for the warrant. It was given to him by Dean; and the defendant said, "I suppose it is of no further use to you, as you have gone all over my premises." Dean replied, "Keep it at your peril." The defendant then put the warrant into his pocket, when the officers seized hold of him, and in attempting to get possession of the warrant, pushed the defendant's back against the counter in his bar, when he took up a pewter pot, and gave Dean a blow on the head with it; and the defendant ultimately kept possession of the warrant.

Jones, Serjt., for the defendant, admitted, that the defendant had no right to keep the possession of the warrant, but contended, that the officers, by pushing the defendant against the bar, had committed the first assault.

Lord TENTERDEN, C. J. (to the Jury.) It is conceded on all hands, that the defendant had no right to keep the warrant; and that being so, the officers had a right to take it from him, and even to coerce his person to obtain the possession of it, provided that, in so doing, they used no more violence than was necessary. The question therefore is, whether in this case the officers used more violence than was necessary to get back the warrant; for if they did not, the defendant had no right to strike them.

Verdict—Not Guilty.

Scarlett, A. G., *Tindal*, S. G., *J. Williams*, and *Parke*, for the Crown.

Jones, Serjt., and *Brodrick*, for the defendant.

[Attornies—*Mayow*, and *Molloy*.]

BAKER v. BERKELEY, Esq. Nov. 5.

If a person who keeps hounds and a hunting establishment, gives notice not to trespass on the lands of A., and after this his hounds go out, followed by a number of gentlemen who go upon the lands of A., the owner of the hounds is answerable for all the damage they do, though he himself forbear to go on the lands, unless he distinctly desires the gentlemen so out with his hounds not to go on those lands.

If a stag, hunted by the hounds of B., run into the barn of A., B. and his servants have no right to enter the barn to take his stag; and if they do so they are trespassers.

TRESPASS *quare clausum fregit*, with a count for an assault. Plea, to the whole declaration—Not Guilty.

It appeared, that the plaintiff occupied a farm near Harrow on the Hill, and that the defendant, the Honourable Grantley Berkeley, had, in the year 1824, received a notice not to trespass on the plaintiff's lands. It was also proved, that the defendant kept stag-hounds, and employed a huntsman, &c.; and that on the 31st of December, 1826, a considerable number of persons, who were hunting with the defendant's hounds, went over the plaintiff's lands, doing damage to the fences and grass to the value of about 23*l*. It did not appear that the defendant himself went on the plaintiff's lands; and some evidence was given to show, that he rode along a road to avoid doing so. It further appeared, that the stag, which the defendant's hounds were hunting, ran into the plaintiff's barn, followed by six couple of the stag-hounds; and that the plaintiff shut the barn doors, and would not suffer the defendant or his servants to go into his barn to rescue the stag from the hounds, which was in consequence so much worried, that it died in about a quarter of an hour after. It was also proved that, in attempting to get to the barn, the defendant gave the plaintiff a blow.

**Brougham*, for the defendant, contended, that as the defendant did not himself go on the plaintiff's lands, he was not liable for the 23*l*. [*33] claimed for injury to the fences and grass.

LORD TENTEDEN, C. J. If a gentlemen sends out his hounds and his servants, and invites other gentlemen to hunt with him, although he does not himself go on the lands of another, but those other gentlemen do, he is answerable for the trespass that they may commit in so doing, unless he distinctly desires them not to go on those lands; and if (as in the present case) he does not so desire them, I think he is answerable, in point of law, for the damage that they do. With regard to the defendant's attempt to go into the plaintiff's barn, it is clear that the plaintiff had a right to refuse any person's going into it, if he chose to do so. Whether it might be discreet in him, is another question; but, undoubtedly he had a right to say, that they should not go into his barn; and if they did so, they are trespassers.

Verdict for the plaintiff—Damages, 100*l*.

Scarlett, A. G., Alderson, and Jeremy, for the plaintiff.

Brougham and Curwood, for the defendant.

[Attornies—*Young & J.*, and *Clark & F.*]

•COURT OF KING'S BENCH.

SITTINGS AT WESTMINSTER, AFTER MICH. TERM, 1827.

BEFORE LORD TENTERDEN, C. J.

SHARP v. PRATT. Nov. 29.

If a person who has possession of another's goods, is desired by the owner to send them to a particular place, and he not only refuses to send them to that place, but says generally that he will not deliver them up, unless payment of a debt due from the owner to him is guaranteed; such general refusal is evidence of a conversion, although he might not be bound to send the goods to any particular place.

TROVER for clothes, army accoutrements, saddlery, &c. Plea—General issue.

It appeared that the plaintiff, an officer in the 8th regiment of Hussars, had joined his regiment at Dundalk, in Ireland; and that the goods, for which the action was brought, had been sent by the different tradesmen of whom the plaintiff had bought them, to the defendant, to be packed, and forwarded to Ireland. The defendant did not forward them; and the plaintiff, therefore, sent the following authority to his agent, Mr. Pearson.

"Brighton, Friday 11th, 1827.

"Will you have the goodness to call on Mr. Pratt, of Bond Street, and see if my baggage has been sent to your house in Dublin; if not, you have my authority to take it from him, and have it sent yourself. Mr. Pratt has so often disappointed me, that I think this precaution is necessary. I shall be in town I hope in a day or two.—Yours, most truly,

W. E. FLOOD SHARP."

Mr. Pearson authorized Mr. Friswell to apply for the goods; and the latter, accordingly, sent the following letter to the defendant.

"83, Wimpole Street, 16th May, 1827.

*35] "Sir,—I am informed by Mr. Pearson, the agent for *Mr. Sharp, that you detain the latter gentleman's military and other luggage, which was sent to you to be packed; and that your pretence for so doing is the non-payment of an account due to you by Mr. Sharp. Mr. Pearson has informed me that he has explained to you that your money is perfectly safe, although immediate payment cannot be made of your account. It will, therefore, be unnecessary for me to explain further, although I shall be willing so to do if you desire it: but I now write to inform you, that Mr. Sharp's authority for delivering up the things to Messrs. Cork and Spain shall be produced to you; and that, after such production, if you persist in your refusal to deliver them up, I shall instantly adopt proceedings to compel you to do so.—I am, Sir, your obedient servant,
W. FRISWELL."

This letter was delivered to the defendant by a clerk of the plaintiff's attorney, who also handed the defendant the authority from the plaintiff, and at the same time demanded the property, which the defendant refused to deliver up; and it was proved by Mr. Spain (the person mentioned in the letter), that the defendant called on him, and asked him if he would receive the property, and

he answered that he would ; but the defendant then said, that he would not give up the property unless Mr. Spain would guarantee the amount of a claim he had upon the plaintiff. Mr. Spain declined to do this, and the defendant said he would not give up the property without it.

Brougham, for the defendant. I submit that there is no sufficient demand. Mr. Friswell's letter is any thing but a demand. Mr. Pearson was authorized by the plaintiff, and he authorizes Mr. Friswell. Now the latter only says, if you do not deliver the goods to Cork and Spain, I shall proceed against you. His letter only asks the defendant to carry the goods to Cork and Spain, and a refusal to do that is no conversion.

*Lord TENTERDEN, C. J. I think there is a sufficient demand and refusal in this case. The defendant's answer is not, that he will not send the goods to Cork and Spain, but he tells the attorney's clerk, that he will not deliver them up ; and then this is followed by his telling Mr. Spain that he will deliver them up, if Mr. Spain will guarantee his demand upon the plaintiff ; which Mr. Spain very properly refuses to do.

Brougham. Taking it that there is a refusal, does your Lordship think that any sufficient demand is proved ?

Lord TENTERDEN, C. J. Yes, I do.

Verdict for the plaintiff.

Denman, C. S., and *Godson*, for the plaintiff.

Brougham, for the defendant.

[Attornies—*J. Hill*, and *G. F. Abraham*.]

NICHOLE v. ALLEN. Nov. 30.

If a person know that his illegitimate daughter, of the age of 16, is boarded and clothed by the plaintiff, and neither expresses dissent, nor takes his daughter away, he is liable to pay the plaintiff for such board and lodging without any express promise to do so. And it lies on the defendant to show that his daughter was boarded and lodged by the plaintiff against his consent, or that he has refused to be at the expense of maintaining her.

ASSUMPSIT for board and lodging furnished to the illegitimate daughter of the plaintiff. Plea—General issue.

It appeared that the child had been boarded and lodged by the plaintiff, since the year 1811 ; but the present claim was only for board and lodging from the month of May, 1823, to May, 1825. It was proved that the defendant had always acknowledged the child as his daughter, and knew of her being boarded at the plaintiff's, and one of the witnesses stated in cross-examination, that the defendant at one time allowed 12*l.* a year for her support.

J. Williams. I submit that there is no proof of any promise to pay.

*Lord TENTERDEN, C. J. The father is under an obligation to maintain his child ; he knows where his child is, and the witness has told you, that at one time he allowed 12*l.* a year for its maintenance.

J. Williams. There is no proof that the 12*l.* is not paid still.

Lord TENTERDEN, C. J. It lies upon you to show that.

J. Williams. The girl is now sixteen years old.

Lord TENTERDEN, C. J. That may be, but unless the defendant has given distinct notice of his intention to pay no longer, I shall hold him liable ; and leaving out of the case all about the allowance, it stands thus :—he acknowledges her as his child ; he knows where she is ; and allows her to remain there.

J. Williams. There is, I admit, a moral obligation to found a promise, but there is no evidence of any such promise being made.

Lord TENTERDEN, C. J. There is not only a moral, but a legal obligation on the defendant, to maintain his child; he knows where she is, and he expresses no dissent, and does not take her away. There is a legal obligation made out, if it is shown that she is maintained in the plaintiff's house, and he knows it; and it then lies on the defendant to show that she is there against his consent, or that he has refused to maintain her any longer at his expense.

Verdict for the plaintiff.—Damages 23*l*.

Comyn, for the plaintiff.

J. Williams, for the defendant.

[Attornies—*W. Wood*, and *Allen, G. & A.*]

*38] *See the case of *Cameron v. Baker*, ante, Vol. 1, p. 268; and the case of *Hesketh v. Gosling*, there cited. In the case of *Furillio v. Crowther*, 7 D. & R. 612, where the supposed father of an illegitimate child had made various payments for its maintenance, and then refused to continue its support until the mother obtained an order of filiation; it was held, that no action would lie for arrears of maintenance, at the suit of the mother.

PARKER v. VINCENT. Nov. 30.

A. let a house to the plaintiff, who underlet to the defendant; and on the plaintiff becoming bankrupt, the assignees consented to an action for use and occupation being brought by A. in the plaintiff's name. A. died, and his executor directed the plaintiff's attorney to go on with the action: Held, that the executor was not a competent witness on the part of the plaintiff.

ASSUMPSIT for use and occupation. Plea—General issue.

It was opened, that this action had been brought by the direction of Mrs. Rowley (since deceased), who was the ground landlady of the premises, which were a shop and cellar, in the parish of St. Augustine, in the city of Bristol; and that Mrs. Rowley had let the premises to the plaintiff, who had underlet to the defendant. But that, on the plaintiff becoming bankrupt, his assignees gave up their interest to Mrs. Rowley; consenting, however, that the present action for use and occupation should be brought against the defendant in the name of the bankrupt.

To prove the case, the executor of Mrs. Rowley was called:—he stated, on the *voire dire*, that Mrs. Rowley had employed the attorney to bring the present action; and that he (the witness) had instructed him to continue it; but he also stated, that it was carried on for the benefit of Mrs. Rowley's estate, he himself taking nothing under her will.

F. Pollock, for the defendant. This witness is incompetent, because, by instructing the attorney to go on with the action, he has made himself liable for the costs.

Taunton, contra. The witness has become interested since the commencement of the suit; and it has been decided, that, where the interest accrues after the action is commenced, the party shall not be deprived of the advantage of the witness's testimony.

*39] *Lord TENTERDEN, C. J. Who is deprived of it in this case?

Taunton. The plaintiff, my Lord.

Lord TENTERDEN, C. J. He is merely a nominal plaintiff, and has no interest whatever. I think that this witness cannot be examined. He is incompetent. Nonsuit.

Taunton and Lumley, for the plaintiff.
F. Pollock, for the defendant.

[Attornies—*Dax & Co.*, and *Poole & Co.*]

In the case of *Barlow v. Vowel*, Skin. 586, it was held, that a witness laying a wager on a fact, was not thereby rendered incompetent as a witness respecting it; and in the case of *Res v. Fox*, 1 Str. 652, Lord *Raymond* admitted a prosecutor as a witness, though he had laid a wager that he would convict the defendant. In the case of *Bent v. Baker*, 3 T. R. 37, Mr. Justice *Grose* says, that "the rule is, that a person in whose evidence another has gained an interest shall not, by his own act, deprive the other of the benefit of his testimony." However, Mr. Phillips (in his *Law of Evidence*, p. 137) expresses a doubt, whether this proposition is not expressed in too general terms, and conceives that the case of *Barlow v. Vowel* must have been decided on the ground of fraud. And in the case of *Forrester v. Pigou*, 3 Camp. 380, and 1 M. & S. 9, Lord *Ellenborough* held, that an underwriter who pays on a promise of re-payment, if the policy be determined to be invalid, is not a competent witness for another underwriter who disputes the loss; but that if the promise of re-payment had been made after he had paid unconditionally, or if the party had fraudulently entered into the agreement with him for the purpose of taking off his evidence, it would be otherwise.

*GRAY v. GUTTERIDGE. Nov. 30.

[*40]

If an auctioneer signs a contract for the sale of a house in his own name, and receives the deposit (his principal being present), and, after the purchaser has left the room, pays over the deposit to such principal: The purchaser may, notwithstanding this, maintain an action against the auctioneer to recover back his deposit, if a good title cannot be made.

MONEY had and received. Plea—The general issue. This action was brought to recover back a deposit made at a sale by auction. It appeared that the defendant was an auctioneer, and that, at Garraway's Coffee-house, the plaintiff became the purchaser of a house in Devonshire-street, Portland-place, when the plaintiff, as the purchaser, and the defendant, being the auctioneer, signed the following contract, which was written on the back of the usual printed conditions of sale:—

"I, the under-signed William Gutteridge, do hereby acknowledge to have this day sold by auction, and I, the under-signed John Gray, do acknowledge to have this day purchased, the hereditaments and premises comprised in Lot I. of the annexed particulars of sale, at and for the price and sum of 1080*l.*, and have paid a deposit of 228*l.*; and *we do hereby mutually agree* to complete such sale and purchase, agreeably to the annexed conditions of sale: as witness our hands, this 28th day of September, 1826.

"WILLIAM GUTTERIDGE,
 "JOHN GRAY."

When the contract was signed, the plaintiff paid the deposit, by giving the amount to the defendant, the vendor being present. It, however, appeared, that after the plaintiff had left the room, the defendant handed over the deposit to the vendor. The purchase went off, because the vendor could not complete the title by the time agreed upon.

Follett, for the defendant. I submit, that the plaintiff must be nonsuited. In cases of this kind, there is this distinction taken: If the auctioneer pays over the deposit after notice not to do so, or after he has reason to know that the title is bad, he remains liable, notwithstanding he has paid the money over: but if he pays over the money, he having, at the time, no reason to suspect that the title cannot be completed, the action must be, not against him,

but against his principal. The case of *Edwards v. Hodding* (a), is decided expressly on the ground, that the person paying over the money had occasion to know that there was not a good title.

Lord TENTERDEN, C. J. I quite agree with every thing that is laid down by the Court in that case.

Follett. That case is recognized in the case of *Horsfall v. Handley* (b).

Lord TENTERDEN, C. J. Does it appear that there was a signed contract in that case?

Follett. There is also the case of *Spittle v. Lavender* (c), which is exactly like this case, except that the principal was present; and, in the case of *Burrough v. Skinner* (d), the money had not been paid over.

Lord TENTERDEN, C. J. In this case, the defendant, as auctioneer, signs the written contract, and the money is paid to him, his principal being present; and he does not pay it over to his principal till after the party is gone. He signs the contract in his own name, and receives the money himself; and it is the constant habit of persons making purchases at auctions to pay their deposit-money, trusting to the solvency of the auctioneer. If you think you can sustain a rule, you may move the Court; but I have no doubt about it. If it were not so, endless mischief would ensue.

Verdict for the plaintiff—Damages 226*l*.

*42] **Taunton and Comyn*, for the plaintiff.

Follett, for the defendant.

[Attornies—*Fuller & S.*, and *J. E. Fox*.]

In the ensuing Term, *Follett* moved for a rule to enter a nonsuit, which was refused.

(a) 5 Taunt. 815.

(c) 2 B. & B. 452.

(b) 2 Moore, 5.

(d) 5 Barr. 2639.

Mr. Sugden says (Vend. and Pur. 37), "The auctioneer should not part with the deposit until the sale be carried into effect; because he is considered as a stakeholder or depository of it; and, in a late case (*Edwards v. Hodding*), where the auctioneer was also the attorney of the seller, and paid over the money to the seller after he knew that objections to the title had been raised, an action against him for the deposit was sustained; but the Judges cautiously abstained from pointing out the duty of an auctioneer in any other case." P. 39.—"If, pending a suit for specific performance, a deposit be laid out in the public funds, under the authority of the Court, it will be binding on both vendor and vendee; and, if laid out without opposition by the seller, it must be presumed to be with his assent; and, in either case, he must take the stock as he finds it. But if a purchaser is entitled to a return of his deposit, he is not compellable to take the stock in which it may have been invested, unless such investment were made under the authority of the Court, or with his assent; and an assent will not be implied against a party because notice was given to him of the investment, to which he made no reply (13 Ves. 561). Therefore, where the deposit is considerable, and it is probable that the purchase may not be completed for a long time, it seems advisable for the parties to enter into some arrangement for the investment of the deposit."

In the case of *Burrough v. Skinner*, the Court said, that the auctioneer was a stakeholder, and a mere depository, and that he ought not to part with the deposit till such time as the sale is finished and completed, and it shall appear to whom it properly belongs.

In the case of *Edwards v. Hodding*, the money had been paid over, but the defendant knew that there were objections to the title; and *Gibbs, C. J.*, said—"I do not say that the case in 5 Barr. is not maintainable to the utmost extent to which it goes; but it is not necessary for the Court to go so far for the purpose of the present action;" and Mr. Justice *Heath* observed, that it was admitted, that if express notice had been given to the defendant not to pay over the money, an action would lie, and that the defendant's "knowledge of doubts in the title was equivalent to express notice. However, Mr. Justice *Dallas* said—"I wish distinctly to guard against saying what is the duty of the auctioneer in any other case."

The case of *Horsfall v. Handley*, 2 Moore, 5, was an action for money had and received against the defendant, who was a churchwarden. The defendant had received a sum of money from the clerk of a chapel, for burial fees on the interment of the plaintiff's wife, which sum was not due, and had paid it over (with a number of other fees) to the treasurer of the chapel.

as was his duty under a private act of Parliament, before action brought;—and it was held, that the action would not lie.

The case of *Spittle v. Lavender*, 2 B. & B. 452, proceeded on the ground, that the agent expressly agreed, "as agent for, and on the part and behalf of Spittle," and caused his principal to sign the approval on the back of the contract declared on.

BIGG v. ROBERTS and another, Executors of RUNDELL. Dec. 1.

If, in an action of covenant for arrears of an annuity, the defendant plead a release, lost by time and accident, and, to induce the Jury to presume a release, show that the annuity was not paid for seventeen years, and that the plaintiff had borrowed money of the grantor of the annuity, and regularly paid him interest, without setting off the annuity: The Jury ought not to find for the defendant, unless they are satisfied that there is fair ground for supposing, that, at some particular period during the seventeen years, the plaintiff *actually* executed a release of the annuity; and, to rebut the presumption of such a release, the Jury may look at the situation of the parties, and take into their consideration the circumstances of the plaintiff being a near relative of the grantor of the annuity, having large expectations from him, and of the grantor being a very old man, peremptory with his relatives, and very attentive to his pecuniary concerns.

COVENANT on a deed, dated December 27, 1806, executed by the deceased, whereby he covenanted to pay to his sister, Mrs. Bigg, an annuity of 600*l.* a year for her life, and, after her decease, to his nephew, the plaintiff, for his life. Breaches—The non-payment of the annuity since the year 1812, when Mrs. Bigg died. Pleas—*First*, that the deed was not executed by Mr. Rundell; *Second*, that Mr. Rundell, in the year 1808, assigned, out of his own share, one-sixteenth of the profits of his trade as a jeweller and goldsmith, to the plaintiff; and that, in consideration thereof, Mrs. Bigg and the plaintiff agreed that the deed should be cancelled; that they represented to Mr. Rundell that it was cancelled; and that he, relying on that representation, in 1810 procured the plaintiff to be admitted to a share in the general partnership in the said business; but that, by fraud and covin, the deed was kept **uncancelled*; *Third*, [**44*] a similar plea in substance, omitting the fraudulent misrepresentation; *Fourth*, that, in consideration of the plaintiff being taken into partnership, he agreed that the profits of his share of the trade should go in satisfaction of the annuity; *Fifth* and *Sixth*, payment; *Seventh*, a release, lost by time and accident; *Eighth*, a set-off by two bonds given by the plaintiff to the deceased, payable a year after notice. The replication took issue on the whole of the special pleas.

From the evidence it appeared, that Mrs. Bigg and her son the plaintiff, previously to the year 1806, resided in the county of Northumberland; and that, in that year, Mr. Rundell wished them to reside in or near London, and he addressed very pressing and affectionate letters to them on that subject; and that they accordingly came to reside at Brompton, when Mr. Rundell executed the deed, as stated in the declaration. It was also proved, that, in the year 1807, Mr. Rundell made a will, in which he bequeathed the great bulk of his property to Mr. Bigg, as his residuary legatee. That, in the year 1808, Mr. Rundell gave Mr. Bigg a sixteenth share of the profits of his business, and a bond, payable after Mr. Rundell's own death, for 20,650*l.* However, in the year 1810, the then partnership expired, and, in that year, new articles of copartnership were entered into by Mr. Rundell, Mr. Bigg, and others, whereby Mr. Bigg was admitted to be a partner in the trade, with a larger share of the profits; but, to enable him to purchase a share of the stock proportionate to his share of the business, Mr. Rundell took Mr. Bigg's bond for 35,000*l.*, bearing interest. Mrs. Bigg died on the 29th of April, 1812; but it was admitted that no pay-

ment of the annuity was made after the 25th of July, 1810 (the quarter-day preceding the formation of the partnership), but that it had been paid up to that time (with an addition of 200*l.* a year for the years 1808 and 1809), by Mr. Rundell's own draft upon his banker. The annuity deed was produced uncancelled; and it was proved that Mr. *Rundell, who was a man of immense
 *45] wealth, understood business well, and was particularly cautious in pecuniary matters; but that he was "a man of strong temper, very capricious and peremptory with his relations;" and it also appeared, that, after the will made in 1807, he executed another will, by which he left the bulk of his property to Mr. Neeld, one of the defendants, who was the son of his niece; and that Mr. Rundell was eighty-one years of age when he died.

Brougham, for the defendants. It is stated that the annuity was originally given to induce Mr. Bigg and his mother to reside near Mr. Rundell; and it appears, that, in 1808, Mr. Rundell gave Mr. Bigg a share in his immense business, and he also has Mr. Rundell's *post-obit* for 20,000*l.* In 1810, Mr. Bigg is regularly made a partner in the house; and, from that time, not one atom of the annuity is ever demanded or paid. The claim is kept back for seventeen years; and, after Mr. Rundell is laid in his grave, it is brought forward against his executors. It may be said, that Mr. Bigg did not like to talk to his uncle about money. The contrary is the fact; for Mr. Bigg regularly paid interest on the 35,000*l.* for which Mr. Rundell held his bond, without ever attempting to claim the 600*l.* a year. Does not this authorize you (the Jury) to presume that Mr. Bigg felt and knew that he had not the same claim on Mr. Rundell that Mr. Rundell had on him? If the annuity had been due, Mr. Bigg certainly would have deducted it. An account-current, of the date of 1st November, 1819, in Mr. Bigg's own handwriting, will be put in; and by that it will appear that the very first item is a note given by Mr. Bigg to Mr. Rundell for 1791*l.*, being the amount of interest due from him on an account then stated. Now, if a person cannot pay the interest, but gives his note, is clear proof that, if he had not been liable for the whole, he would have given his note for the less sum. The next year, interest is charged on the 1791*l.*, and the following year Mr. Bigg makes
 *46] a *payment of 606*l.* It may be said—true, but the 600*l.* was the annuity, and 6*l.* by a check. No; the whole 606*l.* was paid by a draft on Messrs. Glyn; and the next year there is a payment of 666*l.* 13*s.* 4*d.*, by a draft on Messrs. Coutts. If there ever was a case in which the silence of a party is eloquent against himself, this is it. He is here paying compound interest to Mr. Rundell, while, according to the present claim, Mr. Rundell owed him a large sum of money. If the annuity was due, why did not Mr. Bigg deduct it? and, not having done so, is it to be endured that he shall come, seventeen years afterwards, and claim all the arrears? In some cases, the legislature has given a period of limitation, within which a claim shall be made. That on bills is six years; but with respect to bonds, there is no legal period of limitation, and it is left to the Jury. Lord *Mansfield* (a) thought that eighteen years' silence was enough to induce a Jury to presume the satisfaction of a bond. Other Judges have considered twenty years as a proper time; and, in the case of *Oswald v. Lee* (b), Mr. Justice *Buller* says, that a Jury ought to presume satisfaction earlier than twenty years, if there be evidence to favour the presumption—such as a settlement of accounts between the parties, without any notice taken of the bond. Now, that case is exactly like the present, except that that was a bond, and this a gratuitous annuity deed. I know it will be said, that, as Mrs. Bigg did not die till the year 1812, the different transactions of 1808 and 1810 did not take place between the same parties. But, still, she was a member of the same family, and whatever was good for her son was good for her; and you may even presume this annuity deed in force till her death, because, where a considerable number of years has elapsed, the Jury may presume a release

during any part of that time; and you will say, whether, after a lapse of so many years, and after so many settlements of accounts, you ought not to presume the deed satisfied.

*The account opened by Mr. Brougham was put in, from which it appeared, that, in the year 1818, Mr. Bigg gave a note for the interest on his debt to Mr. Rundell, and that he paid interest on that note without making any charge of the annuity; and several of Mr. Bigg's letters were put in, inclosing checks for the regular payment by him, to Mr. Rundell, of the interest on that bond, to the time of Mr. Rundell's decease. [847]

Scarlett, A. G., in reply. A great part of Mr. *Brougham's* address goes only to show, that a Jury may, after twenty years, presume payment, if they see no reason to doubt it; and yet Mr. *Brougham* proves, by an elaborate argument, that in this case there was no payment at all. It is said in the plea, that this deed was kept alive by fraud; but is there the slightest evidence of that? In 1808, Mr. Rundell gives Mr. Bigg his *post-obit* for 20,000*l.*; now, the deed was not cancelled then, as the annuity was paid till 1810. In the year 1810, there was no consideration for Mr. Bigg's giving up the annuity, as in that year Mr. Rundell made him pay 35,000*l.* for the share of the business that he received. Is it to be said that Mr. Rundell was careless about it? The contrary is proved; and they even found, that he had preserved the very letters that inclosed the checks for the payment of the interest by Mr. Bigg to himself. The deed is uncanceled in Mr. Bigg's hands. If it had been agreed to be given up, would Mr. Rundell, with the habits of business he possessed, have let it remain in Mr. Bigg's custody? It is said that Mr. Bigg did not introduce it into the accounts; if he had, it would have been satisfied. The fact was this: Mr. Bigg had great expectations from his uncle, and, as his uncle was a most capricious man, and did not choose to mention this annuity, Mr. Bigg thought it most advisable to be silent about it, as it might exasperate Mr. Rundell, and put in hazard the chance he had of his family's acquiring half a million of money under that gentleman's *will. That the annuity has never been paid, is admitted; and then the question is, Whether Mr. Bigg and his mother agreed to cancel the deed, and by fraud kept it alive. [848]

Brougham. My friend has not alluded to the plea of a release.

Scarlett, A. G. You are asked to presume a release lost by the gentleman that preserved the letters inclosing the checks for interest. There is no evidence of any release; and you cannot presume a release without a consideration; and there was no consideration to ground a release after the year 1810.

Lord TENTERDEN, C. J. (in summing up.) This is an action on a deed executed by Mr. Rundell, in the year 1808, whereby he covenanted to pay to Mrs. Bigg 600*l.* a year for her life, and after her death to pay it to the plaintiff. Mrs. Bigg died in the year 1812, and the plaintiff claims the arrears from that time. The defendants have pleaded several pleas: *first*, they deny the execution of the deed by Mr. Rundell; but that is proved. The next two pleas state, that, in consideration of Mr. Rundell giving Mr. Bigg a share in his business, he agreed to give up the deed. This is denied in the replication; and there is no proof of it attempted; and it is clear that there was no such agreement at that time. These pleas, then, go on to charge fraud. The next plea states, that the profits of Mr. Bigg's share of the business were to go in satisfaction of the deed; but this is not proved. The two next pleas of payment are abandoned. The next is a release by deed. There is also a plea of set-off, but that is not material, because the bonds to be set off are only payable a year after notice; and no notice is proved to have been given. And the defendants put their case on this; that on the admission of Mr. Bigg into partnership in the year 1810, he executed a release of this annuity; but it *should be recollected, that he gave a bond for the share he had; and we must not forget that Mr. Rundell was a very careful man; and you will have to ask yourselves, whether he would not have carefully kept a deed of such importance. The [849]

great topic used for the defence is the payment of interest by Mr. Bigg to Mr. Rundell, without his setting off the annuity. That this was the fact is proved by Mr. Bigg's letters, and by the account; and you are therefore to consider whether this convinces you that the annuity was released; and in doing so, you must look at the situation of the parties. They were not indifferent persons; they were uncle and nephew, the latter having a large family, and great expectations from the former, and the annuity being not one for which money had been paid, but one which was a mere voluntary gift. The uncle is proved to be a man far advanced in years, and very attentive to his pecuniary concerns; and we see, and indeed it is in human nature, that as men advance in years, and go on accumulating wealth, they have an increased desire to grasp at, and accumulate more. You will therefore say, whether you think that the forbearance of the plaintiff to claim this annuity was on account of his having executed some deed of release, which cannot be found; or whether you will attribute it to this, that having great expectations from his uncle, and having also that due regard to his own interest, and that of his family, which every man ought to have, he chose regularly to pay the interest on his own bond, which his uncle exacted as matter of business, and yet forbore to mention the annuity, as it might induce his displeasure by lessening the sum that his uncle had to receive of him. If you find a verdict for the defendants, you must be satisfied, that there is fair ground to suppose, that at some particular period a release of this annuity was really executed by Mr. Bigg; and if you are not so satisfied, the plaintiff is entitled to recover.

Verdict for the plaintiff.—Damages, 8850*l*.

*50] **Scarlett*, A. G., and *Ingham*, for the plaintiff.
Brougham and *Tomlinson*, for the defendant.

[Attornies—*Kensil*, and *Amory & C.*]

In the case of *Read v. Brookman*, 3 T. R. 151, it was held, that a deed may be pleaded as "lost by time and accident," without making proof of it; but in the case of *Hendy v. Stephenson*, 10 Ea. 55, a justification in trespass was pleaded, which, after stating that the defendant was possessed of a right of common under a grant, proceeded as follows: "which deed is since lost or destroyed by accident and length of time, and therefore cannot be brought into Court here, and the date thereof is, and the particular parties thereto are, for that reason, wholly unknown to the said defendant:" the Court held this bad, as being much too loose in the description of the deed.

As to presuming payment of money to satisfy a bond after a long lapse of time, Lord Mansfield said (1 Burr. 436), that there was no direct and express limitation of time, when a bond should be supposed to be satisfied; the general time was commonly taken to be about twenty years, but he had known Lord Raymond leave it to a jury upon 18 years; and in the *Winchelsea* causes, 4 Burr. 1963, his Lordship says, that bonds which have lain dormant, shall be supposed to be satisfied after twenty years. However, in the case of *Welden v. Davis*, cited 1 T. R. 271, his Lordship held a lapse of eighteen years sufficient to raise a presumption of payment; and in the case of *Orswold v. Leigh*, Id. 272, we find that the same learned judge said that there was a distinction between length of time as a bar, and where it was only evidence of it. The former was positive, the latter only presumption; and he believed, that, in the case of a bond, no positive time had been expressly laid down by the Court, that it might be eighteen or nineteen years. However, in the same case, *Butler, J.*, says, "I have always been of opinion, that no less time than twenty years could, of itself, form a presumption that a bond had been paid. For even with regard to the rule of twenty years, where no demand has been made during that time, that is only a circumstance for the Jury to found a presumption upon, and is in itself no legal bar. In those cases, where satisfaction of a bond has been presumed within a less period, some other evidence has been given in favour of such a presumption; such as having settled an account in the intermediate time, without any notice having been taken of such a demand. In the case of *Hethershell v. Bows*, Mod. Ca. 22, Lord Holt says, "if a bond be of twenty years' standing, and no demand proved, or good cause of so long forbearance shown, I shall intend it paid on *solvit ad diem*." As this is matter of "presumption for the Jury, like all other presumptions, it may be rebutted by evidence. (1 Cowp. 109). In the case of *Colwell v. Budd*, 1 Camp. 27, Lord Ellenborough says, "after a lapse of twenty years, a bond will be presumed to be satisfied, but there must be either a lapse of twenty years, or a less time, coupled with some circumstance to strengthen the presumption. Here, if it had been proved that the parties had accounted together after the money became payable, it might have been inferred that it was included in the settlement; but as there is no evidence of this, and as twenty years have not elapsed since the bond was forfeited, it cannot be considered as discharged." These cases were mostly decided on the plea of *solvit ad diem*; but if there was a payment of interest

after the day, and this was followed by a long lapse of time, the plea of *solvit ad diem* would be improper, and the plaintiff would recover. The proper plea, under those circumstances, would be *solvit post diem*. To rebut the presumption of payment at the day, an indorsement of a payment of interest in the handwriting of the obligee, is evidence, if it be shown by other evidence, that such indorsement was made within the twenty years, and therefore at a time when it was against his interest to make it; but if it be not shown that it was made at such a time, it is not evidence. *Searle v. Lord Barrington*, 2 Str. 826; and this case has been repeatedly acted upon. It should be observed, that the foregoing cases relate to the payment of money due on a bond; but we have not found any case, in which, from mere lapse of time, the execution of a release was presumed. In the case of *Reed v. Brookman*, (3 T. R. 158), *Ashhurst, J.* says, that "where a man's deeds and muniments are lost by fire, profert of the deed pleaded may be dispensed with. The case of fire is only put by way of instance; for if the deed be destroyed by any other accident, it falls within the same reason; and that brings it to a matter of fact before the Jury, whether there be or be not sufficient evidence that the deed did exist." And in the case of *Hendy v. Stephenson*, (10 Ea. 60), Lord Ellenborough says, "I recollect an instance within my own experience, where, in an action on the Northern Circuit, touching a water course, a grant was pleaded upon presumption of its existence, though it could not then be found; but it was thought necessary to state the supposed names of the grantor and grantee, and the time, of all which the party gave probable evidence."

In the case of *Doe d. Fewell v. Reed*, 5 B. & A. 232, where it appeared, that the defendant's ancestor was let into the possession of lands in 1752, he being a creditor, who had obtained a judgment against the then owner of the land, and that the defendant's family had continued in possession ever since;—the Court held, that the original possession not having been taken under any conveyance, the length of possession was only *prima facie* evidence from which a Jury might infer a subsequent conveyance; but that that might be rebutted, and that the Jury must not presume such conveyance from length of possession, unless they were satisfied that it had actually been executed.

As to presuming a grant from the Crown, see the case of *The Mayor of Hull v. Horner*, Cowp. 102. As to presuming the extinguishment of a quit rent, see *Eldridge v. Knott*, 11. 214. That twenty years' uninterrupted enjoyment of windows looking over another's lands, is, if rebutted, sufficient ground to presume a licence, was held, in the case of *Cross v. Lewis*, 4 D. & R. 234. As to presuming the surrender of attendant terms, see the cases of *Doe d. Burdett v. Wright*, 2 B. & A. 710; *Doe d. Putland v. Hilder*, 1d. 782; and *Bartlett v. Downes*, ante, Vol. 1, p. 522.

REX v. GILKES et al. Dec. 7.

On an indictment against the stewards, &c., of a benefit society for disobeying an order of two justices, commanding them to re-admit A. B. to be a member of that society, it is no defence, that A. B. was a person, who, by the rules of the society, was ineligible to be a member of it, as that was matter of defence before the justices; and if it be proved that the order was served on one of the defendants, and that the others, when A. B. applied to be re-admitted, said, that they would not admit him, and did not care for the justices' order; that is presumptive evidence of a service of the order upon them.

INDICTMENT for disobeying the order of two Justices to re-admit George Spurging to be a member of a Benefit Society. The first count stated, that heretofore, to wit, on the 21st day of March, in the 8th Geo. 4, at the Police Office, Worship street, in the parish of St. Leonard, Shoreditch, in the county of Middlesex, Samuel Twyford, and William Bennett, Esqrs., two of the Justices of our said lord the king, assigned to keep the peace of our said lord the king in and for the county aforesaid, and also to hear and determine divers felonies, trespasses and misdemeanours committed in the same county, did, in due form of law, make a certain order under their hands and seals, which said order was as follows: [It here set out the order, *verbatim*, which recited that George Spurging was a member of the Alfred Union Benefit Society; and commanded the president and members, immediately *on sight thereof*, to restore and re-admit the said George Spurging to be a member of the said society], of which said order the said William Gilkes, S. W., R. C., G. B., J. K., and J. M. afterwards, to wit, on the 22d day of March in the year aforesaid, in the parish aforesaid, in the county aforesaid, there had due notice (a). Nevertheless the

(a) It may be worthy of consideration, whether this indictment is good. The order is, to admit "upon sight." The indictment only states, that they had "due notice" of it.

said William Gilkes, late of the parish aforesaid, in the county aforesaid, labourer, S. W., late of the same, labourer (describing all the defendants), afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully and contemptuously did neglect and refuse, and still do neglect and refuse, to restore and re-admit the said George Spurning to be a member of the said society, as by the said order the said William Gilkes, S. W., R. C., G. B., J. H., and J. M., were required to do, in contempt of our said lord the king and his laws, to the evil example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity. The *second* count stated the substance of the order, but did not set it out. Plea—Not guilty.

A witness proved, that he saw the order signed by the Justices.

Reader, for the defendants, objected, that, before it was read, it must be proved, that the rules and regulations of the society had been duly enrolled at the Quarter Sessions; as, without that, the Justices had no jurisdiction.

Lord TENTERDEN, C. J. I shall not stop the case on this objection; but I will give you leave to move to enter a verdict for the defendants (*a*).

The Justices' order was read; and it stated, *inter alia*, that the rules and regulations were duly enrolled.

The prosecutor proved, that he served the order on Sylvanus Ward, one of
 *54] the defendants, by giving him a *duplicate of it, signed by the Justices; and that some days after that he went to the club-room, and saw all the other defendants, and asked them to re-admit him in pursuance of the order; when two of them said, that he should not be re-admitted, and that they did not care for the magistrates' order; and that to this all the members present expressed their assent.

Reader, for the defendants. I submit, that there is no evidence of a service on any of the defendants except Ward.

Lord TENTERDEN, C. J. I think there is presumptive evidence against the whole of the defendants; for when the party goes to be re-admitted, they say they do not care for the order, and will not obey it.

Reader. My Lord, I am in a condition to show, that at the time when Spurning was excluded from the society, he had done that which, by the rules of the society, justified the other members in expelling him.

Lord TENTERDEN, C. J. That was your defence before the magistrates; and I cannot try the merits of the order here. The Legislature evidently meant, that the parties should have speedy and summary justice before the magistrates: however, you shall have the benefit of the question, whether it is necessary to prove the rules enrolled.

Verdict—Guilty.

Scarlett, A. G., and *Platt*, for the prosecution.

Rouder, and *Adolphus*, for the defendants.

[Attornies, ———, and P. Leigh.]

In the ensuing Term, *Adolphus* moved in pursuance of the leave given, and the Court granted a rule *Nisi* on that point only.

(a) See the stat. 39 Geo. 3, c. 64, and the cases of *Rex v. Aire and Calder Navigation*, 3 T. R. 666; and *Rex v. Hulcot*, 6 T. R. 583.

*BISHOP, Surviving Partner, v. CHAMBRE. Dec. 8.

In an action on a note, if it appear on the inspection of the note, that it has been altered, it lies on the plaintiff to show that the alteration took place under such circumstances as will entitle him to recover.

Whether a conversation between the defendants and one of the witnesses, is sufficient to entitle the plaintiff to recover, on the account stated, is a question for the Court, and not for the Jury.

ASSUMPSIT by the plaintiff, as surviving payee, of a promissory note for 30*l.*, dated 27th May, 1814, payable six weeks after date, and made by the defendant in favour of the plaintiff and his two deceased partners. There were counts in the declaration, stating promises to the three partners, and also another set of counts stating a promise to the plaintiff, as surviving partner. Pleas—First, General issue; Second, the statute of limitations; Third, infancy. Replication—That the promise was within six years; and that the defendant had promised since he came of age. The note was produced, and a witness named Beswick, stated, that in the month of April, 1827, he called on the defendant and showed him the note, when the defendant said, “I know I owe Mr. Bishop money, I wish you had applied sooner; is this my handwriting?” and Mr. Beswick replied, “It is;” on which the defendant said, “I write very differently now; but Mr. Bishop is a very honourable man, and I have no doubt it is all correct, and I will send the money.”

The note was in the following form:—

May
“St. John’s Coll., Cambridge, 27
1814.

“£30 : 0 : 0

Six weeks after date, I promise to pay to Messrs. M. R. and W. Bishop, or order, thirty pounds, for value received.

ALAN CHAMBER.

Beyond the figures 27, in the date, was a part of some other letter or figure; and a portion of the paper on which the note was written appeared to have been cut away close to the figures 27.

Lord TENTERDEN, C. J. The word “May” appears to me to be in a different ink from the rest of the note, and a portion of the paper has been cut off.

* *Brougham*, for the defendant. It lies on the plaintiff to explain away any circumstance of suspicion that appears upon the face of the instrument. It lies on the party producing it to do that, and not upon us. [56]

Lord TENTERDEN, C. J. If the note was altered after it got into the hands of the plaintiff, it will require a new stamp.

Denman, C. S., for the plaintiff. There is no evidence of any alteration.

Lord TENTERDEN, C. J. The word “May” is in a different hand, and it is clear that something has been cut off; and where a note appears to have undergone alteration, the party suing on it must account for that.

Denman, C. S. Supposing the note to have been altered, yet as the defendant, when he saw it, was told that the plaintiff had a claim on him for 30*l.*, and promised to send the money, is not that sufficient on the account stated?

* Lord TENTERDEN, C. J. The whole conversation plainly refers to the note.

Denman, C. S. I hope your Lordship will leave it to the Jury to say, whether there is not a general admission of a debt due from the defendant to the plaintiff?

Lord TENTERDEN, C. J. I will ask the Jury whether they think that the word “May” is in the same handwriting with the rest of the note. But the effect of the defendant’s admission, as answering the plea of infancy, and the plea of the statute of limitations, is for the Court, and not for the Jury.

Denman, C. S. I submit that the effect of the promise should be left to the jury.

*Lord TENTERDEN, C. J. I am clearly of opinion that I cannot leave *that* to the Jury.

Brougham, for the defendant, addressed the Jury on the question whether the word "May" was added after the note was in the hands of the plaintiff.

Lord TENTERDEN, C. J. (In summing up to the Jury.) It appears to me, that the evidence in this case is not such as to entitle the plaintiff to recover on any thing but the note. In point of law, if, after a note is delivered to the party who is to derive benefit from it, it is altered, such note is rendered invalid. The question is, whether you think, on inspection of the note, that it was altered after it had become a perfect instrument in the hands of the plaintiff. Looking at the instrument, it appears, that the whole of it is in one handwriting, with the exception of the word "May," which is in a different hand, and written with paler ink. The paper, too, is cut, and there appears to be a line, which was a part of some letter or figure cut off. And if you think that these alterations took place after the note came into the possession of the plaintiff, you must find your verdict for the defendant.

Verdict for the defendant.

Lord TENTERDEN, C. J. I shall give the plaintiff's counsel leave to move to enter a verdict for the plaintiff, for such sum as he is entitled to upon *his* evidence, if the Court shall think that I am wrong in my opinion.

Denman, C. S., and *Tulfourd*, for the plaintiff.

Brougham, for the defendant.

[Attornies—*Abbott*, and *Manning & D.*]

See the case of *Sentance v. Poole*, *ante*, p. 1.

*58] BEFORE LORD TENTERDEN, C. J., BAYLEY, HOLROYD, AND LITTLE-DALE, Js. Jan. 23.

In Banc.

Denman, C. S., now moved to enter a verdict for the plaintiff, in pursuance of the leave given; and submitted also that it should have been left to the Jury to say, not only whether the note had been altered after it was signed, but whether, if so, it had been altered with the consent of the defendant.

Lord TENTERDEN, C. J. If the note was ever given into the hands of the plaintiff as a perfect instrument, it could not be altered even with the consent of all the parties.

BAYLEY, J. It would require a new stamp.

The Court granted a rule to show cause on the question whether the admission of the defendant was sufficient to entitle the plaintiff to recover on the account stated.

OLDERSHAW v. TREGWELL. Dec. 8.

SAME v. SAME.

If a party sue on a bill, and, after the action is commenced, another bill, accepted by the same defendant of which he is the holder, is dishonoured, and he bring a second action on that: A Judge at chambers would, on application being made, direct the two actions to be consolidated.

There were actions on two bills of exchange, the one payable at two months and the other at four months after date.

After the first bill had been dishonoured, the plaintiff commenced an action on it before the second bill became due. On the second bill becoming due, that was also dishonoured, and the second action was brought on that bill.

Lord TENTERDEN, C. J. These parties need not, in this case, have been at the expense of two trials. If an application had been made to a Judge at chambers, an order might have been obtained to consolidate the actions. *I am sorry that such an application was not made, but I cannot help [*59 it now.

Verdicts for the plaintiffs in both actions.

Carrington, for the plaintiff.

[Attornies—*Oldershaw, jun.*, and *Neck*.]

The authorities on the subject of consolidating actions will be found in 2 Arch. Pr. 198, but none of them exactly resemble the present, as they are all cases of actions commenced by the same plaintiff, against the same defendant, at the same time. However, as the saving of expenses is equally beneficial to both parties, it might be worth while to consider whether, under circumstances similar to those of the principal case, a Judge at chambers would not order a consolidation at the instance of the plaintiff as well as at the instance of the defendant.

REX v. COPPARD. Dec. 10.

On an indictment for perjury, in a cause at *Nisi Prius*, it is no variance that the *Nisi Prius* record states the trial to have been on a day different from that stated in the indictment.

If the indictment state the trial to have been before one of the Judges (who in fact sat for the Lord Chief Justice), and the *Nisi Prius* record state the trial to have been before the Lord Chief Justice; *semble*, that this is no variance.

If the indictment, in setting out the substance of oral evidence charged to be false, put "Mr." for "Mister," and "Mrs." for "Mistress;" this is no variance, though it should appear that the witness said "Mister," and "Mistress," and not "Mr." and "Mrs."

PERJURY.—The indictment stated, that at the Sittings of *Nisi Prius*, holden after the Term of St. Michael, at Westminster, to wit, in the parish of St. Margaret, within the liberty of Westminster, in the county of Middlesex, on the 16th day of December, 7 Geo. 4, before Sir *Joseph Littledale*, knight, then and yet being one of his Majesty's Justices assigned to hold pleas in the Court of our said lord the king, before the king himself, a certain issue, before then duly joined in the said Court, between one John Smith and one Samuel Peach, in a certain plea of trespass on the case upon promises, in which the said John Smith was the plaintiff, and the said Samuel Peach was the defendant, came on to be tried, &c. The indictment then stated the oath, and averred, that, on the trial of that issue, it was material to inquire, "whether, in the beginning of the month of August, 1825, Amelia, the *wife of Samuel Peach, had seen the said Lawrence Coppard, and one William Nelson, then being servants of the said [*60 John Smith; and whether any conversation had then and there passed between the said Amelia Peach and the said Lawrence Coppard and William Nelson, or either of them, respecting the regilding of the frames of certain pictures," &c.: and went on to state, that the defendant, on the 6th of December, 7 Geo. 4, with force and arms, at, &c. "upon his said oath, before the said Sir *Joseph Littledale*, at and upon the said trial, unlawfully, falsely, &c. did depose, swear, &c. amongst other things, in substance and to the effect following; that is to say, that, in August, 1825 (meaning the month of August, in the year 1825), he (meaning himself) went to Mr. Peach's house (meaning the house of the said Samuel Peach), about some tea-poy, and that Mrs. Peach (meaning the said Amelia, the wife of the said Samuel Peach), gave them (meaning the said Lawrence Coppard and the said William Nelson) some orders." The indictment

proceeded to set out the whole of the evidence given by the defendant on the trial of the action, and to assign perjury upon it. Plea—Not guilty.

The *Nisi Prius* record of the case of *Smith v. Peach* was put in. The *postea* stated the trial to have taken place before the Right Hon. Sir Charles Abbott, knight.

Scarlett, A. G., for the defendant. The indictment states the trial to have been before Mr. Justice *Littledale*, and the *Nisi Prius* record states it to have been before your Lordship. The prosecutors cannot, by parol evidence, vary what is stated in the record.

Lord TENTERDEN, C. J. They are not held to the day stated in the *Nisi Prius* record (a). I am told, that all the *records on the Circuits are *81] drawn up as before both Judges; and yet it has been held, that an indictment for perjury, stating the oath to have been taken on a trial before one Judge, is good, although the record of the trial names both (b). In London and Middlesex, every *distringas* is drawn, "except the Chief Justice shall come;" and I am not aware, that, if the trial is not before me, the name of either of the learned Judges before whom it may be, is ever mentioned in the record.

Scarlett, A. G. If the indictment had stated, that the trial was before your Lordship, that would have done, as the *Nisi Prius* record would have proved that allegation.

Lord TENTERDEN, C. J. I shall not stop the case on this objection; but I shall give leave to enter a verdict for the defendant, if there is any thing in the objection.

A witness proved, that the trial was before Mr. Justice *Littledale*, and that the present defendant swore to a conversation with Mrs. Peach to the effect stated in the indictment.

*82] *Adolphus*, for the defendant. In the indictment in setting out the evidence charged to be false, they put "*Mr.*" for "*Mister*," and "*Mrs.*" for "*Mistress*," just as if they were setting out an affidavit, which is wrong.

Lord TENTERDEN, C. J. But they put innuendoes—"meaning the said Samuel Peach," and "meaning Amelia, the wife of Samuel Peach."

Adolphus. The indictment asserts, that, at the former trial, the witness said "*M. R.*" and "*M. R. S.*," which is disproved, and is contrary to the fact.

Lord TENTERDEN, C. J. I cannot read it so.

Adolphus. I remember in the case of *Rex v. Kennett* (c), that the Court would not read "*Esq.*" to mean "*Esquire*."

Lord TENTERDEN, C. J. They do not profess to set out the tenor, but only the substance, which I think they have done.

Much evidence was given on both sides.

Verdict—Not guilty.

Gurney, Denman, C. S., and *Brodrick*, for the prosecution.

Scarlett, A. G., *Adolphus*, and *Kelly*, for the defendant.

[Attornies—*Carr & F.*, and *Cole*.]

(a) See the cases of *Rex v. Aylatt*, 1 T. R. 69; *Pope v. Foster*, 4 T. R. 590; *Purcell v. Macnamara*, 9 East, 157; *Woodford v. Ashley*, 11 East, 508; and *Rex v. Hucks*, 1 Stark. 521.

(b) In the case of *Rex v. Alford*, 1 Leach, 179, the prisoner was indicted for perjury, and the trial on which the oath was administered was stated to be before the Hon. *Edward Wiles* (the Judge who actually tried the case). When the *Nisi Prius* record was produced, it stated (as usual) that the trial was before both the Judges. It was doubted whether this supported the allegation in the indictment; but, on the point being reserved for the twelve Judges, the conviction was held right. In the case of *Rex v. Emden*, 9 East, 437, the Court held, that the place mentioned in the jurat of an affidavit is not conclusive as to the place at which it was sworn; and that, on an indictment for perjury in Middlesex, if the jurat stated it to be sworn in London, the prosecutor might go into evidence to show that it was sworn in London; and the Court also held that the jurat was not a necessary part of the affidavit to be set forth in the indictment; and, therefore, it was not necessary to set out the jurat, which stated a swearing in London, and then traverse it by an averment that the defendant was, in fact, sworn in Middlesex, and not in London.

(c) MS.

*BIRKETT v. CROZIER. Dec. 11.

The Jury, who are summoned by the sheriff to make the presentment before Commissioners of Sewers, should come from the body of the county, and not from the district over which the Commissioners have jurisdiction; and where the precept to the Sheriff was to summon "good and lawful men of your county, and resident within the Tower Hamlets," that being the district over which the Commissioners had jurisdiction: It was held bad; and a presentment made by that Jury and all the subsequent proceedings founded on it, declared to be void.

TRESPASS.—The *first* count of the declaration was for breaking and entering the plaintiff's house, and carrying away his goods; *Second* count, for taking the goods only. Pleas—*First*, General issue; *Second*, to the first count of the declaration, that the supposed trespasses in the first count mentioned, were committed under the authority of the Commissioners of Sewers for the Tower Hamlets, for a lot or tax assessed on the plaintiff (a); *Third*, a *similar plea to the second count. Replication—*De injuria*.

Tindal, S. G., for the plaintiff, opened, that the plaintiff was possessed [64 of a house at Hackney; that the defendant acted under the Commissioners of Sewers for the Tower Hamlets, in which the parish of St. John at Hackney is situated; and that the plaintiff's house was thirty-five feet above the level of the highest tide, and nine feet above the highest flood ever known; and he therefore contended, that the plaintiff was not liable to the sewer-rate, as he had neither received benefit, nor was protected from damage by means of the sewers. He further stated that it would appear that the plaintiff had no use of the sewers for the running off of the refuse water of his house, as it would be proved that he had a cess-pool on his own premises; and he further objected, that the Commissioners had assessed the whole district of the Tower Hamlets under one general rate, which had never been done antecedent to the year 1825, and that the parish of Hackney had not been assessed at all to the sewers, prior to the year 1770; and that from the time of the earliest Tower Hamlets Commission, that district had been divided into several distinct levels: the Hackney Level, the Limehouse Level, and others; and they had been separately assessed, which was the only fair way; as it was most unjust, in the present mode, that the parish of St. John at Hackney, receiving little benefit from the sewers, should pay at the same rate as the parish of St. Anne, Limehouse, which received infinitely more benefit.

The trespass was admitted.

(a) As there is no precedent for a plea of this kind in any of the published collections, the form of it may be considered acceptable. It was as follows:—

"And for a further plea in this behalf, as to breaking and entering the said dwelling house, and as to the seizing and taking the goods and chattels, (to wit), one set of cruets and frame, one hearth-rug, one fender, and one set of fire-irons there found, and carrying away the same, and converting and disposing thereof to his own use, as in the first count of the above declaration is mentioned, he the said defendant, by leave of the Court here for that purpose had and obtained, according to the form of the statute in such case made and provided, says, that the said plaintiff ought not to have or maintain his aforesaid action against him, because he says, that the said supposed trespasses were committed by him, the said defendant, by the authority of a certain commission of sewers for the Tower Hamlets, (excluding St. Catharine's and Blackwall Marsh) for a lot or tax assessed upon the said plaintiff by the said commission, according to the purport, tenor, and effect of a certain act of Parliament made in the 23d year of the reign of our late sovereign lord king Henry the Eighth; and this he the said defendant is ready to verify; and therefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against him."

By the statute 23 Hen. 8, c. 5, s. 12, if the issue be found for the defendant, or the plaintiff is nonsuited, the defendant is entitled to treble damages, to be assessed by the same Jury who try the cause. However, in the case of *Warren v. Dix*, *post*, p. 71, Lord *Ellenborough* held, that, to entitle the defendant to such damages, he must pray them on the record. It therefore seems, that for a defendant to obtain the assessment of such damages, his plea should, after the conclusion of it, as it stands at present, go on, "and further prays his treble damages, by reason of his wrongful vexation in this behalf according to the form of the statute in such case made and provided."

*65] *Scarlett*, A. G., for the defendant. If the parish of St. *John at Hackney is aggrieved by the present Commission of Sewers, they might petition the Crown for a separate Commission for the Sewers of their own parish; but at present they are within the jurisdiction of the Commissioners of the Tower Hamlets; now it is the duty of the Commissioners to keep the sewers in order; and they have a Jury impannelled to make presentments of those persons who are, or may be, benefited by the sewers. The Jury having presented this, their presentment is made public; and the law gives each person, who considers himself aggrieved, a liberty to traverse such presentment before the Commissioners; and a new Jury may be called together to try the goodness of the presentment; but if, after public notice, no one comes in to question it, the Commissioners must consider that the presentment is acquiesced in; and they are bound to make an assessment of so much in the pound equally, on all those returned in the presentment. They cannot say how much one is benefited more than another. They must make an equal pound-rate upon their whole district. Take it, that the parish of Hackney is benefited to only a certain degree by these sewers, still, if it is benefited *at all*, the *proportion* of the rate to be paid by that parish is not to be regulated by a comparison of benefits as between them and other parishes, but there must be an equal pound-rate for the whole district, for which the Commissioners have jurisdiction. If a party has *no* benefit, the Jury ought not to return him at all; but if the Jury present, that he *may* derive benefit, he is made liable; and if he is wrongfully presented by them, he ought to traverse. If an act of Parliament points out a mode of proceeding, the party cannot take a different mode; and here the act of Parliament directs a Jury to be impannelled, to say who is liable, and then gives abundant opportunity to any party injured to traverse their presentment. Now, if a party may lie by, and say that the Commissioners and collectors are liable to actions of trespass, merely because they act as they are bound to do, and enforce a *present-

*66] ment that nobody denies or questions, the greatest inconvenience would ensue; and I submit, that if a party neglects to traverse a presentment, he can take no objection to it afterwards. In the case of *Warren v. Dix (a)*, Lord *Ellenborough* thought, that where the party lay by and did not traverse the presentment, he could not question it on the trial of an action like the present. It will be proved, that the plaintiff's attorney was furnished with a copy of the presentment; and he was therefore bound either to traverse or acquiesce. But as I have no right to presume what is my Lord's opinion on this point, I shall proceed to justify the conduct of the Commissioners. It is objected, that formerly the Commissioners divided the Tower Hamlets into smaller districts, called *Levels*, making a separate rate for each. But this was considered irregular; and the late Sir *V. Gibbs* advised, that the Commissioners could only make one general rate for the whole of the Tower Hamlets; and they have followed that advice, which I now have to contend, was their correct course. Indeed, if they were to go into a comparison of benefits, there ought to be a separate rate for every street or every house, as each street, or even each house, might receive benefit in a degree different from the others. I therefore submit, that there must be one general rate over the whole district, subject to the finding of the Jury who make the presentment; and if it is found, that a party is benefited at all, he must pay in the same proportion as the rest. It is said that the plaintiff has no communication with our sewer, and that he has a cess-pool; but still it will be shown that that cess-pool percolates into our sewer; and besides that, every shower of rain that comes on the roof of the plaintiff's house, runs off down his lawn, and into drains communicating with our sewer. In the case of *Stifford v. Hamston*, tried before Lord Chief Justice *Dallas*, it appeared

*67] that the party's refuse-water went *into a pond; but, as it was also proved, that, when the pond overflowed, the surplus water went into the sewers,

(a) This case is not in print. We have been favoured with a note of it, which see *infra*, p. 71.

the party was held liable to the sewer-rate. If a new sewer is constructed, benefiting but a few, those few alone are liable to pay for the construction of it; but if, when constructed, all may open drains into it, it is for the Jury to say, not only who *are* benefited, but who *may be* so. I shall therefore contend, that as this rate was made under the presentment of a Jury, which is not traversed, that alone is an answer to the action; but if that should ~~be~~ clear, I shall submit, that there can be no separate rate for the parish of St. John at Hackney, distinct from the rest of the Tower Hamlets; also, that the plaintiff's house is benefited by the sewers (a).

Lord TENTERDEN, C. J. (having referred to the case of *Stafford v. Hamston* (b)) I shall not stop the case upon the point, that a presentment not traversed is conclusive on the party; but I will reserve that question, either on bill of exceptions, or on a special verdict. It is a most important question.

Scarlett, A. G. In the case of *Stafford v. Hamston*, the Court went expressly on the party's having no opportunity to traverse the presentment.

*The Commission of Sewers for the Tower Hamlets was read (c).
The precept to the Sheriff of Middlesex to summon the Jury, by whom the presentment was made, was also put in and read. It was as follows:—

“Middlesex, to wit.—

“To the Sheriff of Middlesex.

“By virtue of his Majesty's Commission of Sewers for the Tower Hamlets (excluding St. Catharine's, and Blackwall Marsh), under the great seal of Great Britain, bearing date the 15th day of February, one thousand eight hundred and twenty-one, to us and others directed; we, Sir D. W. Knight, C. S., &c., Esquires, six of the said Commissioners, do hereby *will and require you to cause to come before us, on Wednesday, the 17th day of August, now next ensuing, at a court of sewers, then to be holden at the Court House, Great Alie Street, in the parish of Saint Mary, Whitechapel, in your county, at two of the clock in the afternoon; forty-eight good and lawful men of your county, and resident within the Tower Hamlets, to inquire of all matters and things, relating to, or concerning the sewers of those limits; and to do and execute all such other matters and things as shall be then and there

(a) As the modern authorities on the subject of liability to the sewers-rate are so few, we have given a brief outline of the arguments of the learned Attorney and Solicitor-General, though the case was eventually determined on another ground.

(b) 5 Moore, 608. This was an action of trespass for taking the plaintiff's goods, in which the defendants justified the taking for a sewers-rate. At the trial, the plaintiff offered evidence that she was not benefited by the sewers. This evidence was rejected, but the Court granted a new trial; and *Dallas*, C. J., said, “The Commissioners are only to assess those who receive, or are likely to reap profit, or who have or may sustain hurt, loss, or disadvantage. In the present case, the plaintiff offered evidence to prove that she derived no benefit from the sewer in question. The case states that this was objected to, on the ground that her house was within the district comprised within the decree; and it has been insisted that the presentment and decree were conclusive against her; but this depends on the question of jurisdiction; and the Commissioners could not conclude the party assessed without allowing her an opportunity of being heard.” “In some stage or other, the party who is to bear a burden, on the ground that he derives, or is likely to derive a benefit, or is in danger of taking some hurt, ought to have an opportunity of showing that no benefit is or can be derived, nor hurt sustained. This he has not, before the presentment made, nor while it is making, nor before the decree; nor has he any notice of the presentment or the decree, but by the assessment and notice of such assessment or demand, under it; the effect, therefore, of rendering the presentment and decree conclusive, would be to decide against the party unheard, and without allowing him any possibility of being heard. On general principles, this would be unjust; but it is enough to state the cases referred to, in order to show that the assessment is not considered as conclusive.” The cases referred to are *Masters v. Scroggs*, 3 M. & S. 447, and *Dore v. Gray*, 2 T. R. 358. In the former, it was held, that the Commissioners cannot assess a person in respect of drains communicating with a great sewer, if it is proved at the trial that the level of his drains is so much above the sewer that he would not be benefited by work done on such sewer. In the latter, Mr. Justice Buller lays down, that with respect to the jurisdiction of the Commissioners, the line to be drawn is, that where the party is or is likely to be benefited by the sewers, that is sufficient to give the Commissioners jurisdiction.

(c) The form of the commission is given in the stat. 23 Hen. 8, c. 5.

given them in charge; and herein fail not, at your peril: Given under our hands and seals, the 15th day of June, one thousand eight hundred and twenty-seven."

This precept was signed and sealed by six of the Commissioners.

Tindal, S. G. This precept is bad. The Jury should come from the county at large, and here, the sheriff is limited to residents within the Tower Hamlets. By the commission itself, they are "to inquire, by the oaths of honest and lawful men of the said *shire or shires, place or places*, where such defaults or annoyances be, as well within liberties as without, by whom the truth may be rather be known, through whose default the said hurts and damages have happened, and who hath or holdeth any lands," &c. Now the words, "place or places," here evidently refer to cities and boroughs. The legislature meant counties and places *ejusdem generis*. I therefore submit that if this precept is wrong, the presentment, and the whole of the subsequent proceedings, are *coram non jure*.

Scarlett, A. G., for the defendant. The act goes on "place or places where the default shall happen," which means, the district over which the Commissioners have jurisdiction.

*70] *Curwood*, on the same side. In the case of the **Custodes Libertat &c.* v. The Inhabitants of *Outwere (a)*, a presentment was quashed because it did not appear that the place was within the *Hundred* from which the Jury came.

Tindal, S. G. But, in this case, the Jury does not come from the hundred. The commission in another part says, that "the sheriff or sheriffs shall cause to come such and so many honest men of his or their *bailiwick*, as well within liberties as without, by whom the truth may best be known."

Scarlett, A. G. It appears to me that the word liberties means the districts.

Lord TENTERDEN, C. J. I think not; the phrase, as well within liberties as without, is well known. The case in *Style* must have been decided when every Jury must consist of a certain number of hundredors; but I think, that as the law now stands, the sheriff must be directed to summon a Jury from the body of the county. The words "place or places" following "shires," must mean places analogous to shires, such as towns and cities; and as I cannot find in this act that the word "place" is ever put to denote the district for which the Commissioners are appointed, my strong opinion is, that the Jury must come *de corpore comitatus*; and that the Commissioners had no right to limit the sheriff in the way they have done (b). I think the plaintiff is entitled to a verdict.

Verdict for the plaintiff.—Damages, 3*l.* 6*s.*

*71] **Tindal*, S. G., and *Brodrick*, for the plaintiff.

Scarlett, A. G., *Gurney*, and *Curwood* for the defendant.

[Attornies—C. H. Pulley, and J. W. Unwin.]

(a) *Style*. 185. 191. 132.

(b) In the marginal note of the case of *Res v. The Commissioners of Sewers of Somerset*, 7 Ea. 71, it is said, that "By the stat. 23 Hen. 8. c. 5, the Jury by whom a presentment is made to Commissioners of Sewers, concerning what lands are within a level, and subject to a certain rate, ought to be summoned by the Sheriff from the body of the county, in pursuance of a precept directed to him from the Commissioners for that purpose." However, that point is by no means expressly decided there. A Jury was so summoned, and the Commissioners sent them away, and the presentments were made by standing Juries who acted for life, and of whom the Sheriff only summoned the foremen; and Lord *Ellenborough*, on this point, only said, "How it happened that a legal Jury summoned by the Sheriff from the body of the county were dismissed, and other vicious Juries substituted in their place; the Jurymen of which vicious Juries are also charged with having entered into a previous combination to make certain presentments, I shall not at present inquire; but any thing more alien from judicial proceedings than these, I never saw." "The Juries were not summoned by the Sheriff; the precept from the Commissioners to the Sheriff was, to summon the foremen of the Juries; and the return of the Sheriff is, that he has returned the foremen. There is no return of the Jurymen themselves. That, therefore, is not pursuant to the act of Parliament, which at any rate requires the presentment to be made by a *disinterested Jury* returned by the Sheriff, and not by a body alien altogether to the jurisdiction."

WARREN v. DIX.—*cor.* Lord ELLENBOROUGH. (1805.)

A Jury, impaneled to inquire and present at a Court of Commissioners of Sewers, presented, that A. was benefited by the Sewers; and he received a summons to show cause why he should not pay; he neglected to traverse the presentment, and a distress was levied for the amount of the rate: Held, at *Nisi Prius*, that these facts were a justification in an action of trespass for taking the distress, as the presentment, if duly made, and not traversed, justified the Commissioners in issuing the warrant of distress.

The presentment need not contain the name of every person benefited; if it find "All Fore Street" to be benefited, that is enough to include every one having a house there; and any one so having a house might traverse such presentment, he stating in his traverse, that his property is so situated, and that he is aggrieved by the presentment.

The warrant of distress need not recite the presentment.

The defendant is not entitled to recover his treble damages, under the stat. 23 Hen. 8. c. 5. s. 12, in case of a verdict in his favour, or a nonsuit, unless he claims them on the record.

TRESPASS for taking the plaintiff's goods. Pleas—Not guilty, and justification, that the supposed trespass was committed by the authority of a Commission of Sewers, the plaintiff not paying the sum of 1*l.* 17*s.* 6*d.* which was duly assessed upon him, by virtue of a certain act of Parliament, passed in the reign of King Henry the 8th. Replication—*De injuria*. The plaintiff was an inhabitant of Fore Street, Limehouse, and had a house, &c. there. The defendant acted under the Commissioners of Sewers for the Tower Hamlets.

The trespass was proved.

*Gibbs, S. G. There is in this case a presentment of a Jury, that the lands now in question are benefited by this sewer; and in consequence of that presentment, which has never been traversed, the Commissioners have issued their warrant, and it would be a most extraordinary thing, if the Commissioners, who are to act upon the presentment of a Jury, could have an action of trespass brought against them, for that which they have done under such circumstances. The plaintiff might have traversed the presentment, if he was aggrieved by it; but he has not done so.

Lord ELLENBOROUGH, C. J. The mode which the law affords to the Commissioners to be informed of their duty, is by the presentment of a Jury, and that is an authority for them to act upon; and there is an opportunity of traversing that presentment, if any one is injured by it.

Perk for the plaintiff. The warrant of distress recites nothing of this presentment.

Gibbs, S. G. Nor need it.

Lord ELLENBOROUGH, C. J. I think really that this presentment, if duly made, is an answer to this action.

The presentment was put in. It did not mention the plaintiff by name, but only stated that "all Fore Street" was benefited by the sewer.

Lord ELLENBOROUGH, C. J. One thing peculiar to this statute is, that the defendant is to recover treble damages, by reason of his wrongful vexation in that behalf, with his costs; and these damages are to be assessed by the same Jury.

Erskine, for the plaintiff. The Commissioners are not bound to tax every one who is in the presentment. There is still a jurisdiction vested in them by law, to exercise their own judgment in rating and taxing those who have been previously assessed by the Jury; and besides, the plaintiff's name is not mentioned in this presentment.

Lord ELLENBOROUGH, C. J. "All Fore Street," are the words found in this presentment; and as he lives there, these words, in fair description, comprehend him. The question then is, whether the Commissioners are not fairly protected under those means which the law has appointed for informing their judgment. That is, the presentment of a Jury; and if that Jury had formed any erroneous judgment, their presentment might have been traversed; which has not been done in this case.

Erskine, for the plaintiff. Could we traverse it, my Lord, when we were not named in it?

Lord ELLENBOROUGH, C. J. Oh yes; the plaintiff might have described himself as the occupier of land so situated, saying he was aggrieved by virtue of that presentment assessing him in a certain sum, on the ground that he received benefit from that sewer, and that he was ready to satisfy a Jury, that he received no such benefit from it.

Erskine. If this is the law, my Lord, and if the presentment of a Jury be conclusive against all those who are included in it, then I say, that it is absolutely necessary that there should be a summons, to show cause why the party should not pay, with notice of the presentment on which the taxation is founded; the warrant of the Commissioners ought to recite that a presentment has been made.

Garroo, for the defendant. In this case, there was the very summons that it is said there ought to have been.

Lord ELLENBOROUGH, C. J. If there was a summons, though it does not recite the presentment of the Jury, I think it would be sufficient.

Erskine. Does your Lordship think that the authority of the Commissioners is founded, in every particular instance, on the presentment of the Jury, so that the party has no action against the Commissioners, and that they cannot be wrong doers?

Lord ELLENBOROUGH, C. J. They might be wrong doers, as the plaintiff might not have land; he might show that he did not come within the operation of the act. The question whether such a sewer is of advantage to a man, so as to render him liable to be rated, is a question for the consideration of a Jury, under the direction of the Commissioners; and after the Jury have duly made their presentments, the Commissioners are to proceed to enforce them, if the matter so found be not traversed; for if it be not traversed, it is conclusive, at least it

would render the party liable to taxation; and if there were any collusion between the Jury and the Commissioners, they are liable to be prosecuted criminally.

The presentment was dated 24th March, 1803; and the precept to the Sheriff was issued on the 13th July, 1802.

*74] *Lord ELLENBOROUGH, C. J.* The issuing of the precept is long antecedent to the presentment. It will be a question whether that sort of presentment by a Jury is agreeable to the act of Parliament.

Gibbs, S. G. 'His is a continuing business.

Lord ELLENBOROUGH, C. J. Yes; they seem to have taken up one part one day, and another part another day, and they have been employed by continuation, in different parts of this business. If I find that this Jury, convened in July, proceeded by adjourned meetings to different parts of the business, I should think it sufficient; but if I find them going on year after year, I think they cannot do that.

Erskine. My Lord, considering the novelty of this point—

Lord ELLENBOROUGH, C. J. I shall reserve the whole. It will be as well to make a case of it. It is a matter of some novelty.

Gibbs, S. G. Under the act of Parliament, it will be necessary for us to have some damages found for the defendant.

Lord ELLENBOROUGH, C. J. (Having referred to the statute, 23 Hen. 8, c. 5.) This, to be sure, is very singular; but I do not see how I can give the defendant damages, who makes no claim of them on the record, and therefore I do not wish to introduce such an anomaly.

Gibbs, S. G. If judgment is given for the defendant, I hope that your Lordship will certify that this was an action brought against the Commissioners of Sewers.

Lord ELLENBOROUGH, C. J., directed a verdict for the plaintiff for 1*s.* damages, subject to a special case, which was never argued, as the matter was compromised.

*75]

*MEAGOE v. SIMMONS. Dec. 15.

The general rule is, that no paper can be put into the hand of a witness to refresh his memory, which is not of his own handwriting, therefore, if he is asked whether he has not been imprisoned in France, the counsel asking this cannot put into his hand an authenticated copy of the sentence of the French Court.

If in action on a bill, it has been opened, that the bill in question, at the same time with another bill, was usuriously discounted by the plaintiff, and after a *primâ facie* case of usury made out, a witness, who is called to disprove it, is asked as to some thing he has said respecting a trial relative to the other bill, this is not a matter so far collateral, that the other side may not call a witness to contradict him as to what he said. If in an action on a bill the plaintiff's counsel make out a *primâ facie* case, and the defendant's counsel proves a case of usury, and, after the plaintiff has called a witness in reply to deny the usury, a witness be called to contradict the plaintiff's witness in reply, the defendant's counsel is entitled to observe on the plaintiff's evidence in reply, and on the contradiction; and the plaintiff's counsel then has a general reply.

ASSUMPSIT by the plaintiff as the indorsee against the defendant as the acceptor of a bill of exchange for 1000*l.*, drawn by Augustus De Lisle.

The plaintiff relied on the formal proofs. The defence was, that the plaintiff, when he discounted the bill, received more than five *per cent.* for so doing.

To prove the usury, M. De Lisle was called. In cross-examination, he was asked, whether he had not been sentenced to two years' imprisonment by a French Court of Justice? This he would not admit; and, for the purpose of refreshing his memory, the plaintiff's counsel put into his hand the sentence of the French Court.

Scarlett, for the defendant, objected that the witness could not be allowed to refresh his memory from any paper not of his own handwriting.

Lord TENTERDEN, C. J. That is certainly the usual course. This document may be made evidence in another way.

The witness gave the paper back without looking at it.

For the plaintiff, a witness named Coates was called in reply, to disprove the usury. He was cross-examined as to something he had said relative to the trial of a former action, which action was between the same parties, on a precisely similar bill, which it was alleged had been discounted by the plaintiff at

the same time as the bill which was the subject of the present action, the plaintiff taking more than five *per cent.* on each. The witness denied the conversation imputed to him.

**Scarlett*, A. G., for the defendant, wished to call a witness to prove that Coates had said what was imputed, relative to the trial of the former case. [76]

Gurney, contra. As any thing respecting the trial of the former cause must be a collateral matter, the defendant's counsel must take the answer, and is not at liberty to call witnesses to contradict Mr. Coates.

Lord TENTERDEN, C. J. If the conversation was as to a collateral matter, it could not be asked; but as it is respecting another bill which was discounted at the same time, and under the same circumstances, I do not think it is collateral matter.

The witness was examined to contradict Mr. Coates.

In this case the plaintiff's counsel had opened and proved the bill. The defendant's counsel opened a defence of usury, and called witnesses to prove it; witnesses were then called by the plaintiff, in reply, to disprove the usury; and a witness was after that called for the defendant, for the purpose of contradicting one of the witnesses in reply. The defendant's counsel then replied on the evidence given in reply, and on the contradiction given to a part of that evidence, and the plaintiff's counsel then made a general reply (a).

Verdict for the plaintiff.

Gurney and *Parke*, for the plaintiff.

Scarlett, A. G., *Chitty*, and *Kelly*, for the defendant.

(a) In the case of *Goodtitle* dem. *Revett v. Braham*, 4 T. R. 496, which was a trial at bar, the lessor of the plaintiff, who claimed as heir at law, proved his pedigree and stopped. The defendant set up a new case which the plaintiff answered by evidence which ultimately went to the Jury. The Court held, that the defendant should have the general reply.

In the case of *Essex v. Bignold*, 4 D. & R. 70, it was held, that if the defendant's counsel open mere facts, but call no witnesses, the plaintiff's counsel will be still entitled to the general reply. See *Fairlie v. Denton*, *post*, p. 103.

*ADJOURNED SITTINGS IN LONDON, AFTER MICHAELMAS TERM, 1827. [77]

BEFORE LORD TENTERDEN, C. J.

GRAMMOND v. CROUCH. Jan. 8.

If a certificated conveyancer induce a creditor of a bankrupt to employ him in investigating a bankrupt's affairs, by representing himself to be an attorney and solicitor, he is not entitled to recover any thing for his trouble: and even, if he paid fees to counsel in the course of the investigation, he cannot recover them of his employer as money paid, laid out, and expended.

ASSUMPSIT.—The first count of the declaration was on a special agreement, that, in consideration that the plaintiff would investigate the affairs of one *Parsons*, a bankrupt, the defendant, and certain other persons who signed this agreement, would each of them pay an equal share of the reasonable charges

to be made by the plaintiff for so doing. There was also a count for work and labour, as a certificated conveyancer (a). Plea—General issue.

The plaintiff was a certificated conveyancer; and it appeared, that the defendant and others, being creditors of Parsons, a bankrupt, signed a resolution, by which they agreed that an investigation should be made of the bankrupt's affairs; and they thereby empowered the plaintiff to take such steps as he should think necessary; and each of them agreed to pay him an equal proportion of the reasonable charges to be made by him. It was proved, that the plaintiff waited on various persons to acquire information respecting the state of the bankrupt's property, and also attended Mr. Rose, the barrister, to consult him on the propriety of presenting a petition to the Lord Chancellor, to stay the allowance of the *bankrupt's certificate. However, it appeared from the cross-examination of one of the plaintiff's own witnesses, that the plaintiff represented himself in the business as an attorney and solicitor.

Lord TENTERDEN, C. J. I am quite clear that the plaintiff cannot recover. His own witness proves that the plaintiff held himself out as an attorney and solicitor; and besides that, I see his bill is drawn out exactly like an attorney's bill—Attendances, 3s. 4d. and 6s. 8d., and so forth.

Denman, C. S. We have proof of the plaintiff's having paid Mr. Rose his fee; and I submit that at least we may recover that.

Lord TENTERDEN, C. J. I think not. The plaintiff held himself out to be an attorney, and induced the defendant and the other creditors to employ him by means of a misrepresentation of his own situation. The plaintiff must be called (b).

Nonsuit.

Denman, C. S., and Chitty, for the plaintiff.
Gurney and Kelly, for the defendant.

[Attornies—Constable & K., and Pope.]

(a) It was at one time considered, that a certificated conveyancer could not recover his fees in an action; but in the case of *Poucher v. Norman*, 5 D. & R. 648, the Court of King's Bench held, that a certificated conveyancer might maintain an action for his fees the same as a surgeon or an attorney, overruling the case of *Jenkins v. Slade*, ante, vol. 1, 270.

(b) See the case of *Steed v. Henley*, ante, Vol. 1, p. 574.

*79]

*MEUX et al. v. HUMPHRIES. Jan. 9.

A brewer, who supplies beer to a public house, cannot charge any person as a primary debtor but the person licensed to keep the house: and if beer be so supplied on the credit of a person not licensed, the brewer cannot recover against such person, on the ground that it is a fraud on the Excise.

ASSUMPSIT by the plaintiffs as payees against the defendant as the maker of a promissory note for 317l. 19s. 6d. There was also a count for goods sold. Plea—General issue.

It appeared, that the consideration of the note was beer supplied by the firm of Messrs. Meux & Co. the plaintiffs, for a public-house called the Joiners' Arms. The beer was supplied on the credit of the defendant; but one of the witnesses stated, in cross-examination, that the person licensed to keep the Joiners' Arms as a public-house, and who in fact did keep it, was Mrs. Sessa, the niece of the defendant.

Lord TENTERDEN, C. J. I am clearly of opinion, that the brewers cannot

charge any one as their debtor, in the first instance, except the party who is licensed to keep the house, because it is a fraud on the Excise. The brewer may hold any person, who is not licensed, liable as a collateral security, but not as the primary debtor.

The license was not in Court; and after some other parts of the case were gone into, the parties agreed upon a compromise; and

A juror was withdrawn.

F. Pollock, and *Chitty*, for the plaintiffs.

Scarlett, A. G., and *Platt*, for the defendant.

[Attornies—*Holmer*, and *Sandom*.]

*SHUTE et al. v. ROBINS et al. Jan. 10.

[80]

If a bill drawn by a banker in the country, on a banker in town, in favour of A. payable after sight, be indorsed by A. to the defendants, who indorse to the plaintiffs seven days after the date of the bill, and the plaintiffs delay presenting it for acceptance for four days; it will be left to the Jury to say whether the plaintiffs have been guilty of unreasonable delay, and in considering this, the Jury may infer, from the defendant himself having kept the bill so long unaccepted that it is not the course of business to present such bills for acceptance immediately after the party receives them.

Assumpsit by the plaintiffs as indorsees, against the defendants as indorsers, of a bill of exchange for 100*l.*, dated the 12th day of November, 1825; payable 20 days after sight. The bill was drawn at Plymouth by Sir W. Elford & Co., bankers there, on Messrs. Barnett & Co., bankers in London, in favour of Mr. William Couling, who indorsed it to the defendants, by whom it was indorsed to the plaintiffs.

The facts proved were these:—The plaintiffs were distillers at Bristol, and the defendants bankers at Liskeard. Mr. Couling, the payee, lived at St. Germans, which is 12 miles from Liskeard, the latter place being 20 miles from Plymouth. The plaintiff's traveller, Mr. Bezley, being at Liskeard, and wishing to have a bill payable in London, in exchange for provincial cash notes, on Thursday, the 17th of November, 1825, received this bill from the defendants just as he had on other occasions received similar bills; and it being his custom to transmit bills to his employers, the plaintiffs, only once a week, he did not transmit this bill to the plaintiffs till the ensuing Thursday, November the 24th. This bill, therefore, reached them, at Bristol, on Friday the 25th, after the London post had gone out. It appeared that there is no post from Bristol to London on Saturdays; and on Tuesday, the 29th of November, the bill was paid by the plaintiffs to Messrs. Stuckey & Co., their bankers, at Bristol, to be transmitted to London. On Thursday, the 24th of November, the bank of Sir W. Elford & Co., at Plymouth, stopped payment; and when this bill was presented for acceptance on the 1st of December, Messrs. Barnett refused to accept it: and it was proved that they had refused to accept any bill of Sir W. Elford & Co., presented on or after Monday, the 28th of November; and that the last day on which Messrs. Barnett & Co. accepted bills drawn on them by that firm was Saturday, the 26th of November.

**Gurney*, for the defendants, on this evidence contended that the delay [81] on the part of the plaintiffs' agent, Mr. Bezley, in transmitting the bill, was such laches on the part of the plaintiffs, as to exonerate the defendants, the indorsers; for that if Mr. Bezley had transmitted the bill to his employers, on the day after that on which he received it, namely, the 16th of November, it

would have arrived in London in time to have been accepted by Messrs. Barnett & Co., as they accepted all such bills presented on or before the 26th; and that if proper diligence had been used, this bill might have got to Bristol, so as to have been forwarded from that place to London, on Monday, the 21st, and have been presented on Tuesday, the 22d; and if it had been presented on that day, or indeed on any day up to the 26th inclusive, it was in proof that it would have been accepted in due course, by Messrs. Barnett.

Scarlett, A. G., in reply. The most that can be alleged against the plaintiffs, is a delay of only four days; and this delay is said to be such laches as will discharge the indorsers. Our traveller receives the bill on Thursday the 17th; he was not bound to send it till the 18th, which was Friday, and it then could not arrive at Bristol till the Saturday. The bankers at Bristol could not have forwarded it from that place till Monday the 21st, and it could not arrive in London till Tuesday the 22d; now as the bankers in London were not bound to present it till the next day, which was Wednesday, they could not by the greatest diligence have presented this bill for acceptance, more than four days antecedent to the time when Messrs. Barnett ceased to accept.

Lord TENTERDEN, C. J. The bill could not have got to London till Tuesday the 22d; and I go with you in your proposition, that the party need not present for acceptance on the very day, on which he receives the bill.

*82] *Scarlett*, A. G. Now what was the conduct of the defendants themselves? This bill bears date the 12th of November, and as it is not proved when it was indorsed, and is proved that Mr. Couling lived only twelve miles from the defendants, I have a right to assume that it was indorsed on the day on which it bears date. The defendants have it in their possession till the 17th, and yet they say that we are to lose our right to sue on the bill by reason of a delay of only four days. The question is, whether there is so much delay as will prevent us from recovering. Now, if there is, the defendants have contributed to it by their act, they being guilty of still greater delay than we. However, I do not mean to accuse them of neglect, and I only mention this to show that it is not expected that a holder of a bill of this sort, should send it for acceptance on the day he receives it, or on the day after. In the case of *Fry v. Hill* (a) it was held, that a bill payable after sight, must be presented in a reasonable time. I therefore submit, that we were not guilty of such unreasonable delay as will prevent us from recovering against the defendants.

Lord TENTERDEN, C. J. (In summing up.) In this case the defendants contend that there was such unreasonable delay in the presenting of this bill for acceptance, as will prevent the plaintiffs from recovering in the present action. This is, I think, a mixed question of law and fact, and to decide it, we must look at the bill itself, and must also take into consideration the ordinary practice relative to such bills. This bill is drawn by bankers in the country, upon bankers in London; and as this very bill of the date of the 12th of November, is paid by the defendants to the plaintiffs' traveller as late as the 17th, you may reasonably infer that it is neither expected nor considered necessary to present *83] such a bill as this so speedily as if it were the bill of any private party; in short, that bills of this kind are considered as a part of the circulation of the country: and the best advice that I can give you is, that, taking into consideration the nature of the bill itself, and the time the defendants themselves had kept it, you will say whether, according to the ordinary course of business, you think that the plaintiffs have been guilty of such unreasonable delay in presenting this bill for acceptance as will discharge the defendants as the indorsers of it. If you think the plaintiffs have been guilty of such unreasonable delay, you will find for the defendants, but if you think, under all the

circumstances, that they have not, and adopt my suggestion, you will find for the plaintiffs.

Verdict for the plaintiffs.

Scarlett, A. G., and *Chitty*, for the plaintiffs.

Gurney, and *Coleridge*, for the defendants.

[Attornies—*Evans & S.*, and *Cooke*.]

See the cases of *Muilman v. D' Eguino*, 2 H. B. 565. *Goupy v. Harden*, 7 Tunt. 160. *Fry v. Hill*, 7 Tunt. 397.

MARTIN v. BRIDGES and ELMORE. Jan. 10.

If one of two partners has become bankrupt, and obtained his certificate, and after that he acknowledges a debt due to the plaintiff by his partner and himself; this acknowledgment is not sufficient to take the case out of the statute of limitations, in an action against him and his partner for such debt, if his partner plead the statute of limitations, and he plead his bankruptcy.

MONEY had and received. The defendant Bridges pleaded—*First*, the general issue—*Second*, the statute of limitations. The defendant Elmore pleaded his bankruptcy in the year 1819.

Gurney opened, that the plaintiff had been a seaman on board the ship *Nimrod*, of which the defendants had become owners. That this ship had been, in the year 1811, sent out to the Southern whale fishery, at which time she *belonged to a person of whom the defendants had purchased her while in the South Seas. That the plaintiff was to receive a 95th share of the net [†84 profits of the voyage; and that, while in the South Seas, two prizes were taken by the *Nimrod*. And that in the year 1813 an account was made out, on which the plaintiff was paid by the defendants a sum equal to his share of the proceeds, deducting the duties and expenses; but that, in the year 1814, the defendants petitioned the Crown for a remission of the duties on the cargo of the *Nimrod*, on account of the meritorious conduct of the crew in respect of the prizes; and in the course of that year the duties, amounting to about 14,000*l.*, were remitted by the Crown, and paid to the defendants. Of this sum the plaintiff claimed a 95th share. To take the case out of the statute of limitations, the plaintiff's counsel relied on an acknowledgment by the defendant Elmore, which, it was contended, would be good against both the defendants, as they were partners.

LORD TENTERDEN, C. J. Was the acknowledgment after the bankruptcy of the defendant Elmore?

Gurney. Yes, my Lord.

LORD TENTERDEN, C. J. I would put it to you, whether an acknowledgment made by a person who is not himself liable at the time when he makes it, is sufficient to take the case out of the statute of limitations, so as to charge his partner.

The certificate of the defendant Elmore was put in, and by that it appeared, that he became bankrupt in the year 1819.

Gurney. It was a matter of option whether Mr. Elmore would rely on his certificate or not.

LORD TENTERDEN, C. J. I must presume that every man will set up a discharge, if he has one; and you see that the defendant Elmore, [†85 does in fact rely on his certificate.

Platt. A promise by a bankrupt, after his bankruptcy, to pay a debt due

before, must now be in writing; but before the statute 6 Geo. 4, c. 16, a verbal promise would do; and if Mr. Elmore has made such a promise he will be liable.

Lord TENTERDEN, C. J. Mr. Gurney has not opened any express promise.

Gurney. I am in a condition to prove that Mr. Elmore said, that the money had been received, and that the men ought to have shares of it.

Lord TENTERDEN, C. J. I am afraid there is nothing to take the case out of the statute.

Nonmit.

Gurney, and Platt, for the plaintiff.

Scurlett, A. G., for the defendants.

[Attornies—E. Jacob, and Evans & S.]

TUCKER and another, Assignees of HICKMAN, a Bankrupt, v. BARROW, Gent. one, &c. Jan. 11.

Under the 81st sect. of the bankrupt act, 6 Geo. 4, c. 16, a *bond fide* payment made by a bankrupt more than two months before the issuing of the commission, the receiver having no notice of an act of bankruptcy, is protected, and the fact of his knowing the bankrupt to be in difficulties makes no difference. An admission by a party in his examination before Commissioners of bankrupt, that he has received a sum of money belonging to the bankrupt after an act of bankruptcy, is not evidence of an account stated with the assignees; and the most that an examination before the Commissioners does, is to make out a *prima facie* case for the assignees, that the party has so much of the bankrupt's money in his hands so as to call on him for an explanation; but if there be no count for money had and received to the use of the assignees, they must be nonsuited. Whether the act of bankruptcy, by lying in prison 21 days, relates to the first of the 21 days, or only to the last of them?—*Quere*.

ASSUMPSIT.—The first count of the declaration was for money lent by the bankrupt; *Second*, money paid, laid out and expended by the bankrupt; *Third*, money had and received to the use of the bankrupt; *Fourth*, on an account stated with the bankrupt; *Fifth*, a count for money lent, money paid, money had and received to the use of the bankrupt, and on an account stated with him, laying a promise, after the bankruptcy, to pay the plaintiffs as assignees; *Sixth*, an account stated with the plaintiffs, as assignees. Plea—General issue.

The commission was dated May 23d, 1826; and the act of bankruptcy relied on was, a lying in prison from the 30th of January, 1826, to the 16th of June in the same year.

The plaintiff's counsel suggested that it was doubtful whether, under the 5th sect. of the bankrupt act, 6 Geo. 4, c. 16, the act of bankruptcy, by lying in prison, related to the first of the twenty-one days of the lying in prison, as under the former statutes, or to the last of the twenty-one days only.

Lord TENTERDEN, C. J. I will reserve that point if it become material (a).

(a) By the stat. 6 Geo. 4, c. 16, s. 5, it is enacted, "That if any such trader having been arrested or committed to prison for debt, or on any attachment for non-payment of money, shall, upon such or any other arrest or commitment for debt or non-payment of money, or upon any detention for debt, lie in prison for twenty-one days; or, having been arrested or committed to prison for any other cause, shall lie in prison for twenty-one days after any detainer for debt lodged against him and not discharged, every such trader shall be thereby deemed to have committed an act of bankruptcy; or if any such trader having been arrested, committed, or detained for debt, shall escape out of prison or custody, every such trader shall be deemed to have thereby committed an act of bankruptcy from the time of such arrest, commitment, or detention. Provided, that if any such trader shall be in prison at the time of the commencement of this act, such trader shall not be deemed to have committed an act of bank-

*To show that a sum of 75*l.* 9*s.*, belonging to the bankrupt, was paid into the hands of the defendant on the 10th of February, 1826, his examination before the commissioners of bankrupt was read. It contained (*inter alia*) the following statement:—

Qu. Have you received any money on account of the bankrupt?

Ans. Yes; it appears by the auctioneer's account that I received the sum of 75*l.* 9*s.* on account of the bankrupt.

Qu. When was this sum received by you?

Ans. I believe about the 10th of February last.

Qu. Have you any doubt that you received a sum of 75*l.* 9*s.* on the 10th of February?

Ans. I have very little doubt of it.

Lord TENTERDEN, C. J. This money is received more than two months before the issuing of the commission, and under the 81st sect. of the stat. 6 Geo. 4, c. 16 (a), *bond fide* transactions, two months before a commission issues, are good unless the party has notice of a prior act of bankruptcy; knowledge of the party's insolvency will not do. *And there is no act of bankruptcy [*88 applicable to this case, unless the first day of the imprisonment is the time at which we are to consider the act of bankruptcy as committed: and if that be so, the plaintiffs cannot recover in this action, as there is no count for money had and received to the use of the assignees.

Deacon, for the plaintiffs. Does your Lordship think that the 81st sect. of the bankrupt act extends to payments made by the bankrupt?

Lord TENTERDEN, C. J. The legislature uses the word "dealings," and I do not know of any larger term that could have been used. Knowing the party to be in difficulties is nothing at all under this act, if the transaction is not within two months of the suing out of the commission.

For the defendant it was proved, that he had, on the 10th of February, received the sum of 75*l.* 9*s.*, which sum was the proceeds of the sale of the bankrupt's goods; and that he paid the bankrupt's rent and a sum due to himself out of it, and then handed the residue to the bankrupt, while in prison.

On this evidence Lord TENTERDEN, C. J., directed a

Nonsuit.

F. Pollock, and *Deacon*, for the plaintiffs.

Brougham, and *Chitty*, for the defendant.

[Attornies—*Stevens, W. & W.*, and *Squire*.]

ruptcy by lying in prison, until he shall have lain in prison for the period of two months." The doubt is, whether the words in italics, beginning *every such trader*, extend over the whole clause, or whether they relate only to persons arrested, committed, or detained for debt, who shall escape out of prison or custody.

(a) By that section it is enacted, "That all conveyances by, and all contracts and other dealings and transactions by and with any bankrupt, *bond fide* made and entered into more than two calendar months before the date and issuing of the commission against him, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, *bond fide* executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed: provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not, at the time of such conveyance, contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed: Provided also, that where a commission has been superseded, if any other commission shall issue against any person or persons comprised in such first commission, within two calendar months next after it shall have been superseded, no such conveyance, contract, dealing, or transaction, execution or attachment, shall be valid, unless made, entered into, executed or levied more than two calendar months before the issuing of the first commission."

*BEFORE LORD TENTERDEN, C. J., BAYLEY, HOLROYD, AND LITTLE-DALE, Js. Jan. 23.

In Banc.

F. Pollock now moved for a new trial, on the ground that the examination of the defendant before the commissioners (above set forth) was evidence upon the count upon an account stated with the assignees; and he contended that an admission of the receipt of money belonging to a bankrupt after an act of bankruptcy, was evidence of a subsisting debt due to such bankrupt's assignees; and he cited the cases of *Knowles v. Michell* (a), and *Higmore v. Primrose* (b).

BAYLEY, J. It seems to me that this case is distinguishable from both the cases cited. I agree, that if there be an acknowledgment of a subsisting debt, that is evidence on the account stated. In one of the cases cited there was an acknowledgment of a specific sum of nine guineas being due, and in the other the acknowledgment went specifically to a bill of exchange. It is true that the defendant says, in this case, that he has received a sum of money, but he does not acknowledge it as a subsisting debt due to the assignees, nor say, that he is liable to pay any thing to them; and if that be so, I cannot say, that he accounted with the assignees, and was found in arrear.

*HOLROYD, J., concurred.

*90] LITTLEDALE, J. I should have much doubt whether any thing said in an examination before commissioners of bankrupt would be evidence on the account stated. However, it may be evidence of money had and received. The party is brought there by compulsion, and he is compelled to answer questions, which is nothing like accounting and being found in arrear. I think the admission, to support an account stated, must be either to the person to whom the money is owing, or some one sent by him. Looking at the form of the count on an account stated, it is not at all suitable to the present evidence.

LORD TENTERDEN, C. J. The most that an examination before commissioners of bankrupt does, is to make out a *prima facie* case for the assignees, that the defendant has so much of the bankrupt's money in his hands, so as to call on him for an explanation.

Rule refused.

(a) 13 Ea. 249. In this case the plaintiffs declared for goods sold and upon an account stated. The action was brought for the price of trees sold when growing; but as it was proved, that the defendant admitted that a sum of nine guineas was due to the plaintiff, the Court held that the plaintiff was entitled to recover that sum on the account stated.

(b) 6 M. & S. 65. In this case it was held, that the acceptor's admission of his liability to pay the plaintiff the amount of a bill of exchange, of which the latter was indorsed, was sufficient to enable the plaintiff to recover on the account stated, there being a variance as to the count on the bill.

BEDFORD et. al., Assignees of COHEN, a Bankrupt, v. PERKINS. Jan. 11.

A., being a trader, before any act of bankruptcy, directed his broker, who had authority to distrain for rents due to him, to pay a certain sum to B. in satisfaction of a debt, and the broker, *tand fide*, agreed with B. to pay him as soon as he received the rents, and after this A. became bankrupt: Held, that the assignees of A. could not recover this sum from the broker, though he did not in fact pay it over to B. till after the commission issued.

MONEY had and received by the defendant to the use of the assignees. Plea—General issue.

It appeared that the bankrupt, who was the owner of certain houses, had
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given the defendant, a broker, authority to distrain on the tenants of those houses for rent. The bankrupt owed a person named Hudeveurk a sum of money; and the latter called on the bankrupt to pay it; *but instead of [91] doing so, the bankrupt directed the defendant to pay him out of the rents; and the defendant told Hudeveurk that he had not the money then, but agreed to pay him the amount as soon as he got the money from the tenants. All this occurred before Cohen, the bankrupt, had committed any act of bankruptcy. The defendant did not, in fact, pay over the money to, nor was it demanded by Hudeveurk before the suing out of the commission.

On the part of the plaintiff it was contended, that this was money had and received to the use of the assignees.

Scarlett, A. G., *contra*, argued, that as the transaction was *bonâ fide*, and as the defendant agreed to pay the sum to Hudeveurk, as soon as he received it, he was bound to do so; and therefore he never at any time held the money for the assignees.

Lord TENTERDEN, C. J. As this was a *bonâ fide* transaction, the question is, whether, if there had been no bankruptcy, Cohen could have recovered this money from the defendant. I am of opinion that he could not; and I think that what passed between the parties as to the paying it to Mr. Hudeveurk, is such an appropriation of it as will prevent the plaintiffs from recovering.

Verdict for the defendant.

Campbell and Hutchinson, for the plaintiffs.

Scarlett, A. G., for the defendant.

[Attornies—*Hutchison*, and In person.]

*MULLETT v. HUTCHISON. Jan. 12.

[92]

A paper, stating that the party signing it has certain bills in his hands, which he has "to get discounted, or return on demand," does not require an agreement stamp.

ASSUMPSIT.—The declaration stated, that certain bills had been indorsed by the plaintiff, and delivered to the defendant, which he undertook to procure to be discounted, or to return to the plaintiff. Breach—That the defendant did not get them discounted, and would not return them, but on the contrary thereof converted the said bills to his own use. Plea—General issue.

On the part of the plaintiff, an unstamped paper, signed by the defendant, was offered in evidence. It was in the following terms:—

"Sir,—I have in my hands three bills, which amount to 120*l.* 10*s.* 6*d.*, which I have to get discounted, or return on demand.

JOHN HUTCHISON,
6th June, 1826."

"To Mr. Mullett.

Kelley, for the defendant, objected, that by this paper the defendant agreed to do one of two things, *viz.* either to get the bills discounted, or to return them; and therefore it was not admissible in evidence without an agreement stamp. [93]

Fish, contra, relied on the case of *Tomkins v. Ashby* (a), *and con-

(a) 6 B. & C. 541. In that case the plaintiff had deposited money with the defendant, who gave a memorandum in the following terms:—

"September 25th, 1824.

"Mr. Tomkins has left in my hands 200*l.*"

It was objected that this paper ought to have borne a receipt stamp; but the Court held, that

tended, that the paper contained a mere acknowledgment that the defendant had the bills in his hands, but that, by the terms of it, the defendant did not agree to do any thing.

Lord TENTERDEN, C. J. I shall receive the paper in evidence; but I will give Mr. *Kelly* leave to move to enter a nonsuit.

Verdict for the plaintiff.

Fish, for the plaintiff.

Kelly, for the defendant.

[Attornies—*Clift & F.*, and *Thomas*.]

In the ensuing Term, *Kelly* moved, in pursuance of the leave given at the trial; but the Court refused the rule, being of opinion that the paper received in evidence was not an agreement, and did not require any stamp.

it did not require any stamp at all: and Lord *Tenterden* intimated, that the only receipts that required a stamp, were those which imported that something formerly due had been discharged; and his Lordship also said, that acts of Parliament, imposing duties, are to be so construed, as not to make any instruments liable to them, unless manifestly within the intention of the Legislature.

HILLYARD v. MOUNT. Jan. 12.

By a clause in the ship's articles of a South Sea whaler, the seamen serving on board were to lose their wages if they did not return with the ship to the port of London. After serving 27 months, some of the seamen were, with the consent of the captain, exchanged into another ship for others belonging to that ship: Held, that if these seamen lost their wages under the articles, they could recover a reasonable compensation for their services, on the count for work and labour.

DEB on ship's articles under seal, dated the 21st day of April, 1822, by which it was agreed, that the plaintiff should serve as a seaman on board the ship *Mary*, a South Sea whaler, of which the defendant was the owner, on a voyage to the South Seas, and that the plaintiff should receive a one hundred and fortieth share of the net proceeds of the cargo. The declaration then proceeded to state, that the plaintiff duly served, and that his share amounted to 94] 60 $\frac{1}{2}$ l. There were also counts for wages for *work and labour, and the money counts. The defendant pleaded the general issue "*nil debet*" to all but the special count; and to that he pleaded, that it was agreed by the ship's articles, that if any seaman did not return with the ship to the port of London, he should forfeit and lose his proportion of the proceeds of the cargo; and averred, that the plaintiff did not return with the ship to the port of London (a). Replication—That the plaintiff had license to quit the ship. Rejoinder—Denying the license.

It appeared that the plaintiff executed the articles, and performed his duty on board the ship *Mary* till the month of July, 1824, but that on the return of the ship after the active part of her voyage was completed, they, off the coast of Japan, met with the ship *Harlestone*, another whaler, outward-bound, and that

(a) There were seven other special pleas, and the general issue *non est factum* pleaded to the special count; but no question was raised on any but the plea above stated.

it was agreed between the captain of the *Mary*, and the captain of the *Harlestone*, that certain men of the *Mary* (of whom the plaintiff was one) should be exchanged into the *Harlestone*, and that the *Mary* should bring home some of the *Harlestone's* men who were sick : and it was proved, that before the plaintiff left the *Mary*, the captain stated, that he was discharged with his (the captain's) free will, and that he was not to lose his one hundred and fortieth share of the cargo, and that the captain sent his boat to convey the plaintiff on board the *Harlestone*.

The ship's articles were put in, and contained a clause as stated in the plea.

Brougham, for the defendant, was proceeding to argue that this was an answer to the present action.

Lord TENTERDEN, C. J. *Mr. Brougham*, you contend, that under these articles, if the plaintiff does not come home with the ship, whether he [95] quits her with leave or not, he loses all his wages. There is certainly a clause in the articles to that effect : however, the question is not raised on these pleadings, because the issue is taken on license or no license ; but still, taking that point to be in your favour, and taking it, that, by leaving the ship with the consent of the captain, the plaintiff loses his right to wages under the articles, I am most clearly of opinion, that he may recover a reasonable compensation for his services under the common counts contained in this declaration. It is true, that if the issue of license or no license is found for the plaintiff, you may move to enter up judgment *non obstante veredicto*, but then the other party may have their verdict entered on the count for work and labour ; for if the plaintiff does not recover under the ship's articles, he is most clearly entitled to a reasonable compensation for so many months' labour as he has performed.

Verdict for the plaintiff, subject to a reference as to the amount ; and the arbitrator was, on the face of his award, to raise the question, whether, as part of the rigging was cut away in a storm, the plaintiff was liable to general average.

Scarlett, A. G., and Comyn, for the plaintiff.

Brougham and Parke, for the defendant.

[Attornies—*Jones & H., and Cox.*]

See the case of *Train v. Bennett*, *ante*, p. 3.

*BENNETT v. WOMACK. Jan. 12.

[96]

A net rent is a sum to be paid to the landlord clear of all deductions ; and if one agree to take a lease at a net rent, he cannot object that the lease contains a covenant for him to pay the land and sewers-taxes.

What are usual covenants is a question of fact for the Jury, and not a question of construction for the Court.

ASSUMPSIT on a written agreement to take an assignment of a lease of a public-house. The first special count of the declaration averred that the plaintiff was ready to perform his part of the agreement, but that the defendant, not regarding, &c. would not accept the assignment. There were other special counts, and the money counts. Plea—General issue.

The agreement which was signed by both the parties, was in the following form :—

"This agreement witnesseth, that Charles Bennett, of Brook Hill, Clerkenwell, Victualler, doth agree to sell to William Womack, of Hoxton, the lease and

goodwill in trade, of the house and premises now occupied by him, known by the sign of the Coach and Horses, situate in Brook Hill aforesaid, for the sum of 275*l.*, as he holds the same, at the *net annual rent* of 27*l.*, for an unexpired term of at least eleven years and three quarters, from this time; and under *common and usual covenants*; and also such of his household goods, &c. &c.; and the said William Womack doth hereby agree to take a proper assignment of the said lease and premises as above described, *provided there are no other than common and usual covenants* contained therein; and that he will pay unto the said Charles Bennett, the said sum of 275*l.* for the same, &c. &c."

This agreement was dated on the 17th of January, 1827; and was to be carried into effect on the 1st of February, in the same year. It was proved that an abstract of the plaintiff's title was delivered on the 30th of January, and that, on the morning of the 1st of February, the defendant said that he repented of his bargain, and would not complete the purchase; and it was also proved, that he did not come to the place appointed during any part of the day.

*97] *Kelly*, for the defendant. By this agreement the "defendant only agrees to take an assignment with the common and usual covenants. Now, by the abstract delivered, it appears that the original lease contains a covenant by the tenant to pay the "land-tax, sewers-rate, and all other taxes, rates, duties, and assessments whatsoever." Now, the land-tax and sewers-rate are landlord's taxes, and a covenant by a tenant to pay them certainly cannot be considered usual. There is besides in the original lease a proviso for a re-entry in case the rent is in arrear for 15 days, or in case the premises should be used for any other trade than that of a licensed victualler. If this house had been used by a linen draper, and there had been a covenant that no other trade should be carried on there, it would be manifestly a covenant in restraint of trade; but this is worse still, because this house cannot be carried on as a victualling house, without a license, the granting of which is discretionary in the Justices.

Lord TENTERDEN, C. J. The question is, whether these are usual covenants in such a lease.

Kelly. In the case of *Church v. Brown (a)*, Lord Eldon says, "The safest rule for property is, that a person shall be taken to grant the interest in an estate which he proposes to convey, or the lease he proposes to make; and that nothing which flows out of that interest as an incident, is to be done away by loose expressions to be construed by facts more loose; that it is upon the party who has forborne to insert a covenant for his own benefit, to show his title to it; and that it is safer to require the lessor to protect himself by *express stipulation*, than for Courts of Equity to hold, that contracting parties shall insert *not restraints expressed by the contract or implied by law*, but such, more or less in number, as individual conveyancers shall from day to day prescribe as proper to be imposed *upon the lessee; and that all those restraints so *98] imposed from time to time, are to be introduced as the aggregate of the agreement." And I therefore submit, that any thing which goes to limit the enjoyment of the term, by the tenant, should be expressly stipulated for by the landlord.

Lord TENTERDEN, C. J. I have no doubt on the first objection. Here the landlord is to have a *net annual rent* of 27*l.*; now, that he will not have, unless the tenant pays the land-tax and sewers-rate. As to the covenant for re-entry for non-payment of rent, that is quite usual, though in some cases it is after a lapse of a greater, and in others a less number of days from the time of the rent becoming due. With regard to the stipulation, that no other business shall be carried on than that of a licensed victualler, I have some doubt, and I am ready to hear evidence on either side.

A clerk of the plaintiff's attorneys proved, that he was in the habit of seeing

a great number of public-house leases, and that this stipulation was contained in six leases out of every ten.

Kelly. I submit that, under the case of *Church v. Brown*, this is a question of construction for the Court, and not a question of fact for the Jury.

Lord TENTERDEN, C. J. I am clearly of opinion, that what is a usual covenant is a question of fact for the Jury. If there had not been the word "net," I should have been with the defendant on the first objection; a *net* rent means a sum clear of all deductions: and with regard to the other point, as it is proved that more than half the leases contain such a covenant, there being no evidence on the other side, I shall recommend the Jury to say that it is usual.

Verdict for the plaintiff.

**Scarlett*, A. G., and *Chilton*, for the plaintiff.

Kelly, for the defendant.

[*99]

[Attornies—*Vandercom & C.*, and *Mills*.]

In the ensuing term *Kelly* moved to set aside the verdict and enter a nonsuit, but the Court refused a rule.

YATES and another, Assignees of MARSHALL, a Bankrupt, v. CARNSEW. Jan. 14.

If a person who has numerous dealings with a bankrupt, on being examined before the Commissioners, does not bring his books with him, but, while under examination, consents that the accountant to the commission shall make extracts from them; these extracts cannot be used as evidence against him, without also reading his examination. If one buys goods of a bankrupt under such circumstances as will entitle his assignees to maintain trover for them, such buying is in itself a conversion, and the assignees need not adduce evidence of a demand and refusal. Upon the question, under the stat. 46 Geo. 3, c. 135 (repealed from the 1st Sept. 1825, by the stat. 6 Geo. 4, c. 16), whether a party dealing with a trader knew him to be insolvent; the Jury may infer such knowledge from the fact of the party buying goods of the trader to a great extent for a period of near two years, at prices more than thirty per cent. under prime cost.

TROVER for woollen cloths. Plea—General issue.

The commission of bankrupt which issued against Marshall was dated the 22d of November, 1824, and it was proved that he committed an act of bankruptcy on the 5th of January in that year.

The case on the part of the plaintiffs was, that the defendant had bought the cloths when he must have had a knowledge that Marshall was insolvent (a).

*It appeared that Marshall was an extensive dealer in woollen cloths, and that in almost every week during the year 1823, and also in the year 1824, up to the time of his bankruptcy, he bought cloths of the manufacturers, [*100]

(a) As this commission issued in the year 1824, and before the stat. 6 Geo. 4, c. 16, which came into operation on Sept. 1, 1825, the question in this case was on the stat. 46 Geo. 3, c. 135 (repealed by the stat. 6 Geo. 4, c. 16), which protected all payments and transactions with any bankrupt, *bona fide* made or entered into more than two calendar months before the issuing of the commission, unless the party had notice of an act of bankruptcy committed by the bankrupt, or that he was insolvent, or had stopped payment. The stat. 6 Geo. 4, c. 16, s. 81, considerably alters the law as it stood under the stat. 46 Geo. 3, c. 135. For that sect. see *ante*, p. 87, and the case of *Tucker*, assignee of *Hickman v. Barrow*, *ante*, p. 85.

and sold them, as soon as he received them, to the defendant, at prices much under prime cost, and under the market prices at that time. It was proved, that on one occasion, in the year 1823, Marshall bought certain pieces of cloth of the manufacturer at 67*l.* 18*s.*; and immediately afterwards sold them to the defendant for 382*l.* 11*s.*; and that, throughout their dealings in the year 1824, the sales of cloths to the defendant were at prices which were on an average 34*l.* 12*s.* 7*d.* *per cent.* lower than Marshall was to pay the manufacturers for them; and that those prices were very little more than fair prices for the mere wool in an unwrought state; but it was also proved, that the defendant paid for them in cash.

For the purpose of showing the different dealings between Marshall and the defendant, the latter was examined before the Commissioners of Bankrupt; on his examination he did not bring his books with him, but while under examination he consented that the accountant to the commission, and one of the clerks of the solicitor, should go and examine his books, and compare those parts of them which related to these transactions, with an extract of the bankrupt's books, which they took with them. They did so, and the plaintiff's counsel wished to call the accountant to prove, from this inspection of his books, what the dealings between Marshall and the defendant had been (the latter having had notice to produce his books).

Gurney, for the defendant, objected that the plaintiff's counsel ought not to be allowed to do this, without also reading the defendant's examination before the Commissioners of Bankrupt, because the books were examined at the defendant's counting-house, merely to save the trouble of producing them before the Commissioners.

*101] *Lord TENTERDEN*, C. J. I think I must consider it as all one transaction, and that if this account is made use of by the plaintiffs, the examination before the Commissioners must also be read.

The defendant's examination was read: it stated that the bankrupt had told him that he was selling the cloths at a profit, and that he was worth between 3000*l.* and 4000*l.*; and it also stated that the defendant believed Marshall to be a solvent man.

There was no evidence given of any demand of the cloths being made on the part of the plaintiffs, or of any refusal of the defendant to deliver them up.

Gurney, for the defendant, objected that there was no conversion, as no evidence had been given of any demand or refusal.

Lord TENTERDEN, C. J. It has been decided, I think, that the buying goods of a party who was not authorized to dispose of them is enough (*a*).

Gurney, for the defendant, addressed the Jury, and contended that the mere fact of a party selling his goods at low prices, could not be at all considered as conveying a knowledge that the seller of them was insolvent, for in the course of trade it often happened that a merchant of great opulence, having bought an article at a given price, and finding the market going against him, would sell at a loss, not only because he might fear that his loss would be greater if he waited, but also to get his capital again into a disposable state, so as to invest it in something else, *which might be more productive; and he relied on the *102] fact of the defendant's paying ready money, which he would not have done, if he had not been satisfied in his own mind that all was right; and he complained, that the effect of a verdict for the plaintiffs, would be to make the defendant pay for these goods twice over.

Lord TENTERDEN, C. J. (In summing up to the Jury). The question in this case is, whether the defendant must not, as a man of business, have known from the nature of these dealings with the bankrupt, Marshall, that the latter

(a) In the case of *Hurst v. Greenap*, 2 Stark. 306, *Lord Ellenborough* said, that the very act of taking goods from one who had no right to dispose of them, was in itself a conversion; and the Court of K. B. afterwards concurred in that opinion: see also the case of *Soames v. Watts*, ante, Vol. 1, p. 400.

was an insolvent man. We find Marshall selling for a period of nearly two years, at prices vastly below prime cost; and it is for you, as men of business, to say, whether the defendant could go on dealing with a man in this way for so long a time, without knowing that he was insolvent. There is no doubt, that, for the sake of getting ready money, great sacrifices are often made in one or two transactions, by solvent men, but the strength of this case on the part of the plaintiffs is, that there were not merely one or two dealings between these parties, but a continued series of them, both in the year 1823, and in the year 1824. If you think that the defendant at any time during those years, knew that Marshall was insolvent, from that time the dealings between them were all void. The plaintiffs now claim to recover the full value of the goods, and the defendant complains of hardship in having to pay for these goods twice over; but upon that I can only say, that those who deal with insolvent men, must be content to run that risk, and have only to thank themselves if such speculations do not always answer. However, as this is an action of trover, the damages are in your discretion, and you may find a verdict for such amount as you may think reasonable and proper, under the whole of the circumstances of this case.

Verdict for the plaintiffs.—Damages 3999*l.* 7*s.*

*Scarlett, A. G., Campbell, and R. V. Richards, for the plaintiffs. [*103]
Gurney, and F. Pollock, for the defendant.

[Attornies—C. Knight, and Sweet & Co.]

FAIRLIE v. DENTON and another, Gents. Two, &c. Jan. 16.

The plaintiff wrote a letter to the defendant, which the defendant did not answer. At the trial, the plaintiff's counsel called for it under a notice to produce, and wished to give evidence of its contents: Held, that such evidence was not admissible; but that if, by the letter, the plaintiff demanded a certain sum, so much only of the copy of it might be read as stated the sum demanded. If the defendant's counsel take an objection, and the plaintiff's counsel answer it, and in replying on the objection the defendant's counsel cite a case, the plaintiff's counsel will be allowed to observe on the case so cited.

MONEY had and received. Plea—General issue.

The plaintiff had sent a letter to the defendants, demanding a sum of money as due to him. But no answer had been returned by the defendants.

The plaintiff's counsel called for the letter under a notice to produce, with a view of reading it in evidence, as a part of their case.

Scarlett, A. G., for the defendants, objected, that an unanswered letter, written by the plaintiff, was not evidence in his own favour; for otherwise a party would only have to write a letter to make evidence for himself.

F. Pollock, *contra*. Certain things are stated in this letter, which the defendants might deny by answering it; and I submit that it is evidence, exactly the same as what is said verbally in the presence of a defendant is evidence against him, though he may make no answer.

Lord TENTERDEN, C. J. I am slow to admit that. What is said to a man before his face, he is in some degree called on to contradict, if he does not acquiesce in it; but the not answering a letter is quite different; and it is too much to say, that a man, by omitting to answer a letter at all events, admits the truth of the statements that letter contains. I am of opinion that this letter cannot be read. You may have that single line read, in which the *plain- [*104]

tiff makes a demand of a certain amount, but not any other part, which states any supposed fact or facts (a).

*105] *That line only of the letter, which contained a demand of the sum in question, was read.

In the course of the case, *Scarlett*, A. G., took an objection, which was answered by the counsel on the other side; but, in replying on the objection, *Scarlett* cited a case.

F. Pollock wished to observe on the case cited; but it was contended by

Scarlett, A. G., that he had no right to speak on the objection, after the counsel making it had replied.

Lord TENTERDEN, C. J. As a case has been cited in replying on the objection, I think that Mr. *Pollock* has a right to observe on that case (b).

Verdict for the plaintiff.

F. Pollock, and *R. V. Richards*, for the plaintiff.

Scarlett, A. G., and *Comyn*, for the defendants.

[Attornies—*J. & S. Pearce & Co.*, and In person.]

In the ensuing Term, *Scarlett*, A. G., obtained a rule *nisi* for a new trial, on the ground that the verdict was against evidence.

(a) It has been a question, on trials for high treason, how far papers found in the house of the party accused, are admissible in evidence against him; and the following extract from the trial of Mr. Horne Tooke, 25 State Tr. 120, respecting the admissibility of a letter, from a person named Cooper, which was found in his house, may be acceptable.

"Mr. Tooke. I do not know what papers may have been taken from my house; but are letters written to me to be produced as evidence against me?"

Lord Chief Justice Eyre. Being found in your possession, they undoubtedly are producible as evidence; but as to the effect of them, very much will depend upon the circumstances of the contents of those letters, and whether answers to them can be traced, or whether any thing has been done upon them. A great number of papers may be found in a man's possession, which will be *primâ facie* evidence against him, but will be open to a variety of explanations; and it is always a very considerable explanation, that nothing appears to have been done in consequence of the paper being sent to him; but all papers found in the possession of a man are *primâ facie* evidence against him, if the contents of them have application to the subject under consideration.

Mr. Tooke. The reason of my asking it is, I am very much afraid, that, besides treason, I may be charged with blasphemy.

Lord Chief Justice Eyre. You are not tried for that.

Mr. Tooke. It is notorious, that I do not answer common letters of civility; but I have received and kept many curious letters. I received some letters from a man whose name is *Oliver Verall*, and he endeavoured to prove to me that he was God, the Father, Son, and Holy Ghost. I kept the letters out of curiosity, and it is probable they may be produced against me. He proved it from the Old Testament, in the first place, that he was God the Father; because God is *O Verall*, that is, God over all. He proved he was God the Son from the New Testament, "Verily, verily, I am he," that is, *Verall I, Verall I*, I am he. Now, if these letters, written to me, which I from curiosity have preserved, but upon which I have taken no step, and to which I have given no answer, are produced against me, I do not know what may become of me.

Lord Chief Justice Eyre. If you can treat all the letters that have been found upon you, with as much success as you have these letters of your correspondent, you will have no great reason for apprehension, even should that letter be brought against you."

The letter of Mr. Cooper was read.

In *Watson's Case*, 2 Stark. 140, it was held, that papers found in the lodgings of a co-conspirator, at a period subsequent to the apprehension of the prisoner, may be read in evidence, although no *absolute proof* be given of their previous existence, where strong presumption exists, that the lodgings had not been entered by any one in the interval between the apprehension and the finding, and where the papers are intimately connected with the objects of the conspiracy, as detailed in evidence.

(b) If, on the trial of a case, the defendant's counsel calls no witnesses, but, in his address to the Jury, cites cases, the practice is for the plaintiff's counsel to observe on the effect of those cases, confining himself to the law, without touching on the facts. As to the right to reply upon the facts and evidence, see *ante*, p. 75.

*LOVELAND, surviving Obligee, v. KNIGHT. Jan. 18.

If in an action on a bond given by the sureties of a collector of taxes, there be breaches assigned, that the collector did not pay over money received, and that he did not duly demand and enforce payment of the taxes, it is not necessary, on the part of the plaintiff, to prove exactly what money he received; for if it be proved that he was to collect a certain sum, and that he paid over a smaller sum, and did not take proper steps to *exonerate himself* from the residue, the plaintiff will be entitled to recover. Omitting a word where the context supplies it, or inserting a wrong word, where the context corrects the mistake, is no variance. Therefore, if on oyer of a bond, the obligees are described as Commissioners acting under an act of Parliament for the regulation of the duties *on assessed taxes*, and in the bond the duties are stated to be duties *of assessed taxes*, this is no variance.

DEBT on a bond for 7000*l.*, dated July 4th, 1824. The defendant craved oyer of the bond, of which the condition was, that one Richard Winkles, junr. who had been appointed a collector of assessed taxes for the parish of St. Mary, Islington, should well and truly pay, in pursuance of the acts of Parliament in such case made and provided, all sums of money assessed on and to be collected in the said parish; and that he should duly demand the sums assessed from the respective persons by whom the same were payable; and in case of non-payment, should duly enforce the powers of the said acts of Parliament against such as should make default. Pleas, *first*,—*Non est factum*. *Second*—Performance of the condition. *Third*—That Winkles was removed and discharged from his office of collector, on the 15th day of November, 1824; and that he performed the condition of the bond up to that time. *Fourth*—A nearly similar plea, stating also the appointment of a new collector in the place of Winkles. *Fifth*—Fraud.

Replication to the second, third, and fourth, pleas—That Winkles did not perform the condition, but that, on the contrary thereof, while he was collector, divers sums were assessed to be collected in the parish, and were collected and received by Winkles, yet that neither he nor his sureties well and truly paid the sums by him so collected, in pursuance of the directions of the statutes in the condition referred to. And further breaches were assigned, that, although many persons in the parish were duly assessed, yet Winkles *did not demand* the sums assessed, or any of them; and also that, although divers persons were duly assessed, and the taxes duly demanded, yet Winkles *did not enforce* the powers of the acts of Parliament. The replication also took issue on the plea of fraud. Rejoinder—Denying the breaches, and concluding to the country.

*The bond was read. In setting it out in the record on oyer, it [*107 was stated as follows:—"Know all men, by these presents, that we, Richard Winkles, junr., of &c., and Samuel Knight, of &c., which said Richard Winkles, junr. is a collector for the parish of Islington, nominated, and appointed by the Commissioners acting for the division of Finsbury, in the county of Middlesex, in the execution of an act of Parliament, made and passed in the 43d year of the reign of his late Majesty king George the Third, intituled, 'An act for consolidating certain of the provisions contained in any act or acts relating to the duties under the management of the Commissioners for the affairs of taxes, and for the amending the same.' And also a certain other act of Parliament, made and passed in the 48th year of his said late Majesty's reign, intituled, 'An act to amend the acts relating to the *Duties on Assessed Taxes*, and of the tax upon the profits of property, professions, trades, and offices, and to regulate the assessment and collection of the same, so far as relates to the assessed taxes.' And also of a certain other act, &c. [setting out the titles of several more statutes], which said Samuel Knight, &c., are jointly and severally held and firmly bound, &c."

When the bond was read, it appeared, that, in the bond itself, instead of the words "*duties on assessed taxes*," the words were, "*duties of assessed taxes*."

F. Pollock and Parke contended, that, as the bond was set out on oyer, the party was obliged to set it out in the very words.

Scarlett, A. G., Holt, and Bayly, contra, argued, that if it were material to set out the title of this act, it must no doubt be done correctly; but that here, the change of the word *on* for the word *of* did not alter the sense; and as it could not mislead any one, it was no variance.

*108] *Lord TENTERDEN, C. J.* A deed set out on oyer is to be considered the same as if it were made part of the declaration; but in the present case it strikes me, that the words set out, and those found in the bond, amount to the same in substance; but I will give leave to move to enter a nonsuit.

The duplicate assessment of the parish of St. Mary, Islington, was put in; and, under it, Mr. Winkles was to have collected 6022*l.* 7*s.* 5*d.*, but it was proved by the Receiver-General of taxes for the county of Middlesex, that Mr. Winkles only paid over to him a sum of 226*l.* 1*s.* 8*d.* This witness also proved, that it was the duty of a collector of taxes to make a return of all distresses that he had made for taxes in arrear, and also a return on oath of all persons bankrupt or insolvent, who were defaulters, and of whom he could not get the amounts of taxes assessed on them (a), but that Mr. Winkles had made no such returns.

The plaintiff's counsel contended, on this evidence, that, as breaches were assigned for not demanding, and for not enforcing payment of the taxes, as well as for not paying over the money actually received to the Receiver-General of taxes (b), it was not necessary to call every inhabitant who had paid taxes to Mr. Winkles, to show how much money he had received, and not paid over to the Receiver-General; for that it stood thus:—if Winkles had received the money, and kept it, the plaintiffs could recover on the first breach; and if he had not received it, and had not made such returns to the Receiver-General as would exonerate himself, he was liable on the other breaches; and they relied on the 12th and 43d sections of the statute 43 Geo. 3, c. 99; and on the 23d section of the stat. 43 Geo. 3, c. 161 (c).

*109] **F. Pollock*, for the defendant, submitted, that some allowance ought to be made for the taxes on empty houses, and for the taxes of those persons who would not have been able to pay, if the collector had used every diligence.

Lord TENTERDEN, C. J. The law is against you. The breaches are for not paying over, and also for not demanding and enforcing payment. Now, it appears that no return is made of any list of defaulters, which should have been done to discharge the collector; and by not returning such a list, persons are enabled to run away, who would otherwise have been obliged to pay their taxes; and therefore Mr. Winkles is liable for those taxes.

Verdict for the plaintiff for the whole amount of the taxes, deducting the sum paid over by Winkles, the sum received by the succeeding collector, and 800*l.* obtained on an extent against the goods of Winkles.

Scarlett, A. G., Holt, and Bayly, for the plaintiff.

F. Pollock and Parke, for the defendant.

[Attornies—*Smith & Buckerfield*, and *H. Hughes*.]

(a) Under the stat. 43 Geo. 3, c. 99, ss. 44, 45.

(b) Under the 48th section of the stat. 43 Geo. 3, c. 99.

(c) We have not thought it necessary to set out any of the sections of these statutes, as they will be found in 5 Burn's Justice, tit. Taxes, p. 319, *et seq.*

BEFORE LORD TENTERDEN, C. J., BAYLEY, HOLROYD, AND LITTLE-
DALE, JS. Jan. 28.

In Banc.

F. Pollock now moved, in pursuance of the leave given at the trial, and contended that the word *on* being substituted for the word *of* in setting out the title of the statute 48 Geo. 3, which was stated in the bond, was a fatal variance; and that if a deed be set out on oyer, the party is bound to set it out in the very words; and that the deed set out being the same *in substance*, would not be enough; and he relied on the judgment of *Gibbs*, C. J., in *the case of [^{*110} *Waugh v. Bussell* (a), where his Lordship said, "After oyer, and *non est factum* pleaded, the question is, whether the tenor set out is the same as the tenor of the bond executed; and I do not apprehend that it would suffice that it should agree in substance. In a declaration, it is only necessary to state the legal effect of the instrument; but on oyer, the plaintiff professes to produce a copy of it, as of the deed by which he asserts that the defendant is bound; and if it is not the true copy, the defendant may say, that is not the deed he executed."

BAYLEY, J. Is not the Court bound to take notice, that there is an act of Parliament of that year, relating to the duties *of* assessed taxes?

LORD TENTERDEN, C. J. The sense is not altered.

F. Pollock. I submit, that whether the sense is altered or not, it is equally a variance on oyer.

BAYLEY, J. Omitting a word where the context supplies it, is no variance. Inserting a wrong word where the context corrects the mistake, is also no variance.

F. Pollock. In the case of *King v. Marsack* (b), in a declaration which recited an act of Parliament relating to Sheriffs, the words goods *and* chattels, were put for goods *or* chattels, and that was held to be a variance; and in the case of *Boyce v. Whitaker* (c), Lord Mansfield said, that as the defendant had unnecessarily set out an act of Parliament, he should be held to half a letter; and in the case of *Rann v. Green* (d), where the plaintiff declared on a private act of Parliament, as an act passed in the fourth year of the reign of Philip and Mary, and it was really passed in the fourth and fifth year, this was held to be a variance.

*LORD TENTERDEN, C. J. In setting out a deed on oyer, you must not depart in any way from the sense. I think in this case that the sense is [^{*111} the same. The case in *Taunton* is very different from the present; there the variance was, by putting "one" for "one hundred," and no one could say that that did not alter the sense.

BAYLEY, J. If, on looking at the whole instrument, we see that there is a mistake, and the context shows what it should be, we are bound to read it correctly. In one case the word "is" had been evidently inserted by mistake, and the Court held, that they could reject it; so, if an instrument had a blank left in it, and in declaring on such instrument, the plaintiff had filled up that blank with the word that must have been intended, that would be no variance. Here the word "on" is used instead of the word "of" in setting out the title to an act of Parliament. We are bound to know what is the right word, and we must read it correctly.

HOLROYD and LITTLEDALE, JS., concurred.

Rule refused.

(a) 5 Taunt. 709.
(c) Cited Id. 774.

(b) 6 T. R. 771.
(d) 2 Cowp. 474.

GENERAL RULE. *Jan 28.*

Lord TENTERDEN, C. J., said, that the Court wished it to be understood, that for the future, in *Hilary* and *Trinity* Terms, the Court would not hear any motion for a new trial, unless such motion were *actually made* within the first four days of the Term; and that even if counsel were instructed within the first four days, and there should not be time to hear them on the fourth day, the Court would not hear them afterwards; and in such cases the parties could only blame themselves for not instructing their counsel sufficiently early (a).

(a) The practice has been for counsel, at the close of the fourth day of each Term, to insert
 *112] in a list the names of those cases in which they are instructed to move; which cases they were called on to move, on the following days, in the order of their precedence. And, it seems, that, in *Easter* and *Michaelmas* Terms, in which, on account of the Circuits, the number of motions is large, the Court will continue to allow that course to be pursued.

 COURT OF KING'S BENCH.

ITTING AT WESTMINSTER, IN HILARY TERM, 1828.

BEFORE LORD TENTERDEN, C. J.

DEPCKE v. MUNN, and another. *Feb. 4.*

The Courts have so often decided that interest is not recoverable in an action for money had and received, that the Judge at *Nisi Prius* will not allow the point to be entered into.

ASSUMPSIT for money had and received. The defendants were auctioneers, who, in the year 1825, sold property belonging to the plaintiff, and received deposits from the purchasers, which they refused to pay over to the plaintiff, and for these deposits the present action was brought.

In the progress of the cause, every thing was admitted except the right of the plaintiff to recover interest, and against this Sir J. Scarlett was proceeding to contend, when he was interrupted by

Lord TENTERDEN, C. J., who said, the Courts have held again and again that interest cannot be recovered in an action for money had and received. The plaintiff may bring his action at once, but if he suffer his money to remain in the hands of the defendant, he is not entitled to recover interest upon it. This has been decided so often, that I cannot now venture to allow the question to be agitated.

Verdict for the plaintiff, for the principal sum only.

Rotch and *Patteson*, for the plaintiff.

Sir J. Scarlett, and Chitty, for the defendants.

[Attornies—R. & M. Broune, and Wilson & Co.]

*COURT OF COMMON PLEAS.

ADJOURNED SITTINGS AT GUILDHALL, AFTER TRINITY
TERM, 1827.

BEFORE MR. JUSTICE GASELEE,

(Who sat for the Lord Chief Justice.)

EDMONDS v. PEARSON. July 16.

A witness from the country, subpoenaed there by the defendant, without receiving sufficient for his expenses, and afterwards, when in London, subpoenaed by the plaintiff, and called by him on the trial, is bound to give his evidence both in chief and on cross-examination, and must seek to obtain his expenses in some other way than by objecting to be examined.

A WITNESS was called on the part of the plaintiff, who objected to being sworn, on the ground that he came from the country, and had not been paid a sufficient sum for his expenses. It appeared that he was subpoenaed in the country *on the part of the defendant*, and received the sum of 10*l.*, and it was after his arrival in London that he was subpoenaed on the part of the plaintiff.

GASELER, J., said, that the witness must give his evidence, as the plaintiff who subpoenaed him *in London* was not bound to pay him anything for expenses.

The witness was accordingly sworn, and, when he had finished his evidence in chief, objected to be cross-examined, as that would be giving evidence for the defendant, who had neglected to pay what was due to him.

GASELEE, J., ruled, that having been examined in chief, he was bound to continue his evidence, and must seek his expenses in some other way.

Wilde, Serjt., and *Hutchinson*, for the plaintiff.

Bosanquet, and *Taddy*, Serjts., for the defendant.

[Attornies—*Reeves*, and *J. & H. Lowe*.]

*COOK v. DEATON.

[*114]

If proper clothes are supplied to an infant by his father, any others furnished in addition cannot be considered as necessaries; and it is the duty of a tradesman when applied to by an infant for clothes to make inquiries of his friends, before he gives him credit.

ASSUMPSIT, on a tailor's bill. Plea—Infancy. Replication—That the goods furnished were necessaries.

The defendant was apprenticed to a person who was in partnership with his step-father in the trade of a glover, and lived in the same house with them. The clothes in question were delivered at the house; and on one occasion the defendant had some of them on, when he was walking in company with his mother. Part of the clothes were to be used for private theatricals. The defendant's step-father provided clothes for him suitable to his station; and hap-

pening once to be present when the plaintiff's servant brought a variety of articles, he directed him to take them back to his master, and at his peril to bring any more.

Wilde, Serjt., submitted that the plaintiff was not entitled to recover anything.

Taddy, Serjt., contended, that at least he was entitled to recover for the clothes which were worn in the presence of the mother. The question is, whether the father had not reason to know that there were other clothes furnished; and, as they were not returned, we are entitled to be paid for them.

The father being asked, stated that he had not any idea of the supply.

BEST, C. J. (in summing up.) The plaintiff *ought to have made inquiries of the father*. The father says he knew nothing about the plaintiff's supplying his son with clothes. As there were proper clothes provided by the father, those furnished by the plaintiff cannot be considered as necessaries.

Verdict for the defendant.

*115] **Taddy*, Serjt., and *Comyn*, for the plaintiff.
Wilde, Serjt., and *Ryland*, for the defendant.

[Attornies—*Glynes* and *Pickering*.]

See *Blackburn v. Mackey*, ante, Vol. 1, p. 1. *Fluck v. Tellemache*, Id. 5. *Turberville v. Whitehouse*, Id. 94.

LEACH v. MULLETT and another. Oct. 3.

The particulars of sale at a public auction described two houses as Nos. 3 and 4, and stated, that the taxes of No. 3 were paid by the tenant. The houses ought to have been described as Nos. 2 and 3, but the names of the occupiers were correct; and it should have been stated that the taxes of No. 3 were farmed by the landlord. The houses, Nos. 2 and 4, were of the same rate; but No. 4 was in the best state of repair: Held, that these misdescriptions were not cured by a condition, which provided, that if any error or mis-statement should be found in the particular, it should not vitiate the sale.

ASSUMPSIT to recover from the defendants, who were auctioneers, a sum of 30*l.*, which had been paid by the plaintiff as a deposit for the purchase of two houses in Elizabeth Place, under the following circumstances: The property was sold by public auction, and in the particulars of sale the houses were described as Nos. 3 and 4, instead of Nos. 2 and 3, but the names of the occupiers were correctly stated. It was also stated in the particulars, that the taxes of No. 3 were paid by the tenant, whereas, in fact, they were farmed by the landlord. No. 4 belonged to a person who had not given the defendant any authority to sell it. One of the conditions of sale consisted of a provision, that if any error or mis-statement should be found in the particulars, it should not vitiate the sale, but an allowance should be made on account of it. It appeared, that Nos. 2 and 4 were of the same description of houses, but that No. 4 was in rather the best state of repairs.

Spankie, Serjt., for the defendant, submitted, that in consequence of this provision, the plaintiff was not entitled to recover. It is for the Jury to say, whether the mis-statements are false and deceitful misrepresentations, or merely errors.

*116] **BEST*, C. J. Do you mean to say, that, if I undertake to sell you one house, by making you an allowance, I can compel you to take another?

Spankie, Serjt. No, my Lord; but in this case the error cures itself. It is said No. 4, occupied by Frost, who is, in fact, the tenant of No. 3. *Constat*

de corpore. The mistake in the number is of no consequence. The name of the tenant is the substantial description of the house. There can be no doubt as to which were the houses meant. If the plaintiff had gone to inquire for them, he would have found them out by the names of the occupants. I submit that this is not such a mistake as will vitiate the contract. In the case of the *Duke of Norfolk v. Worthy (a)*, Lord *Ellenborough* said, that he should always require an ample and *substantial* performance of the particulars of sale, and that a clause, providing that an error in description should not vitiate the sale, was, he conceived, meant to guard against *unintentional* errors; and his Lordship left it to the Jury to say, whether the mis-statement in that case was merely erroneous, or wilfully introduced to make the property appear more valuable. Now, I submit, that, in the present case, the error is quite unintentional, and not intended to deceive. Then, as to the other objection, with respect to the taxes, that is clearly a matter of arithmetical computation, and is therefore a subject of allowance and compensation.

Best, C. J. I quite agree with the law as laid down by my Lord *Ellenborough*. If it is merely an error or a mis-statement from error, then it is cured by the conditions. But there must be this limitation, if the description is of any other property than that intended to be sold, though it is made by error, the conditions do not cure it. If the plaintiff had intended to buy the house *sold, notwithstanding the misdescription, I should have thought that you [*117 would be justified in finding your verdict for the defendant; for I should not suffer the plaintiff to take advantage of a mistake by which he had not been prejudiced.—But, as it stands, it seems to me, that you must take it, that the plaintiff intended to buy Nos. 3 and 4, because they, according to the evidence, were in the best state of repair. But that is not all: there are too many mistakes here. There is a mistake as to the payment of the taxes. If it was a pure mistake, not prejudicing the party, then it would be cured by the conditions; but I think that auctioneers ought to be narrowly watched, lest, under the idea of mistake, they may cover material matters. If you think, in this case, that it is all a mere error, capable of being compensated by pecuniary recompense, then you will find your verdict for the defendant.

Verdict for the plaintiff.—Damages, 30*l*.

Andrews, Serjt., and *Hutchinson*, for the plaintiff.

Spankie, Serjt., for the defendants.

[Attornies—*H. Chester*, and *Clutton*.]

(a) 1 Camp. 337.

WILLIS and another v. ELLIOTT, Senr. Oct. 3.

The assignment to the provisional assignee of the Insolvent Debtors' Court, is not made void by the death of the insolvent before his petition has been heard; and such provisional assignee may, after such death, assign to the assignee for the creditors; and they may bring actions in respect of the insolvent's property.

TROVER.—The plaintiffs were assignees, under the Insolvent Debtor's Acts, of Elliott, junr., the son of the defendant; and the question was, whether, under the circumstances of the case, the assignment made to them by the provisional assignee was valid. The insolvent presented his petition on the 27th of February, 1827, and executed the provisional assignment on the same day, pursuant

*118] to the statutes; and on the 26th of March, 1827, he *died. The assignment from the provisional assignee to the plaintiffs was not made till the 2d of April, 1827. The insolvent's petition had not been heard by the Court previous to his death. The question turned on sect. 11 of the 7th Geo. 4, c. 57 (a).

*119] *Wilde, Serjt., for the plaintiffs, contended, that the assignment was valid, and continued in force notwithstanding the death of the insolvent, as the statute would not take away what had been once vested.

Taddy, Serjt. The discharge of the insolvent from his debts, so far as his person is concerned, is the only consideration for the assignment; and if he dies before that discharge takes place, the whole thing fails. This construction appears to be the regular one by analogy to the statutes concerning bankrupts. The stat. 1 Jac. 1, c. 15, s. 17, enacted, that if a bankrupt died before distribution, the Commissioners might nevertheless proceed in execution concerning his goods, &c. in such sort, as they might have done if he had been living. By the statutes relating to insolvents, passed previously to the 1 Geo. 4 (b), the insolvent was not to execute the assignment till the order was made for his discharge. The adjudication of discharge is the foundation of the proceedings; and as that could not take place here, the whole of the proceedings must fail. Then, again, the 57th section seems to contemplate the event of death, and to give a different remedy to that which is here contended for, viz. by enabling a judgment to be entered up against the party. Now this could not be against him as an insolvent, because a judgment is against the person, and the person of the insolvent is protected. That section provides, that, before any adjudication, the prisoner shall execute a warrant of attorney to confess judgment for the amount of the debt contained in the schedule; and the Court may permit execution to be taken out thereupon, when the insolvent is of ability to pay, or is dead, leaving assets.

*120] *BEST, C. J. Assume, for a moment, that this is an assignment without consideration, yet, unless my brother *Taddy* proves that his client purchased for a valuable consideration, it is good as against him. But I take the law to be this, upon the words of this statute, and in comparison with the other statutes, that the assignment takes effect absolutely on the presentation

(a) That section enacts, "that such prisoner shall, at the time of subscribing the said petition, duly execute a conveyance and assignment to the provisional assignee of the said Court, in such form as is to this act annexed, of all the estate, right, title, interest, and trust of such prisoner, in and to all the real and personal estate and effects of such prisoner, both within this realm and abroad, except the wearing apparel, bedding, and other such necessities of such person, and his or her family, and the working tools and implements of such prisoner, not exceeding, in the whole, the value of twenty pounds, and of all future estate, right, title, interest, and trust of such prisoner, in or to any real and personal estate and effects within this realm or abroad, which such prisoner may purchase, or which may revert, descend, be devised or bequeathed, or come to him or her, before he or she shall become entitled to his or her final discharge, in pursuance of this act, according to the adjudication made in that behalf; or in case such prisoner shall obtain his or her discharge from custody, without adjudication being made in the matter of his or her petition, then, before such prisoner shall be at large and out of custody; and of all debts due or growing due to such prisoner, or to be due to him or her before such discharge as aforesaid, which conveyance and assignment, so executed as aforesaid, in form aforesaid, shall vest all the real and personal estate and effects of such prisoner, and all such future real and personal estate and effects as aforesaid, of every nature and kind whatsoever, and all such debts as aforesaid, in the said provisional assignee; and the same shall be made subject to a proviso, that in case the petition of any such prisoner shall be dismissed by the said Court, such conveyance and assignment shall, from and after such dismissal, be null and void to all intents and purposes; and the said Court is hereby empowered to dismiss any such petition in the matter whereof a final adjudication shall not have been made in pursuance of this act, at any time when it shall seem fit to the said Court to dismiss the same: provided always, that where in any case, by leave of the said Court, any amendment shall be made in any such petition, or an amended petition shall be filed as of the date of the original petition, which the said Court is hereby empowered to do and authorize, without dismissing such original petition, the assignment and conveyance executed in such case shall not thereby be affected, but shall stand good to all intents and purposes, notwithstanding such amendment or amended petition so filed as aforesaid."

The "Form of Conveyance and Assignment," alluded to in the above section, is given in a Schedule to the act.

(b) 53 Geo. 3, c. 102; 54 Geo. 3, c. 25; 56 Geo. 3, c. 102.

of the petition, except in the case particularly mentioned and excepted. It seems that the legislature found that they had done wrong in allowing the assignment to be made at the time of the *discharge*. No doubt they found that a great deal of property was conveyed away after the insolvent came into prison. The late statutes, therefore, alter the law in that respect; and it appears to me, that the assignment operates in every event but one, and that is specially stated in the proviso itself, on the principle—" *Expressio unius est exclusio alterius*."—The words are, "which conveyance and assignment, so executed as aforesaid, in form aforesaid, *shall vest* all the real and personal estate and effects of such prisoner," &c. "in the said provisional assignee, and the same shall be made subject to a proviso, that, *in case the petition* of any such prisoner shall be *dismissed* by the said Court, such conveyance and assignment shall, from and after such dismissal, be null and void to all intents and purposes."

With respect to section 57, it appears to me, that that section has nothing to do with the property the insolvent had at the time of his discharge. The object of that section is to make him do justice afterwards, and to get hold of property subsequently acquired, which property can only be obtained if he lives to get discharged. I do not think that the statute of Jac. 1 has any direct relation to this point, as that was made in the imperfect state of the law. I am decidedly of opinion, that this proviso must be construed most liberally towards the creditor, otherwise these acts of Parliament for the discharge of insolvent debtors would be much more injurious than beneficial to the public.

*The amount of damages was afterwards referred.

[*121]

Wille, Serjt., and *Kelly*, for the plaintiffs.

Taddy, Serjt., for the defendant.

[Attornies—*Galsworthy*, and *Kinder*.]

In the ensuing Michaelmas Term, *Taddy*, Serjt., moved for a nonsuit, but the Court refused a rule.

See 1 Moore & Payne's Rep. p. 19.

PHILLIPS v. HARTLEY. Oct. 3.

A document by which A. agrees to grant, and B. to take, a lease of certain premises for a certain term, at a certain yearly rent, is to be considered merely as an agreement, not requiring a lease stamp, although no lease be prepared, and B. occupies during the whole of the term under such document, and pays the rent specified in it.

An administrator *cum testamento annexo*, cannot declare before administration is granted.

USE and occupation, on the following agreement:

"Memorandum of an agreement for a lease, made &c. between &c.; viz. A. Phillips agrees to grant, and A. Hartley agrees to take, a lease of &c. for &c. at the yearly rent, &c. &c. &c."

No lease had been prepared; but the defendant had occupied during the term under the paper in question. It was stamped with an agreement stamp.

Wille, Serjt., for the defendant, submitted, that this was itself a lease, and

required a lease stamp. The words are immaterial; the question is, whether it is an instrument merely preparatory to another, or is itself to regulate the holding; many things are to be done under it before the commencement of the term. Nothing is said about the time when a lease is to be prepared, or by whom, or what covenants it is to have; but here are all the particulars of the tenancy in this specific paper; and in point of fact, the premises have been enjoyed under it during the whole of the term.

*122] *V. Lawes*, Serjt. The instrument is merely executory, *whether we look at the words or the intention of the parties. It is "memorandum of agreement for a lease," not "agreement of a lease;" then "A. H. agrees to take," not "takes" a lease, &c. If there is nothing uncertain in the language of the instrument, it must have its fair construction, and be taken as an agreement only.

Barr, C. J. I think it is only an agreement for a lease, no present interest passes.

Wilde, Serjt. It is not necessary that the interest should be present, the question is, whether an interest is to pass. A lease may commence *in futuro*, and if at Midsummer an interest passed, that will be sufficient. It is clear the parties took some interest under this paper.

Barr, C. J. I think it does not confer any present interest; I think the lessor might have turned the defendant out the next day, and all he could have got would have been by a suit in a Court of Equity.

The agreement was received in evidence, and the case went on; the plaintiff was administrator with the will annexed. The date of the administration was the 12th February, 1827. The declaration was of Hilary Term, 1827, which commenced on the 23d of January, and ended on the 12th of February.

Wilde, Serjt., submitted, that the plaintiff must be nonsuited. The declaration, being entitled of the Term generally, has relation to the first day, viz. the 23d of January; and the administration was not granted till the month of February. An administrator cannot declare before administration granted. His title commences with such grant and is not like that of an executor, which relates back to the date of the will.

*123] **V. Lawes*, Serjt. I submit that an administrator *cum testamento annexo* stands in the situation of the executor who has renounced.

Wilde, Serjt. His authority comes from the law in the same way as that of any other administrator.

Barr, C. J. I think it is so (a).

The case was afterwards referred.

V. Lawes, Serjt., and *Chitty*, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attornies—*Collier & Co.*, and *Hardwick*.]

(a) In *Wankford v. Wankford*, *Powys*, J., said, "That an executor is a complete executor as to every intent but bringing of actions, before probate, so that he may release a debt due to the testator," &c., "but an administrator cannot act before letters of administration granted to him." 1 Salk. 301.

See also the next case of *Thompson v. Reynolds* and another.

THOMPSON v. REYNOLDS and another. Oct. 4.

A plaintiff sued as executor, and in his declaration made profert of the letters testamentary in the usual form, which states "whereby it appears to the Court here that the plaintiff is executor," &c. The defendant did not demand oyer, but pleaded that the plaintiff never was nor is executor "in manner and form" as alleged in the declaration. The plaintiff replied that he was, and continued to be executor in manner and form, &c. Held, that the plaintiff might recover on this issue, although he had not taken probate till some months after the declaration.

REPLEVIN.—The declaration commenced as follows: James Reynolds, and Henry Holland Duffill, the defendants in this suit, were summoned to answer Joshua Thompson, the plaintiff in this suit, and *executor of the last will and testament of John Fisher, deceased*, of a plea—Wherefore &c. &c. Profert was made in the usual manner, viz.—And the said plaintiff brings into Court here the *letters testamentary* of the said John Fisher, deceased, *whereby it appears to the Court here, that the said plaintiff is executor* *of the last will and testament of the said John Fisher, and hath execution thereof, &c. [*124]

There were several avowries, and a plea in the following form, viz.: "that the plaintiff, suing as executor as aforesaid, ought not to have or maintain his aforesaid action against the defendants, because they say that the plaintiff *never was nor is the executor of the last will and testament of the said John Fisher, deceased, in manner and form as the said plaintiff hath above, in his said declaration, in that behalf alleged.*"

To this plea the plaintiff replied, that he "by reason of any thing by the defendants in that plea alleged, ought not to be barred from having and maintaining his aforesaid action against them, because he saith, that he *at the time of the commencement of this suit was, and from thence hitherto has been, and still is, executor of the last will and testament of the said John Fisher, deceased, in manner and form as he the said plaintiff hath above, in his said declaration, in that behalf alleged.*"

The declaration was of Hilary Term, and it appeared, that the plaintiff had not proved the will till the 6th of July following.

Wilde, Serjt., for the defendants, submitted that the plaintiff ought to be nonsuited. An executor cannot declare before probate. How is a defendant to know whether a plaintiff is clothed with the character of executor, unless he has taken out probate? A plaintiff must make profert; and the necessity of doing that shows, that the probate should be obtained before the time when profert is made. The will being a will of personality, the only title of the executor is by the probate. The record of the Ecclesiastical Court is the only evidence of executorship.

BEST, C. J. How is the objection to be taken advantage of?

***Wilde, Serjt.** I apprehend the defendants can only deny that the plaintiff filled the character of executor. [*125]

Spankie, Serjt., for the plaintiff. They should have demanded oyer of the probate.

Chitty, contra. It is true that the defendants may demand oyer, but they have no means of enforcing that demand. They can only search, to ascertain if probate has been granted; and in this case we have done that. The words of the issue are, that the plaintiff "never was, nor is, executor" of Fisher, "in manner and form," as in the declaration alleged. Now, what is the manner and form in which that allegation is made? It is this, viz. that it appears by the probate; whereas, at the time of the allegation, there was no probate in existence. The executor's title is derived only from the probate. In the 3 T. R. it is said (a), that the mere production of the probate is an answer

(a) *Arguendo* in *Allen v. Dundas*, 3 T. R. 125, on the authority of *Rex v. Vincent*, 1 Strange, 481. However, on this point the case of *Rex v. Buttery, Russell & Ryan*, 342, determined

o a charge of having forged the will to which it relates. When a plaintiff declares, he must have a complete cause of action, which this plaintiff had not, and therefore he must be called.

Spankie, Serjt. There is a fallacy in the arguments on the part of the defendants. My friends assume that the plaintiff, as executor, derives his title from the probate, whereas in fact it is from the will itself, from the appointment of the testator, that he has his authority. The *probate is not produced as the executor's title, but merely as the evidence of it (a).

Best, C. J., was of opinion, that the plaintiff would be entitled to a verdict on the special plea (b).

The case was then gone into, and the plaintiff had a verdict on the plea above-mentioned, and the defendants on the avowries.

*127] **Spankie, Serjt., and Lee*, for the plaintiff.
Wilde, Serjt., and Chitty, for the defendants.

[Attornies—*Nicol*, and *Owen*.]

in the year 1818, decided, that on an indictment for forging a will, the probate unrepealed is not conclusive evidence of its validity, so as to bar the prosecution. This case expressly overrules that of *Re v. Vincent*, above alluded to.

(a) In the case of *Smith v. Mills*, 1 T. R. 480, it is said that "an executor does not derive his title under the probate, but under the will; the probate is only evidence of his right, and is necessary to enable him to sue; but he may release before probate." And in the case of *Re v. Nelwood*, 4 T. R. 356, Lord Kenyon says, "that nothing but the probate, or letters of administration, with the will annexed, is legal evidence of a will in all questions respecting personality."

(b) As to the power of an executor before probate, in Comyn's Dig. tit. Administration, B. 3, it is said, that an executor may commence an action before probate, though he shall not declare; and reference is made to the case of *Wankford v. Wankford*, 1 Salk. 299; and upon looking into that case it appears that the distinction is made because "when he comes to declare, he must produce in Court the letters testamentary;" and it is added, "the reason why an executor cannot go on before probate is, for the enforcing of probates, as is said in *Hutton 34*, because, upon probate, there are inventories exhibited, and other acts done by the executor, which are for the benefit of the creditors of the testator."

In *Hensler's* case, 9 Co. 38 a. it is said, "Les executors ont leur titre per le testament que est temporal, &c. quel testament est complet quant a tous biens et chateaux in possession et reversion," &c. "Mes quant a suer des actions in les Courts le Roy les judges ne admittont les executors a suer per choses in actions sinon que ils monstrent le testament dument prove desout seal del ordinary:"—The case of *Duncomb v. Walter*, 3 Lev. 57, decides, that, if an executor arrest a man before probate, and afterwards prove the will, it is good by relation between the parties; but not as against strangers. And in the report of the same case, in 1 Vent. 370, it is said, "Where an executor brings an action before probate, yet, if he shows the probate upon the declaration, it is well enough."

See also the case of *Smith v. Mills*, 1 T. R. 480, before cited in note (a).

ADJOURNED SITTINGS IN LONDON AFTER TRINITY TERM, 1827.

BEFORE LORD CHIEF JUSTICE BEST.

MORRISON and another v. LENNARD. Oct. 8.

Though the mode of examining a deaf and dumb witness by means of signs made with the fingers, is a mode receivable even in capital cases, yet, where the witness can write, *semble* that it would be better to make him write his answers to the questions put to him.

COVENANT on an indenture of apprenticeship. The apprentice was called as a witness. He was both deaf and dumb. An interpreter was sworn, who put

questions to the witness by signs made with his fingers, and was answered by the witness in the same mode. The interpreter said, that he spelt every word to the witness completely.

It appeared that the witness was able to write.

BEST, C. J., observed. I have been doubting whether, as this lad can write, we ought not to make him write his answers. We are bound to adopt the best mode. I should certainly receive the present mode of interpreting, even in a capital case; but I think, when the witness can write, that is a more certain mode.

Verdict for the plaintiffs.

Wilde, Serjt., and Busby, for the plaintiffs.

Andrews, Serjt., for the defendant.

[Attornies—*Haslem, and Vincent.*]

*RICHARDSON v. WEBSTER, Bart. Oct. 9.

[*129]

A mercer furnished ribands to a person who was a candidate for the representation of a city in Parliament; the ribands were partly used as presents for voters; the mercer was himself a voter, and received orders for some of the ribands, from the candidate himself, in his committee room, but was not told for what purpose they were wanted: Held, that he was entitled to recover the price of the ribands from the candidate, notwithstanding the provisions of the stat. 7 and 8 W. 3, c. 4.

Assumpsit for goods sold and delivered.

The plaintiff was a mercer, residing at Chichester, in Sussex, and the demand was for the price of a quantity of ribands furnished by him for the use of the defendant at the time of the general election in the year 1825, the defendant being then a candidate to represent Chichester in Parliament.

One of the defendant's committee proved, that after the election was proclaimed, he, by the desire of the defendant, ordered the ribands in question of the plaintiff at his shop; and that afterwards, the plaintiff, who was himself a voter, attended at a meeting of the committee, at which the defendant himself gave him an order for ribands, but did not say for what purpose they were wanted. It appeared that in fact they were very generally distributed, being partly given to voters, partly to a set of persons called White Boys (some of whom were also voters), and partly to ladies; on some occasions they were given to any person who asked for them; and a part of them was used for the decoration of the Golden Fleece, which was the sign of the inn at which the committee met.

*Taddy, Serjt., for the defendant, contended, that, upon the words of the statute 7 & 8 W. 3, c. 4, the contract was illegal, and the plaintiff could not recover. The words of the statute are very general; viz. that no person or persons to be elected to serve in Parliament for any county, &c. after the teste of the writ, &c., or after any such place becomes vacant, shall by himself or themselves, or by any other ways or means on his or their behalf, or at his or their charge, before his or their election, directly or indirectly give, present, or allow to any person or persons having voice or vote in such election any money, meat, entertainment, or provision, or make any present, *gift, reward, or* [*129] *entertainment to or for any such person or persons, or to or for the use, advantage, benefit, employment, profit, or preferment of any such person or persons, in order to be elected, or for being elected to serve in Parliament," &c.*

BEST, C. J. As far as the ribands for the voters are concerned, that will be an answer to the action.

Taddy, Serjt. Then the remainder cannot be distinguished: the contract

itself is void, the order is a joint order, and cannot be good for part and bad for part. It is impossible to divide an illegal contract. If it was for ribands for the voters, the subsequent disposal of part of them in a different way will not alter it. This is clearly an illegal contract, if the plaintiff was at all aware of the purpose for which they were wanted. He cited *Ribbans v. Cricket* and *Another (a)*.

Russell, Serjt., for the plaintiff. That was not the case of any thing sent to the candidate, but the case of a contract by an innkeeper to supply voters with provisions.

Best, C. J. I do not think there is enough, upon this evidence, to show that the plaintiff furnished the ribands expressly to be used for an illegal purpose.

Taddy, Serjt. It is for the Jury to say, whether the plaintiff did not know that the ribands were to be used by voters. I submit that he must have known it, as he was himself a voter, and received orders for them in the defendant's committee room.

*130] *Best, C. J.*, (to the Jury). The question for you, is, whether the plaintiff knew that these ribands were ordered for the purpose of distribution among the voters; for if he did, he is not entitled to recover. If there were no other purpose to which ribands could be applied, that would be cogent evidence of their being supplied solely for that purpose. But there were several other purposes, as the decoration of the sign, &c. I cannot find, upon the evidence, that the plaintiff was ever told that these ribands were to be used for an illegal purpose. If you think that he did know it, then you will find your verdict for the defendant. But it seems to me, if you believe the evidence, that your verdict must be for the plaintiff.

Verdict for the plaintiff—Damages 21*l.* 5*s.*

Russell, Serjt., and *Kelly*, for the plaintiff.

Taddy, Serjt., for the defendant.

[Attornies—*Ellis & B.*, and *Capron & Co.*]

(a) 1 Bos. & P. 264. This case decides, that, it being contrary to 7 & 8 W. 3, c. 4, for a candidate to furnish provisions to any voters after the teste of the writ, an innkeeper cannot recover against a candidate for provisions so furnished at its request.

RAINS and another, Assignees of EVELYN, a Bankrupt, v. STORRY.
Oct. 1.

A. applied to B. for goods; B. asked for a reference; A. referred him to C.; C., on being applied to, inquired the amount of the order, and on what terms the goods were to be furnished; and on being told, said "You may send them, and I'll take care that they are paid for at the time." He was afterwards written to, to accept a bill for the amount; to which he replied, that he was not in the habit of accepting bills, but that the money would be paid when due. After this B. the seller wrote to C. about the goods, and spoke of them in his letter as goods which C. had "guaranteed;" and the attorney of B.'s assignees (when he had become bankrupt) wrote to A. for the money, and threatened process; but this letter was a circular, written in pursuance of a list made out for him by B., and without any knowledge of the circumstances under which the debt was contracted: Held, that on this evidence C. was not primarily liable, but only as a guarantor of the debt of A.

• ASSUMPSIT for goods sold and delivered.

The bankrupt's traveller received an order for goods from a Mrs. Stoker; he told her the prices, but asked her for a reference; she referred to the defendant. The traveller went to the defendant, and told him that Mrs. S. had ordered

*131] goods, but that he would not send them without his authority. The defendant inquired as to the amount of the order, and was told about

18l. He asked if it would exceed 20l., and was answered in the negative. He asked if that was sufficient to give her a "fairish start," and was told by the traveller that in his opinion it was. He then made inquiry as to the terms, and was told four months credit, or 2½ per cent. discount for cash. He then said, "*You may send them, and I'll take care the money shall be paid at the time.*" The traveller asked whether he might send any more, if Mrs. S. should want them. To which the defendant replied, "not without letting me know." A letter was soon afterwards written to the defendant, requesting him to accept a bill for the amount of the order; to which he returned for answer that he was not in the habit of accepting bills, but that the money would be paid when due.

E. Lawes, Serjt., for the defendant, submitted, that, on the evidence, there was no case for the Jury, as the order was given by Mrs. Stoker, and not by the defendant.

Best, C. J. The decisions on the subject run very fine; but there is the letter, and my doubt is, whether that letter does not apply itself to the by-gone contract, and make a good consideration.

E. Lawes, Serjt., referred to the case of *Mines v. Sculthorpe* (a).

Best, C. J. Then is not this a direct undertaking by the defendant?

E. Lawes, Serjt. I submit not. Mrs. Stoker gives the order, and [*132 upon that she becomes liable immediately; but the traveller says, very prudently, I will not execute the order immediately, nor until you can refer me to somebody else. The rule laid down in the case of *Matson v. Wharam* (b), is, that if the person, for whose use the goods are furnished, be liable at all, any promise by a third person to pay for them must be in writing.

Best, C. J. If you show that any credit was given to Mrs. Stoker, you will bring your case within that of *Matson v. Wharam*. At present, I do not think you are within that case. If you will show that a bill of parcels was sent to Mrs. Stoker, I will nonsuit the plaintiff.

For the defendant, several letters were then put in. The first was from the attorney for the plaintiff, addressed to Mrs. Stoker, requiring payment by a certain day, and threatening proceedings if the account was not then settled.

The second was from the bankrupt to the defendant, saying, amongst other things, "the goods you *guaranteed* to Mrs. Stoker, have been delivered," &c.

The third was from the same to the same, stating: "I once more write respecting my account, which you *guaranteed* to me," &c.

Wilde, Serjt., for the plaintiff. The evidence is of an original credit to the defendant. Your Lordship will not hold that a tradesman is to lose his demand by speaking of a thing as a guarantee, when in point of law it is not so. The question must be decided upon that which took place before the order was executed, and upon the *fulfilment of which that execution took place. [*133 This, I submit, is the proper test. I am to show, that the defendant was to be liable at all events. The traveller said, that he had refused to trust Mrs. Stoker; on which the defendant said, that he might send the goods, and he would take care that the money should be paid. I have produced the defendant's letter, written soon after the order, in consequence of a bill having been drawn, not on Mrs. Stoker (who it is now contended was liable), but on the defendant himself. And in this letter the defendant does not say, that he is only liable in default of payment by Mrs. Stoker; but that the money shall be paid when it becomes due. This, I submit, shows clearly that the bankrupt treated the defendant as the only person liable in the first instance.

(a) 2 Camp. 215. This case decides, that if a person, by a written guarantee, undertake to another to answer for the payment of goods to be sent to a third, the declaration by the seller, against him must be special on the guarantee; and assumpsit for goods sold, will not be sufficient.

(b) 2 T. R. 80. In this case it was decided, that although a tradesman be induced to send goods on credit to another by a promise made in these words: "If you do not know him, you know me, and I will see you paid;" yet he cannot recover unless such promise were in writing.

The attorney for the plaintiffs was then called, and stated that the letter which he wrote to Mrs. Stoker, was a circular letter; that he wrote a similar letter to all the persons who were mentioned in a list given to him by the bankrupt; and that at the time he wrote it, he knew nothing of the particular circumstances under which the debt was contracted.

After *E. Lawes*, Serjt., had observed upon this evidence,

Wilde, Serjt., was about to commence his reply, when

Barr, C. J., intimated, that he should call the plaintiff.

Wilde, Serjt. Will your Lordship give me leave to move?

Barr, C. J. If you think right to move, you may.

Nonsuit (a).

- *134] **Wilde*, and *Andrews*, Serjts., and *Kelly*, for the plaintiffs.
E. Lawes, Serjt., for the defendant.

[Attornies—*Parker*, and *Hornby*.]

(a) No motion was ever made.

HUBBARD v. JACKSON. Oct. 10.

A bill, which has been paid by the drawer, in default of payment by the acceptor, may afterwards be re-issued by the drawer, and the acceptor will be still liable to pay it. In such case, if an action be brought against the acceptor by the indorsee of the drawer, the acceptor cannot inquire into the state of the accounts between the indorsee and drawer, nor will the state of such accounts furnish him with any defence.

ASSUMPSIT on a bill of exchange, dated 25th December, 1820, at three months after date, drawn by one Melville on, and accepted by, the defendant, made payable to the drawer's order, and indorsed by him to the plaintiff. Before the bill became due, Melville indorsed it to a person named Wallace; but, as the defendant, Jackson, did not pay Wallace when it became due, Wallace sued Melville, who paid the debt and costs, and afterwards indorsed the bill to the plaintiff, Hubbard. Hubbard now sued the defendant as the acceptor.

Storks and *E. Lawes*, Serjts., for the defendant, contended, that he was discharged by the conduct of Melville, the drawer.

Wilde, Serjt., for the plaintiff, submitted, that he was still liable. If a drawer takes up a bill because it is not paid by the acceptor, the bill is not a satisfied bill, and may be re-issued.

The defendant's counsel were then proceeding to go into evidence of the state of the accounts between Hubbard the plaintiff, and Melville the drawer, to show that Hubbard had no claim upon Melville, and, therefore, had no right to sue on this bill, which he received from him.

- *135] **Barr*, C. J. I am clearly of opinion, that, as to the account between Melville and Hubbard, that is no answer to this action; Melville may have a right to bring an action against Hubbard, to recover from him what he obtains from the defendant. With respect to the other point, I am inclined to think that the drawer, not being satisfied by the acceptor, has a right to re-issue the bill. But upon this point I will reserve leave for a motion to enter a nonsuit.

Verdict for plaintiff, with leave, &c.

Wilde, Serjt., and *Kelly*, for the plaintiff.

Storks and *E. Lawes*, Serjts., for the defendant.

[Attornies—*Church* and *Wade*.]

In the ensuing Michaelmas Term, *Storks*, Serjt., moved, pursuant to the leave given; but the Court, on the authority of *Callow v. Lawrence* (a) were of opinion that the verdict was right, and

Refused a rule.

(a) 3 M. & S. 95. "Where the drawer of a bill, payable to his own order, and indorsed by him to T., and by T. to B., upon the bill being dishonoured, paid the amount to B., who struck out his own and T.'s indorsement, and returned it to the drawer, and the drawer afterwards passed it to the plaintiff: Held, that the plaintiff might recover against the acceptor." See *Beck v. Robley*, 1 H. Bl. 89, n.

*HALL and UX. v. WHITE. Oct. 12.

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If a person, who writes an answer to a demand made upon another person of certain things, says, that he has got them, and thereby induces the claimant to bring an action against him, he is liable to such claimant in *detinue*, although it does not appear that he had the general controlling power over the things.

DETINUE.—The female plaintiff was the surviving executrix of the last will and testament of a Mr. Edward Callaway; and the defendant was the co-executor of a Mr. Woolford, who had been the co-executor with Mrs. Hall of the will of the said Mr. Callaway; and the declaration stated, that the plaintiffs, as such surviving executrix, &c., delivered to the defendant certain deeds and writings, to wit, &c., of great value, &c., to be re-delivered by the said defendant to them, when he should be thereunto requested. Yet, that the said defendant, although afterwards requested, &c., had not delivered the said deeds and writings, or any of them, to the said plaintiffs, but still unjustly detained the same from them. There was a second count on a supposed finding (a).

The defendant pleaded, *first, non-detinet*; *secondly*, that the plaintiffs did not deliver; and *thirdly*, that they were not lawfully possessed of the deeds, &c., in the declaration mentioned, in manner and form as they had complained against him. These pleas concluded to the country, and the plaintiffs in their replication joined issue upon them. The deeds sought to be recovered had been in the possession of Mr. Woolford, Mrs. Hall's co-executor, till his death; and the evidence given to affect the defendant consisted principally of letters, which he wrote to Messrs. Watson and Broughton, the plaintiffs' attornies, in answer to an application they made to Mr. Woolford on the subject. The letters related to a proposed interview between the defendant and Messrs. Watson and Broughton, on the part of Mr. Callaway, the son of the deceased testator. The first letter contained this passage: "I have no objection to submit the deeds to Mr. Watson's perusal, nor to his taking extracts," &c. The second letter was, *inter alia*, as follows:—"At the proposed interview, you will not *think [*137] it unreasonable, on my part, in demanding from your client every possible security; indeed, I am sure you will bear me out in such demand: the security must consist of a full discharge of all claims whatever on the estate of the late Thomas Woolford, drawn up by my solicitor, and signed by Mr. Callaway, he paying all expenses attending the same, postages, and every other expense that I have been wantonly put to. And you will have the goodness to inform him that the deeds will not be forthcoming unless these conditions be fully complied with; and that he must come prepared accordingly."

Andreas, Serjt., for the defendant, submitted, that, under the circumstances, he could not be charged with a *tort*, as it did not appear that he had the con-

(a) For the form, see 2 Chitt. Pl. tit. *Detinue*.

trolling power over the deeds, but merely that he had them for a short time, in order to produce them at a proposed meeting.

Best, C. J. If the defendant said, that he had the deeds, and thereby induced the plaintiffs to bring their action against him, I shall hold, that they may recover against him, although the assertion was a fraud on his part. It appears by his letter, that he did so say, and, therefore, I am of opinion that the verdict must be for the plaintiffs. His Lordship then left it to the Jury to give such damages as would compel the defendant to deliver up the deeds, and they accordingly found their verdict

For 450*l.* (a).

Wilde, Serjt., and Busby, for the plaintiffs.

Andrews, Serjt., and Holt, for the defendant.

[Attornies—*Watson & B., and Smith & B.*]

(a) The judgment in detinue is for the recovery of the thing detained, *vel valorum inde*, and costs; Com. Dig. ti. *Pleader*, 2 X. 12. For the form of it, see Archb. Forms, 140.

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*BLACKMAN v. SIMMONS. Oct. 17.

In an action for an injury by a vicious bull, the plaintiff recovered, although it appeared that the bull was attracted by a cow, in a particular state, which the plaintiff was driving past the field in which the bull was, and that the plaintiff first struck the bull on the head, to drive him away from the cow.

Semble, that the owner of a vicious animal, after notice of its having done an injury, is bound to secure it at all events, and is liable in damages to a party subsequently injured, if the mode he has adopted to secure it proves to be insufficient.

THE first count of the declaration stated, that the defendant on, &c. was possessed of, and wrongfully and injuriously kept a certain bull in a certain close of his, near to a public highway, well knowing the said bull to be wild and vicious, and accustomed to attack and injure mankind; whereupon it became his duty to take due and proper means to confine the said bull, &c. Yet that the said defendant so negligently and improperly conducted himself in that behalf, and kept and secured the said bull in so careless, insufficient, and improper a manner, in and upon the said close, that afterwards, to wit, on &c., at &c. *by and through the carelessness, negligence, and improper conduct of the said defendant in that behalf*, the said bull escaped from and out of the said close, and then and there, with great force and violence, attacked and ran at and against the plaintiff, who was then and there passing near the said close, and then and there butted, threw down, and greatly bruised, hurt, and wounded the said plaintiff, &c. By reason whereof, &c. The second count charged, that the defendant did wrongfully and injuriously keep the bull, well knowing that it "was accustomed to attack, butt, and injure mankind," and that while he so kept it, it *attacked and ran at the plaintiff*, &c. The third count was very nearly like the first, except that it omitted all reference either to a close or a highway. Plea—Not guilty.

From the evidence it appeared, that the bull was kept in a field adjoining marsh land, at Tottenham, on which the inhabitants at a certain season of the year, had a right of common for cattle. On the day of the injury, the plaintiff, who was a cow-keeper, and had cattle on the marsh, was accompanied by a lad, driving one of his cows, in "a particular state," past the field in question, for the purpose of taking her to a bull, at a farm a short distance off.

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There was only a shallow ditch between the field and the marsh. The

defendant's bull ran along the field a short time, and then came through the ditch, and went to the plaintiff's cow. The plaintiff struck the bull on the head with a stick, to drive him away, and had nearly succeeded, when his stick broke, and the bull threw him down, and butted him while he was on the ground, and broke two of his ribs. Notice had been given to the defendant, of the bull's having run at a man previously; and, at the time of the accident, a strap and chain were fastened round the neck and one of the fore legs of the animal; but they hung so loosely as not to prevent his running. It was proved, that when the defendant was in treaty for the bull, he was told that he must be cautious, as it was very mischievous; upon which he said, that it would suit him all the better, as he wanted it to turn into a mead where he was annoyed by people fishing. And it also appeared, that, upon a gentleman saying, that he supposed he would not turn in the bull without giving notice to the public, the defendant's reply was, "let him give notice himself."

Taddy, Serjt., for the defendant, contended that he was not liable, as the plaintiff had brought the injury on himself, by his own imprudent conduct, in attacking the bull. The question is not, whether this bull had been at some time or other vicious, but whether the accident, under all the circumstances, would not have taken place with any bull, whether vicious or not. If the bull had been permitted to go with the cow, he would not have touched the plaintiff. The plaintiff has not been injured owing to the vice of the bull, as is charged in the declaration. The strap and chain put on by the defendant were notice to the public, that the bull was vicious.

Best, C. J. (to the Jury.) The conduct of the defendant, in this case, has been most gross and wicked, and *if death had ensued, he would have been guilty of manslaughter. The law ought to be known. If a person [*140 thinks proper to keep an animal of this description, knowing its vicious nature, and another person is killed by it, it will be manslaughter in the owner, if nothing more; at all events, it will be an aggravated species of manslaughter. We have heard much of steel traps and spring guns, but they are not so cruel as the mode which this defendant has adopted of guarding his supposed rights, and preventing his neighbours from fishing. It appears, that this bull was not sufficiently secured. If the plaintiff had gone where he had no right to go, that might have been an answer to the action; but the fact is not so. The plaintiff had a right to be where he was—he was in the pursuit of his ordinary business. I believe bulls, if they are not vicious, may be driven off by a man, under such circumstances as those of this case; but that is for you to say. If you are satisfied, upon the whole, that the injury occurred from the vicious nature of the bull, which the defendant knew, then you will find your verdict for the plaintiff; and if so, I think it is a case in which you are at liberty to give considerable damages.

Verdict for the plaintiff—Damages 106*l*.

Cross and *Spankie*, Serjts., and *Payne*, for the plaintiff.

Taddy and *Wickle*, Serjts., for the defendant.

[Attornies—*B. Whittington*, and *Webb & Tucker*.]

If one has a dog, used to bite sheep, and he bites a horse, it is actionable; for the owner after notice of the first mischief done, should have destroyed him, or kept him from doing further injury. *Jenkins v. Turner*, 1 *Ld. Raym.* 109. See also *Smith v. Peck*, 2 *Str.* 126*l*, where it was said by *Lee*, C. J., that a dog which has bitten a person ought to be hanged; and if he bites people afterwards, the owner is responsible, because he might have effectually prevented it. See also, on the subject of injuries by vicious animals, the cases of *Buenden v. Sharp*, *Salk.* 662; *Jackson v. Pecked*, 1 *M. & S.* 238; *Hartley v. Harriman*, 1 *B. & A.* 630; *Beck and Uz. v. Dyson*, 4 *Camp.* 198; and *Judge v. Cox*, 1 *Stark.* 285.

*HARWOOD v. GREEN. Oct. 18.

An officer in the navy has no right to make communications upon subjects, with which he becomes acquainted in his professional capacity, except to the Government, and, therefore, a letter, written to Lloyd's Coffee-house, about the conduct of the captain of a transport ship, by a lieutenant who was superintendent on board, is not a privileged communication; nor can evidence of its being the practice for persons so circumstanced to make communications to Lloyd's, be received in an action for libel against such a person, either as furnishing a defence, in conjunction with other circumstances, or in mitigation of the damages to be recovered.

LIBEL. The plaintiff was the master of a ship called the Jupiter, which was employed in the transport service, and the defendant was a lieutenant in the navy, who had been appointed by the Government as agent or superintendent on board that ship. The libel was contained in a letter addressed to the secretary at Lloyd's, and imputed to the plaintiff misconduct and incapacity in the management of the vessel. The pleas were—*First*, not guilty; *Secondly*, a justification of the whole of the libel; and *Thirdly* and *Fourthly*, justifications of particular parts of it.

The Secretary of Lloyd's was called as a witness, and stated that, in the reading-room there, a notice was fixed on a board (that being the usual mode), stating that the letter in question might be seen by the parties interested.

He was asked by *Wilde*, Serjt., on his cross-examination, whether it had been the practice for officers in the navy to make communications to Lloyd's.

Taddy, Serjt., objected. If it was any part of the duty of an officer in the navy to make such communications, then it might be inquired into; but we cannot receive evidence of any *practice* in a case like this. A communication to Lloyd's, is no more than a communication to any other coffee-house.

Wilde, Serjt. Lloyd's being the place where persons assemble who are connected with the maritime interests of the country, if it has been the practice for officers in the navy to send communications there, that may go far, coupled with other circumstances, to show *quo animo* the defendant in this case acted.

*BEST, C. J. Do you offer it as an answer to the action?

*142] *Wilde*, Serjt. Not alone, but in conjunction with other circumstances.

BEST, C. J. I am of opinion that an officer in the navy has no right to make any communication to Lloyd's, but only to the Government by whom he employed. The Government, no doubt, would furnish all proper and useful information. But, I am clearly of opinion, that the party has no right to furnish it himself. If it were to be allowed, great mischief might follow; because he might take an incorrect or imperfect view of the subject; and the Government would consider the matter before they communicated any thing.

Wilde, Serjt. I am not quite sure that I shall not be able to show that these communications were at least *known* to the Government.

BEST, C. J. If you show me that the government have *directed* them, I do not say that I will not receive the evidence. But I am clearly of opinion that it can furnish no defence to the action, though, perhaps, it may be received in mitigation of damages.

Taddy, Serjt. I submit that it is not admissible, even in mitigation of damages. Every thing, as to the damages, turns upon the *nature of the communication*; and each particular case may differ in that respect.

Wilde, Serjt. It is material evidence to show the defendant's motives. If it is an unusual communication, made to an unusual place, that may induce the jury to give greater damages than if it is not so.

*143] *Taddy*, Serjt. This would be introducing great laxity in practice; —all turns upon the facts of the specific case in which the communication is made. It is only an attempt, by a side wind, to get rid of the general rules applying to justifications of libel.

BEST, C. J. What we are to try here is, whether the publication in question

is a libel or not. There are certain things which are privileged communications; but I am of opinion that this is not of that description. If the defendant, instead of writing to Lloyd's, had written to the Navy Board, then it would have been impossible to maintain any action against him, unless it could be shown that his statements were false to his knowledge. An officer in the navy is to make no communication, but to his employers. If this is not a privileged communication, then it stands upon the same ground as any other description of libel; therefore, what others have been in the habit of doing, can be no evidence in this case. Therefore, upon further consideration, I think this is not admissible, even in mitigation of damages. The question of motive goes to the defence, and is of no consequence upon the subject of damages, because the only inquiry, if the libel is not defensible, is as to what *compensation* the plaintiff is entitled to recover. I am much struck with my brother *Taddy's* argument, and I do not see by what test we can decide the matter; for the communications in each case may differ, and many of them may be innocent. To make any thing of it, it must be shown that it is the practice of officers in the navy to write untruths, complaining of captains of vessels; and you see what a broad question that would open to us. The defendant has justified the libel, and our inquiry here is, first, whether he published it, and secondly, whether it is true. If it is partially true, that will operate in mitigation of damages; if it is wholly true, of course that will be an answer. My brother *Wilde* shall have leave to move, if he thinks I am wrong in my opinion.

Verdict for the plaintiff—Damages, 50*l*.

* *Taddy*, Serjt., and *Platt*, for the plaintiff.

Wilde, Serjt., for the defendant.

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[Attornies—*T. Harrison*, and *Nelson*.]

PARMETER v. BURRELL. Oct. 19.

A. agreed to sell and B. to buy a ship, which A. undertook should be fitted similar to another ship. Before the time for completing the fittings, B. repudiated the contract, and refused to take the ship. Previous to this refusal, A. had done extras to the ship, at B.'s desire. A. did not go on with the fittings, but sold the ship, and brought his action against B. for the loss upon the sale. In his declaration he averred, that the ship was fitted "*according to the form and effect of the agreement*," and also, that it was ready for delivery at the proper time: Held, that he could not recover on the special contract, nor for the extras, on the count for work and labour.

SPECIAL assumpsit on an agreement, by which the plaintiff agreed to sell, and the defendant to buy a vessel, called the *Snow*; which vessel was, by the terms of the agreement, to be coppered and fitted in every respect similar to a vessel called the *Rambler*. The declaration in the first and second counts averred, that the vessel was coppered and fitted in the same manner as the *Rambler*; and, in the third count, stated it to have been coppered and fitted in every respect, "*according to the form and effect of the agreement*." The declaration also averred, that the vessel was ready for delivery. There were counts for work and labour, &c. The agreement was dated the 13th of May, 1828; and it appeared, that, shortly after that date, and before the time of completing the fittings, the defendant repudiated the contract, on the ground that the vessel was not of the tonnage which was mentioned in the contract. In consequence of this the plaintiff did not go on in making the vessel to correspond with the *Rambler*. The vessel was afterwards sold by the plaintiff, and this action was brought to

recover the loss occasioned by such sale. Some extra work had been done to the vessel by the desire of the defendant, amounting to the sum of about 6*l*.

Wilde, Serjt., for the defendant, submitted, that the plaintiff must be non-suited, as he had not proved performance of the contract he declared upon.

*145] *Spankie*, Serjt., for the plaintiff. After the defendant had refused to take the vessel, we had a right to sell in any way. After such refusal, these fittings became immaterial and unnecessary. Supposing it to be necessary to prove the averment in the declaration, there is reasonable evidence of our having *substantially* performed it. But I submit, that, under the circumstances of this case, it is rather an averment of form, as the defendant refused the ship before the arrival of the time at which they would have to be completed.

R. V. Richards, on the same side. It will be a question for the Jury, whether we have not substantially performed the agreement; at all events, we are entitled to a verdict for the extra work, not included in the contract. After the repudiation of the contract, we might have stopped, and not done any more to the vessel. We have complied with the third count, which states the vessel to have been fitted "according to the form and effect of the agreement."

Best, C. J. If you had not sold the vessel you would have been entitled to recover for the extras; but, by selling, you have put an end to the contract. What was done before the contract must be taken as included in it. You have proved a sum of 6*l*. for things done after the contract by the defendant's order; but as you have sold the ship, with that work upon it, you cannot recover for it as for work and labour. There is a verbal difference between the third count and the others, but it is merely a verbal difference; the substance is the same in all. The plaintiff avers that he has performed his contract. That performance by him is a condition precedent to his recovering on that contract. The two first counts allude to the *Rambler* by name; the third only gives us the trouble of looking at the agreement. If you had stopped, that would have been another thing; but you go on, and you hold the defendant to the special contract; and you must, therefore, show *that you have fulfilled your part of that *146] contract. When you went on, you did not do it according to your undertaking. You aver, that you had the ship ready for delivery, but that is not the fact, because you had it not in the state in which you contracted to put it. I am of opinion that the plaintiff must be called.

Nonsuit.

Spankie, Serjt., and *R. V. Richards*, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attornies—*Oliverson & D.*, and *Reardon & D.*]

BEFORE MR. JUSTICE GASELEE.

BLACKBURN v. BLACKBURN. Oct. 23.

Communications made to a member of a dissenting congregation, respecting an individual about to be appointed a minister of that congregation, are privileged communications, and cannot be made the subject of an action by such individual. But if, in consequence of those communications, a printed circular be sent round, containing contradictions of them, and reflecting on the motives of the party who made them, and such party afterwards write a letter,

and send it to the writer of the circular, in which, after repeating the communications, he adds other statements, which he acknowledges he cannot prove, such *letter* is not privileged, but will make him liable in damages, though it be specially found by a Jury that he was not actuated by *express malice*. In such an action, a letter written to the defendant, containing a statement of the facts upon which he founded his charges, is receivable in evidence on his behalf, to show the *bona fides* with which he acted.

LIBEL. The *first* count in the declaration stated, that the plaintiff, before, and at the time of committing the grievances complained of, was minister of a certain congregation of Protestant Dissenters, assembling for divine worship at a meeting house in Bethnal Green, commonly called the Rev. John Kello's Meeting-House, &c.; and that certain rumours and reports having been circulated, injurious to the character of the plaintiff, a certain letter and statement had been and were published and circulated by the Rev. John Kello, minister, and Robert Garrett and John King, deacons, of the said congregation; in which *said statement there was contained, &c. (a), yet the defendant well knowing, &c. (a), but greatly envying, &c., and to cause it to be suspected and believed that the plaintiff had been *guilty of forgery*, and of the offences and misconduct thereafter mentioned, and subject him to the penalties, &c., falsely, wickedly, and maliciously, did compose and write, and cause and procure to be composed and written, a certain false, scandalous, malicious, and defamatory libel, in the form of a letter, addressed to the Rev. John Kello, Robert Garrett, and John King, &c.; in one part of which said libel there was contained, &c. (b). And in another part of which said libel there was contained, &c. (c). And the defendant, further contriving, &c., inclosed the said libel in an envelope directed to the said Robert Garrett, &c., and then and there sent the said libel so inclosed as aforesaid, to the said Robert Garrett, and thereby then and there published the same. [*147]

There were three other counts, setting out, in different ways, different parts of the libel. The defendant pleaded, first, Not Guilty; and then two special pleas of justification, one affirming the truth of that part of the libel which was stated in the declaration, as charging the plaintiff with forgery, and the other of that part which charged him with fraudulent conduct. The replication was, *de injuria*; and issue was taken upon it.

The facts of the case were as follow:—The defendant, Mr. John Blackburn, was the uncle of the plaintiff, Mr. Samuel Blackburn, and resided at No. 126 in the Minorities, *London. In the year 1814, at which time the plaintiff was a dissenting minister, near Canterbury, he became indebted to a person there, named *Blackley*, and being about to leave that part of the country, gave and indorsed to him a bill in the following form:— [*146]

£20 : 9 : 0.

London, July 28th, 1814.

"Two months after date, pay
twenty pounds, nine shillings ster-

to me, or my order, the sum of
ling.

To Mr. Saml. Blackburn, }
126 Minorities.

Saml. Blackburn.

The plaintiff then went to a place called Hempstead, and, just before the bill became due, inclosed a sum of twenty pounds to the defendant, accompanied by the following letter:—

(a) Here was set out, with innuendoes, the printed statement, as it will appear in the account of the evidence, commencing with the words, "It was now that unpleasant rumours," and ending with the words, "any other meaning."

(b) Here was set out that part of the libel which commences with the words, "Let me, then, in the first place, remind you," and ends with the words, "as groundless as they are injurious."

(c) Here was set out that part which commences with the words, "Respecting your reverend friend," and ends with the words, "who was worse and worse."

"Hempstead, September 28th, 1814.

"Dear Sir,—Previously to my leaving Canterbury, I had occasion to give a bill for 20*l.* 9*s.*, which I made payable at your house. Inclosed, you will receive 20*l.* I will be obliged by your taking up the bill, and taking care of it till I come to town, when I will pay you the 9*s.* Please to present my best respects, &c.; I hope to be able to spend a few days in town before long, when I shall have the pleasure of seeing you. I remain, &c.,

SAMUEL BLACKBURN."

The nine shillings were never paid. About a year after the writing of the above letter, some family disputes arose; and the plaintiff and defendant had no intercourse till the meeting alluded to in the plaintiff's circular. In the year 1826, the plaintiff was about to be appointed assistant to the Rev. Mr. Kello, in the Bethnal-Green Meeting, when some statements to the same effect with some *149] of those in the libel, were made by a Mr. Sturtevant, a member of the congregation, for which an action was commenced against him, but discontinued, on his making an apology. It appearing that Mr. Sturtevant had received his information from the defendant, a meeting took place upon the subject, at which the bill of exchange was produced; and the defendant said, he could prove the charges which he had made against the plaintiff. In consequence of this, a circular was sent round to the members of the congregation, in the following form:—

"Bethnal Green, 15th February, 1827.

"Dear Sir,—The object for which the following statement is transmitted to you is obvious, and therefore requires no comment. It is sent in the hope that, if the unfounded calumnies it refutes should have reached you, the minister they were designed to injure may be restored to the possession of the unimpeachable reputation, both in the church and in the world, we are persuaded he deserves. We remain, dear Sir, your affectionate friends and servants,

(Signed) JOHN KELLO, Minister of Bethnal Green Meeting.
ROBERT GARRETT, } Deacons.
JOHN KING, }

"The increasing infirmities of the Rev. John Kello having rendered it expedient that regular assistance in his public labours should be procured, occasional supplies were engaged for part of the Lord's day, who met with various degrees of acceptance; and some painful differences of opinion having arisen respecting the right of procuring the assistance, which we all admitted to be necessary, led to the resignation of the deaconship of Mr. Briscoe. In this state of things, and subsequent to Mr. Briscoe's resignation, the Rev. Samuel Blackburn was invited, in August last, to preach a single sermon, which was so much approved as to induce an immediate application to him, by the Rev. J. Kello, and the *150] deacons, for his future services; and thus he was engaged, from Sabbath to Sabbath, with increasing approbation, until, at the expiration of two months, a meeting of the church and congregation was publicly convened to consider of the propriety of inviting him to supply the pulpit, once on the Lord's day, for a specific period. At this meeting Mr. Briscoe and Mr. R. L. Sturtevant were present, and made several vague insinuations against the private character of Mr. Blackburn, which led to the postponement of the business for four days, to give time for further inquiries. Having received the most unexceptionable and satisfactory testimonies from those who had known Mr. Blackburn intimately for many years, added to the fact, that he had lived in great respectability in the immediate neighbourhood, for the last nine years, and as the opposing parties absented themselves from the second meeting, by which it might be inferred they admitted their previous opinions to be unfounded, an unanimous invitation for three months was agreed to, and transmitted to Mr. Blackburn, signed by the aged minister and deacons, on behalf of the church

and congregation. From the increasing number of hearers, and some pleasing indications of usefulness, which had resulted from his ministry during these three months, towards the close of that period another public meeting was convened, which was more numerously attended than the former, and an invitation for an additional three months was unanimously agreed to. The Rev. John Kello, in conveying to Mr. Blackburn the request of the meeting, added, 'if the first invitation was unanimous, the second is enthusiastic.'

"It was now that unpleasant rumours, which were traced to Mr. R. L. Sturtevant, began to create uneasiness, and Mr. Garrett, the senior deacon, waited on him, and inquired what grounds he had for the reports he had circulated respecting Mr. Blackburn; the reply of Mr. Sturtevant was—Mr. Blackburn has put his uncle's name to a bill of exchange, which he was obliged to pay to prevent him from being prosecuted:—and stated some other circumstances, which, if true, involved the moral consistency *of Mr. Blackburn. The result [*151] of this conference was communicated to the Rev. J. Kello, who informed Mr. Blackburn of the serious imputations cast upon him. No sooner was the communication made to Mr. B., than he sought an interview with Mr. R. L. Sturtevant, and entreated him to accompany him instantly to his uncle, Mr. John Blackburn, No. 126, Minories; with whom he had held no sort of intercourse for the last twelve years. They went accordingly, and the said Rev. S. Blackburn having ascertained that Mr. Sturtevant had really received from Mr. John Blackburn some communications calculated to induce him to suppose that the imputation was well founded, a meeting was arranged for the following Thursday, at which were present Mr. Sturtevant, senr., Mr. R. L. Sturtevant, junr., Messrs. Garrett and King, the deacons of the church, and Mr. John Blackburn, from whom the injurious report had originated, and who was now requested to produce the bill on which he had rested his insinuations of fraud or forgery, or both. It is not for man to judge the motives of his fellow men, they can only be known to God. The following, however, are the facts, as clearly developed at this meeting. When Mr. John Blackburn was requested to produce the bill, he affected great reluctance, cautioned his nephew, the Rev. S. Blackburn, who appeared impatient for its production, that he would not be answerable for the consequences, if it were produced; and, in fact, led every person present to the painful conclusion, that the document would confirm the charge, and justify those who had brought it forward. At length the bill was exhibited, and found to be a simple bill of exchange, drawn thirteen years ago, accepted by Mr. Samuel Blackburn, and made payable at No. 126, Minories, his uncle's residence, where he occasionally resided when in Town; the necessary funds to meet the payment of the bill, except nine shillings, being also sent by him to his uncle, before the bill became due, in a letter, which was also produced, stating that such bill would be presented, and requested that it might be taken care of till he came to *Town. In fact, the whole transaction was [*152] honourable and regular, and proved nothing but the evil disposition of the individual who could attempt to extract from it any other meaning.

"In consideration of Mr. R. L. Sturtevant's having received the impression from Mr. John Blackburn (though not expressed in language sufficiently explicit to make him legally responsible), and having consented to repair the injury, as much as possible, by publishing this refutation, and offering his apology, the Rev. S. Blackburn has consented to forego the legal proceedings he had commenced against him, he having had no object in taking such a course, but the complete vindication of his character from the aspersions cast upon it.

(Signed) ROBERT GARRETT,
JOHN KING,
S. STURTEVANT.

Witness, WILLIAM BROWN.

"I, Richard L. Sturtevant, hereby express my deep regret for having been so far imposed on by the representations of Mr. John Blackburn, of No. 126,

Minories (the uncle of the Rev. Samuel Blackburn), as to make the injurious and unfounded imputations referred to in the foregoing statement, which I admit to be a correct representation of the facts and circumstances it professes to explain; and I sincerely hope it will have the intended effect of completely removing from the said Rev. S. Blackburn's character any suspicions which may have attached to it in consequence of such imputations.

(Signed) R. L. STURTEVANT.

Witness, WILLIAM BROWN.

Dated this 15th February, 1827."

One of these circulars was transmitted to the defendant himself, who shortly afterwards sent the following case for the opinion of Mr. Denman, the Common Serjeant :—

"Samuel Blackburn being indebted to Mr. Blackley *of Canterbury, *153] in the sum of 20*l.* 9*s.*, for goods sold, gave to him the following bill, [as stated *ante*, p. 148].

"The bill and acceptance are in the handwriting of the drawer, who, at the time he gave the bill, represented to Mr. Blackley that Mr. Samuel Blackburn, the pretended acceptor, was his uncle, and in the receipt of rents for him. This was in part false; for although his uncle did live at 126, Minories, at which place the bill was addressed, his name was not Samuel Blackburn, but John Blackburn; and he was not in the receipt of any rents for his nephew, or indebted to him in any sum; nor did he give him any authority to draw the bill upon him. By the day the bill became due, Samuel Blackburn sent to his uncle, John Blackburn, the amount of the bill, less nine shillings, which, when presented, was taken up by the uncle, with the money sent him by the nephew for that purpose: and the bill is now in the possession of the uncle. It will be perceived, that the transaction took place near thirteen years since; but circumstances have recently transpired, which make it necessary for the uncle of the drawer and acceptor of the bill to take opinion upon the following points.

"First, whether the acceptance was a forgery of Samuel Blackburn, he drawing and accepting the bill, and negotiating the same under the false representation before mentioned?

"Second, Whether, if it was not a forgery, it was an offence indictable at common law, for obtaining money under false pretences?

"Third, If the acceptance was a forgery, could the latter course have been adopted, so as to have avoided the necessity of indicting capitally?

"Fourth, Will the lapse of time prevent the parties from now proceeding in either way?"

Mr. Denman answered the first question as follows:

"On the principle of *Mead v. Young*, 4 T. R., 28, I think the acceptance written on the bill, under the circumstances stated, was a forgery."

*154] "The second and third questions he answered in the negative; and his answer to the fourth was in these terms: "Lapse of time is not effectually a bar; but it would furnish strong ground for suspecting the evidence, and giving it every construction favourable to the prisoner; so that I could not, under any circumstances, now recommend a prosecution."

The defendant then wrote and sent to the persons who had signed the circular, the following letter, which was the libel complained of:—

"To the Rev. John Kello, and Messrs. Garrett and King, the Pastor and Deacons of the Independent Church at Bethnal Green.

"Gentlemen,—By a printed paper, which you have circulated, bearing the date of 15th February, 1827, you have published a statement, respecting my conduct, which is so untrue in point of fact, and so defamatory in its tendency, that I have the assurance of my legal adviser that I could successfully prosecute you for a mischievous libel. I wish not, however, to resort to a mode of justifi-

cation which, amongst believers, is forbidden by apostolic authority, especially as I anticipate that, when you are in possession of the facts I have to communicate, you will, as becometh Christians, confess your mistake, and retract the injurious statement you have circulated against me. And here permit me to premise that, however it might be insinuated that private and unworthy motives have excited my opposition to the Rev. S. Blackburn, I rejoice that I can appeal to the Searcher of hearts, my only consideration has been, what may best promote the real interest of truth and holiness, and the real interest of the kingdom of Christ. Indeed, to every considerate mind it must appear reasonable, that I should not needlessly desire to involve one who bears my name, and partakes of my blood, in a reproach which must necessarily lessen the general respectability of my family, in the opinion of all those who may be informed of the exposure. But, dear as my name and *reputation may be, yet I trust the cause of Christ is still more dear to me; and solicitude for its interest, in connection with your church, has [*155 involved me in this most painful, though necessary, explanation. Let me, then, in the first place, remind you, that I did not seek for an opportunity to expose the conduct of the Rev. S. Blackburn, but that Mr. R. L. Sturtevant, as a member of the church about to choose that reverend person as their co-pastor, applied to me, in all the confidence of old acquaintance, to inform him what were my views of that individual's character. Now, as I considered it as one of the most fearful calamities that can befall a church, to receive as its pastor a man of questionable character, I did, in the confiding frankness of Christian intercourse, and upon his promise to keep the matter secret, inform him of that transaction to which your letter alludes, and which, associated in my mind with other facts, had produced impressions concerning the moral habits of the party concerned, which I will not now describe. I had, indeed, received statements from Tonbridge Wells, Canterbury, and Luton, respecting the character of the Rev. gentleman, whilst travelling in the Wesleyan Methodist connection, no way to his honour; but I could not prove them: statements from the counties of Nottingham and Derby, unsought for by me, upon the authority of some of the most respectable ministers in those districts, that the conduct of the individual in question, when an independent minister in their neighbourhood, was not irreproachable; but then I could not substantiate them. Yet these statements, supported by creditable testimony, together with the facts in my own possession, produced an amount of moral evidence, the force of which I shall feel as long as I live: And therefore I did think it a duty to my friend Sturtevant, and to the church at Bethnal Green, to put him in possession of the facts of that bill transaction, which, in my own judgment, includes both falsehood and fraud. How far my confidence was betrayed by Mr. R. L. Sturtevant, you well know, and that I was compelled to maintain my own *veracity by producing [*156 the bill in question at the meeting you describe, and which I attended without even a friend to witness for me the statements which were made. The transaction of that evening you thus describe: [Here that part of the printed circular was stated, which contains an account of the meeting on the subject of the bill. It then proceeded thus:]—I admit your statement in the general, but deny that the reverend gentleman ever resided in my house, or ever slept there more than one night. If you recollect, I cautioned your reverend friend respecting the consequences; because I believed it was fraudulent in its character, and might involve penal results of no desirable kind. How far my impressions were correct, you will learn from the opinion of Thomas Denman, Esq., the Common Serjeant of London, who, as one of the Metropolitan Judges, may be supposed competent to decide that question. Permit me, however, first to lay before you the case which has been submitted to that learned gentleman, the facts of which can be substantiated on oath. [Here the case was set out as *ante*, pp. 152-3, but only the first question and the answer to it were given. The libel then proceeded thus:] To this measure have I been driven in my own defence by your

indiscreet zeal, and with you must rest all the consequences of this exposure. I presume, however, gentlemen, that this judicial opinion will cause you to feel that the statement, to which you have lent your sanction, 'that the whole transaction was honourable and regular,' is somewhat doubtful; and that your charges of 'imposition and evil disposition' are as groundless as they are injurious. I now, then, solemnly call upon you, as the officers of a church of Christ, who ere long will be our judge, to take those measures which Christian equity demands, to remove from my character those imputations, which, without provocation, you have cast upon it. I do not wish to publish these things to the world; it is fearful enough that the church should hear those things which would make the enemies of godliness to triumph; but from you they could not be
 *157] withheld. Respecting your reverend friend, I wish only to add, that, if he were prepared, with the ingenuousness of Christian repentance, to confess his past indiscretions and sins, no one would rejoice more sincerely in the evidence of his penitence, and in the prospect of his usefulness, than myself; but if he proudly denies facts which are notoriously true, I can only anticipate, that he will be found, like 'evil men and seducers who wax worse and worse.' Waiting your reply, I am, gentlemen, your faithful servant,

(Signed)

JOHN BLACKBURN.

Minories, May 19th, 1827."

Mr. Garrett, one of the deacons of the meeting, was called on the part of the plaintiff; and he admitted, on his cross-examination, that, after the plaintiff was suspended, he made inquiries in the different counties mentioned in the libel as to the plaintiff's character, the results of which he considered himself bound in honour and integrity not to disclose; but he stated that the answers were not satisfactory, and were among the reasons which prevented the plaintiff's re-appointment.

Cross, Serjt., for the defendant, contended, that, under the circumstances, the defendant's letter was a privileged communication; and also, that the declaration was not proved, inasmuch as it alleged the plaintiff to have been charged by the defendant with forgery; and the defendant's statement could not be said to have that meaning. He then offered in evidence a letter, dated 14th September, 1815, addressed to the defendant, purporting to come from Blackley, and stating that the plaintiff had represented, at the time of giving him the bill, that the acceptance was the defendant's, and that the defendant was the person who received his rents in London.

Wilde, Serjt., for the plaintiff, objected.

*159] *GASELEE, J. I think the letter is admissible for the purpose of showing the *bona fides* of the defendant's conduct.

Blackley was then called as a witness. He stated, that the letter in question was not in his handwriting, but another person wrote it for him from his dictation; and that he could not recollect whether its contents were true, as the transaction occurred so long ago. It was proved that the plaintiff paid for the printing of the circular letter; and it appeared on inspection of the bill, that the mode of making the S differed in the signature to the drawing and acceptance.

GASELEE, J. (after ascertaining from the Jury that in their opinion the special pleas were not proved, in summing up, said), I think the original communication made by the defendant to Mr. Sturtevant, and the verbal communication at the meeting, were both of them confidential and privileged; and if it had stopped there, no action for libel could have been maintained by the plaintiff. But I think that the plaintiff's printed statement is not a justification of the defendant's letter, and does not make it a privileged communication, especially as that letter contains representations which had not been previously made, about accounts from Tonbridge and other places, which the defendant admitted he could not prove. It strikes me, that this is going beyond the line of self-defence. But in case the Court should be of opinion that I am wrong, and that the defend-

ant's letter is privileged, I will thank you to give me your opinion as to whether the defendant was actuated by express malice; because express malice would have the effect of destroying the privilege. In deciding the question of damages, you are at liberty to take into consideration the whole of the defendant's letter, though a part of it only is set out in the declaration; and it is for you to say, whether you think *that letter is merely an answer to the observations [159] upon the defendant, made in the plaintiff's circular. You are also at liberty to consider, in estimating the amount of the damages, the nature and extent of the provocation given to the defendant by that circular. You will also say whether you are satisfied that the libel intended to impute forgery to the plaintiff.

The Jury found a verdict for the plaintiff—Damages, 50*l.*, saying, that they were of opinion that the libel imputed forgery, but that the defendant was not actuated by express malice.

Wilde, Serjt., and *Platt*, for the plaintiff.

Cross, Serjt., and *Comyn*, for the defendant.

[Attornies—*Harrison* and *Rush*.]

In the ensuing Michaelmas Term, rules were obtained on the part of both the plaintiff and defendant, which, in the course of that Term, came on to be argued together. In the course of the argument, reference was made to Buller's Law of Nisi Prius (a), Blackstone's Commentaries (b), and the cases of *Edmondson v. Stevenson* (c), *Herve v. Dowson* (d), *Smith v. Richardson* (e), *Crawford v. Middleton* (f), *Weatherston v. Hawkins* (g), and *Bromage v. Prosser* (h).

The Court were of opinion, that the ruling at Nisi Prius was right; that the communication was not privileged; and that such being the case, it was not necessary to show express malice (i).

(a) Pp. 8, 9.

(c) Buller, P. 8.

(e) Willes, 24; Buller, 9.

(g) 1 T. R. 110.

(i) For an account of the argument in banc, and a fuller statement of the pleadings, see Moore & Payne's Common Pleas Rep. p. 33.

(b) Vol. 3, p. 125.

(d) Ib. Willes 24.

(f) 1 Lev. 82.

(h) Ante, Vol. 1, pp. 475, 673.

*BEFORE MR. JUSTICE GASELEE.

[161]

GETTING v. FOSS, Gent. Oct. —.

A circular letter sent by the secretary to the members of a society for the protection of trade against sharpers and swindlers, furnishing information respecting certain bill transactions, is not a privileged communication. *Seem*, that if such letter state particular facts, it will not be a libel, though some of the persons receiving it, believed that it was sent to intimate that the parties mentioned in it were common sharpers and swindlers. *Aliter*, if it contain a general statement, such as, that the party mentioned in it is considered an improper person to be proposed to be balloted for as a member of the society. At all events, in the former case, it is a question for the Jury, whether the society really and bona fide intended to give the particular information which the letter contains.

ACTION for a libel contained in the ninth correspondence of the Society for the protection of trade against Sharpers, and Swindlers, of which society the defendant was secretary. Plea—The general issue, and a justification of the truth of the statements contained in the libel.

The libel was contained in a circular addressed by the secretary to the different members of the society, and stated that he was desired to inform them, that bills were then in negotiation purporting to be drawn at Edinburgh, by E. Boyd, which were accepted by the plaintiff, and made payable at Messrs. Williams, Deacon, & Co's., bankers, in London, who were found, on application to know nothing about the parties.

For the plaintiff, three witnesses were called, members of the society, who had received the letter; and they stated, that they believed the object of the circular letters was, to let all the world know that the persons whose names were inserted in them, were common swindlers and sharpers; and that, without referring to the particular facts stated, they thought that the defendant must have got such information as convinced him that the plaintiff was a swindler and a sharper, and a person of bad character, with whom the members ought not to have dealings. From the cross-examination of these witnesses, it appeared that they had never attended any of the society's meetings, but spoke only of the intention of the circulars from their own impressions.

Wilde, Serjt., for the plaintiff, cited the case of *Goldstein v. Foss* and another (a), in which it was held, that a *statement in a circular like the *161] present, that the plaintiff was considered an improper person to be proposed to be balloted for as a member of the society, was a libel.

Spankie, Serjt., for the defendant. This case differs from that. The society mean to give a caution, and they state the facts upon which the caution rests. The communication is confidential. If it had been sent to Lloyd's, it might be a libel, but it is only circulated among the members of the society. The witnesses have said that they understood the letter to convey the idea that the plaintiff was a swindler. But we are not to be bound by the heedless interpretation of the parties receiving it. If a party, without any foundation, chooses to draw such an inference, is that to affect us? The information is important to be given, and it contains no charge. It does not, without the most strained construction, intimate that the plaintiff was a swindler and a sharper. The question is, whether the communication was warranted by the facts. If the defendant had not made the communication, he would have abandoned the objects for which the society was formed. It is clear law, that if I know that a friend of mine may be injured in a particular transaction, I have a right to give him a warning, and say, have no dealings with such and such men; and the question, in that case, will be one of *bona or mala fides*.

GASELNE, J. Such general statements as came before my Lord TENTERDEN, in the case which has been cited, might be taken to have the meaning which is there put upon them; but I shall leave it to the Jury to say, whether, in the present case, there has been such a general charge, or whether the society intended really to give the particular information which the letter contains. With respect to privilege, I do not think that the letter comes within the class of confidential communications.

*162] *After some evidence had been given on both sides, as to the truth of the statements in the letter, an arrangement was made between the parties, by which

A verdict was taken for the plaintiff on the general issue, with nominal damages, the defendant disclaiming any charge of swindling; and the Jury were discharged from giving a verdict upon the special plea.

Wilde, Serjt., and *Parke*, for the plaintiff.

Spankie, *Adams*, and *Storks*, Serjts., for the defendant.

[Attornies—*Willis & Co.*, and *Fass*.]

SECOND SITTING AT GUILDHALL, IN MICHAELMAS TERM, 1827.

BEFORE MR. JUSTICE GASELEE.

WALTON, Assignee of JEREMIAH NATHANSON and MYER WASSER DRUDENGER, Bankrupts, v. DODSON. Nov. 22.

A guarantie for goods, addressed to one of two partners, may be declared on, as given to both, if it appear that the partner to whom it was addressed did not carry on any separate business. A guarantie not addressed to any one, must be declared on as given to the party to whom or for whose use it was delivered.

ASSUMPSIT on two guaranties. The declaration stated, that, in consideration that the said Jeremiah and Myer Wasser, before their bankruptcy, would sell and deliver to one Levin such goods as he might require of them in the way of their trade and business, the defendant undertook, and then and there faithfully *promised the said Jeremiah and Myer Wasser to guarantee* and be answerable to them for such goods, to the amount, &c. There *were* several [*163 counts (a), but they all stated the promise and undertaking as made to both the bankrupts. Plea—*Non assumpsit*.

When the guaranties were read, it appeared that one of them was addressed to Nathanson only.

Wilde, Serjt., submitted, that on this the plaintiff was not entitled to recover, as it was stated in the declaration to have been given to Nathanson and Drudenger.

GASELEE, J., inquired if the bankrupts were in business together? and was answered, that they were, and that Nathanson did not carry on any separate concern.

Wilde, Serjt. The contract is with one only, and the rule, as to unity of interest, does not apply to the case of a guarantie.

GASELEE, J. I think it is sufficient.

The other guarantie had no address at all.

Wilde, Serjt. Though your Lordship has decided that a guarantie, addressed to one of two partners, will enure for the benefit of both; yet I hope that you will not think that a guarantie, not addressed to either, is in the same situation.

GASELEE, J. Such a guarantie will enure to the benefit of those, to whom, or for whose use, it was delivered.

Verdict for the plaintiff, for 25*l.*, on one guarantie only.

(a) PRACTICE.—In an undefended cause, which was tried in the King's Bench, at the third Sitting in Hilary Term (February 11th, 1828), Mr. Justice *Littledale* observed, that it would much facilitate reference, if attornies, in engrossing their records, and also in making copies of paper books for the Judges, would denote, in the margin, by the words "first count," "second count," and so on, the commencement of the different counts of a declaration.

*Taddy, Serjt., and Chitty, for the plaintiff.
Wilde, Serjt., and Payne, for the defendant.

[Attornies—Shave, and B. Whittington.]

SITTINGS AT WESTMINSTER, AFTER MICHAELMAS TERM, 1827.

BEFORE LORD CHIEF JUSTICE BEST.

DOE, on the Demise of TILT, v. STRATTON. Nov. 29.

Where a party occupies under an agreement for a lease during the whole of the term for which the lease was to be granted; a notice to quit is not necessary at the end of such term, as the agreement is evidence of the expiration of the tenancy as well as of the other terms of the holding.

EJECTMENT. Plea—Not guilty.

The defendant held under an agreement dated the 7th Sept. 1820, by which, in consideration of 50*l.*, and of the rent, matters, and agreements thereafter contained on his part, the lessor of the plaintiff promised and agreed, that he, his heirs or assigns, should and would, on or before the 29th day of September, then next ensuing, upon request made to him or them in writing, for that purpose, grant and execute unto him, his executors, administrators, and assigns, a good and effectual demise or lease, by indenture, of all, &c. [the premises sought to be recovered.] To hold the same unto the said defendant, his executors, &c. for the term of seven years; to be computed from the 29th day of September then instant, at the yearly rent of 100*l.* clear, &c. payable, &c. And it was mutually agreed, that the said lease should contain covenants on the part of the defendant, for the payment of rent; to keep the premises in tenantable repair, &c. and to quit and deliver up possession at the end of the term; and also a proviso empowering the lessor of the plaintiff to re-enter on non-payment of *165] rent, or on non-performance *of any of the covenants. No lease was granted or demanded. The term expired at Michaelmas 1827, and the defendant not having quitted, this action was brought to recover possession.

Jones, Serjt., for the defendant, contended, that he was entitled to a notice to quit, as he must be considered as holding as tenant from year to year, no lease having been executed. Where a lease is executed in pursuance of an agreement, the efflux of time is of itself notice. But if the parties proceed on the terms of the agreement, the defendant enters into possession as tenant from year to year, and then, although it may be true that, with regard to the terms of the holding, the agreement may be good, yet it is not with respect to the collateral matter of forfeiture. The case of *Mann v. Lovejoy* (a) decides, that where the occupier, under an agreement for a lease at a certain rent, pays the rent, he becomes tenant from year to year, and the landlord may distrain. And in the case of *Hammerton v. Stead* (b), Mr. Justice Littledale observes: "It is unnecessary to say whether the instrument in question is or is not a lease; for

where the parties enter under a mere agreement for a future lease, they are tenants at will; and if rent is paid under the agreement, they become tenants from year to year, *determinable on the execution of the lease* contracted for, that being the primary contract. But if no rent is paid, still, before the execution of a lease, the relation of landlord and tenant exists, the parties having entered with a view to a lease and not a purchase."

V. Lawes, Serjt., for the plaintiff, contended, that he was in the same situation with respect to the necessity of *notice, as if a lease had been granted and suffered to run out. The agreement is evidence of the expiration of [*166 the tenancy, as well as of the other terms of the holding.

Holroyd, on the same side, referred to *Doe v. Breach* (a) as a case in point; and also to *Doe v. Smith* (b), *Morgan v. Bissell* (c), *Dunk v. Hunter* (d), *Colley v. Streeton* (e), and *Clayton v. Burtenshaw* (f), as containing observations bearing upon the subject.

Best, C. J. I am of opinion that the plaintiff is entitled to recover. I think that if, during the seven years, they had wished to put an end to the tenancy, they must have given notice, but not at the end of the term. I think this is the common sense of the thing. But as there are cases on the subject, I will give the defendant leave to move to set aside the verdict for the plaintiff, if the Court shall think fit.

Verdict for the plaintiff—Damages 1s., subject, &c.

V. Lawes, Serjt., and *Holroyd*, for the plaintiff.

Jones, Serjt., for the defendant.

[Attornies—*Argill & M.*, and *Ashfield*.]

In the ensuing Hilary Term, *Jones*, Serjt., moved pursuant to the leave given, but the Court refused a rule.

(a) 6 Esp. N. P. C. 106. This case decides, that if a tenant holds under an agreement for a lease, which specifies the covenants to be in the lease, with a right of entry for a breach of them, an ejectment may be sustained on any breach, though no lease has ever been executed.

(b) 6 East, 530.

(c) 3 Taunt. 65.

(d) 5 B. & A. 323.

(e) 3 D. & R. 522, and 3 B. & C. 373.

(f) 7 D. & R. 800, and 5 B. & C. 41.

*SITTINGS IN LONDON, AFTER MICHAELMAS TERM, 1827. [*167

BEFORE MR. JUSTICE PARK.

(Who sat for the Lord Chief Justice.)

GOODMAN v. KENNEL. Nov. 30.

If a master sends his servant on an errand, without providing him with a horse, and the servant takes one, and rides it in the doing of such errand, and an injury happens in consequence, the master is not liable in an action for damages by the party injured.

This was an action brought to recover compensation in damages, for an injury which the plaintiff had received from a horse, which a man named

Corkin, an occasional servant of the defendant's, was riding. It appeared that the defendant, who was a surveyor, occupied a house at Kennington, jointly with a gentleman named Freshfield, who kept a horse in a stable behind the house, where the defendant also had previously kept one, but had not one at the time of the accident. On the day on which the accident happened, the defendant sent Corkin with a book into Holborn, and gave him a shilling for his trouble, before he went. Corkin, who had been in the habit of exercising Mr. Freshfield's horse, went to the stable and took it (without any orders from his master, and without communicating either to him or Mr. Freshfield what he was about to do), and rode it to Holborn, and was on his way back when the injury happened.

Mr. Freshfield was called as a witness, and proved that he had expressly desired Corkin never to ride his horse on any errand *into London*. There had been an investigation at a police office, and contradictory evidence was given with respect to some statements of the defendant before the magistrate, on the subject of the ownership of the horse. And there was also contradictory evidence as to whether the defendant and Mr. Freshfield had been in the habit of mutually using each other's horses.

*169] *Wilde, Serjt.*, for the plaintiff. Every master is liable for his servant's acts, when that servant is engaged in the execution of his commands. It is of no consequence, in this case, whether the horse belonged to the defendant or not. The principle is this: if you have the benefit of the man's services, you must be responsible for his misconduct. The question is this, was Corkin in the course of his employment by Kennell; for if he was, whether he chose to go on horseback or on foot, if the injury happened by his misconduct, Kennell is liable.

PARK, J. I cannot bring myself to go the length of supposing, that if a man sends his servant on an errand, without providing him with a horse, and he meets a friend who has one, who permits him to ride, and an injury happens in consequence, the master is responsible for that act. If it were so, every master might be ruined by acts done by his servant without his knowledge or authority. His Lordship then left to the Jury the contradictory evidence as to the ownership of the horse, and the question as to any implied authority from the defendant to Corkin to use it; and they found a

Verdict for the plaintiff.—Damages, 60*l*.

Wilde, Serjt., and *Thesiger*, for the plaintiff.

Taddy, Serjt., for the defendant.

[Attornies—*Meggy*, and *Evans & H.*]

In the ensuing Hilary Term, *Taddy, Serjt.*, moved to set aside the verdict, on the ground that there was no evidence to go to the Jury, as to the defendant's ownership *of the horse, or his assent to his servant's using it. But the *169] Court refused a rule, expressing it as their opinion, that the summing up was perfectly correct, and that the whole of the case had been properly put to the Jury.

The case of *M'Manus v. Crickett*, 1 East, 106, decides that a master is not liable in trespass for the wilful act of his servant (as by driving his master's carriage against another), done without the direction or assent of the master; but that he is liable to answer for any damage arising to another, from the negligence or unskillfulness of his servant acting in his employ.

ADJOURNED SITTINGS IN MIDDLESEX, AFTER MICHAELMAS
TERM, 1827.

BEFORE MR. JUSTICE PARK.

DAVIS v. CROWDER and another. Dec. 1.

The party, who was defendant in a suit, cannot, in an action against the sheriff for a false return to a *fi. fa.*, issued in that suit, be called as a witness for the defendant, to show circumstances from which the Jury might infer that no debt was actually due by him.

ACTION against the sheriff of Middlesex, for a false return of *nulla bona* to a writ of *fi. fa.*, issued in a cause of *Damon v. Steward*. The plaintiff was the assignee of Damon, under the Insolvent Debtors' Act.

On the part of the defendants, Steward was called as a witness, and *Taddy*, Serjt., admitted that he called him, to show circumstances from which the Jury might infer, that no debt was actually due from him to Damon.

Wilde, Serjt., objected, on the ground that the witness was interested.

Taddy, Serjt. He cannot avail himself of his own evidence. He cannot be benefited by this cause.

PARK, J. I cannot fathom all the possible ways in which he may be benefited. I am of opinion that his evidence ought not to be received. If I am wrong in that opinion, you may move the Court upon the subject.

Verdict for the plaintiff (a).

Wilde, and *V. Lawes*, Serjts., and *Chitty*, for the plaintiff.

Taddy, Serjt., and *Hutchinson*, for the defendants.

[Attornies—*R. Hill*, and *F. Smith*.]

(a) No motion was made.

*BEFORE MR. JUSTICE GASELEE.

[*170]

SEAGOE v. DEAN. Dec. 3.

A. agreed with B. by *parol*, that if B. would take of him a lease for twenty-one years, of certain premises, he would give 20*l.* towards putting them into repair. B. accepted the lease, and A. refused to pay the money: Held, in an action for it, that an admission by A. that the money was due, entitled B. to recover upon the account stated.

THE first count in the declaration stated, that in consideration that the plaintiff would become tenant to the defendant, of a certain cottage, &c. at a yearly rent of 39*l.*, under a lease for twenty-one years, to be granted, &c.; the defendant undertook that he would pay the plaintiff 20*l.* towards the repairs of the premises, and that he would make a certain opening, &c. &c. The second count was

similar, except that it omitted the promise to make the opening. There were the usual money counts, and an account stated.

The plaintiff was a widow, and her daughter was called as a witness, and stated that she was present at a conversation between the defendant and her mother, in which the defendant said, that if her mother would take a lease of him for twenty-one years, at 39*l*. a year, he would open a place for the deposit of coals, and give her 20*l*. toward the general repairs of the premises. It was also proved, that the defendant on one occasion said, I know I owe the money, but I cannot be compelled to pay it, because the only person to prove the agreement is the plaintiff's daughter, and she cannot be a witness; and on another occasion he made a similar acknowledgment of the debt, and said he could not pay it then, but would deduct it out of the next quarter's rent. The lease was taken by the plaintiff. The parol agreement was made on the 1st of January, and the lease was dated in February; and was to hold from the Christmas preceding. The 20*l*. was demanded when the first quarter's rent was due.

Wilde, Serjt., for the defendant, objected that the parol evidence was not admissible. This is one of the cases to which the statute of frauds particularly applies (a).

*GASELEE, J. I am of opinion that it is a matter quite distinct from *171] the lease. I think the evidence is receivable, and that the plaintiff is entitled to a verdict upon the account stated. But I will give you leave to move to enter a nonsuit.

Verdict accordingly.

Andrews, Serjt., and *Hutchinson*, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attornies—*H. Chester*, and *Pearce & Co.*]

In the ensuing Term, *Wilde*, Serjt., moved pursuant to the leave given. According to the declaration, it is one entire contract, and relates to the granting of a lease, and therefore, by the statute of frauds, it ought to be in writing. Also, as the lease has been executed, we must look to that for the terms of the contract, and we do not find there any thing about this payment; the lease must be taken to contain the consideration. As to the account stated, it does not appear, whether the repairs had been done at the time of the conversation relied on, and the admission is connected with the contract, and the contract is for becoming tenant under a lease. Up to the execution of the lease there was no binding contract.

BEST, C. J. If the plaintiff was bound to rest his claim upon the special counts, I think he could not recover. But I consider the admission as evidence upon the account stated, and I do not think that the statute of frauds stands in the way of this decision, for although under that statute the original contract might be void, yet there was a moral obligation to pay, which I think the law will convert into a legal one. There is an abundance of cases which go to show, that notwithstanding a failure of the original contract, if there be a moral obligation, it will support a subsequent promise.

*172] *PARK, J. I think this case was properly decided on the account stated; I do not think the 20*l*. has any thing at all to do with the lease.

BURROUGH, J., concurred.

GASELEE, J. If this action had been against the landlord for not granting, or against the tenant for not accepting the lease, the objection must have prevailed; but I take it to be every day's practice, that although a party might not

be bound if he stood on his legal objections, yet, if he afterwards acknowledge that the money is due, it may be received on the account stated.

Rule refused.

BEFORE MR. JUSTICE BURROUGH.

DUNCAN v. MEIKLEHAM. Dec. 4.

In an action of replevin against a broker, a person who, at the time of the distress, was in partnership with such broker, but who, at the time of the trial, had ceased to be his partner, is a competent witness for him.

In such action, if it be proved that the landlord employs the attorney to defend the broker, that is sufficient evidence of the broker's authority to distrain in the absence of any written warrant.

REPLEVIN. The defendant made cognizance in the third plea as bailiff of one Fisher. To prove the authority to distrain, a witness was called, who stated, that at the time of the distress he was in partnership with the defendant Meikleham, and that Meikleham acted in the matter on the behalf of the partnership. The partnership had since been dissolved.

Wilde, Serjt., submitted, that he was not a competent witness, as he would be liable to contribution in the event of the defendant's losing the verdict, and having to pay the costs.

Spankie, Serjt., contended, that in such a case the act would be found to be a trespass, and one trespasser cannot require contribution from another.

**Wilde*, Serjt. A broker making a distress is not that kind of trespasser who cannot require contribution. [*173]

BURROUGH, J. I am of opinion that the witness is competent.

The warrant from Fisher to the defendant was not forthcoming, and to supply the deficiency, *Spankie*, Serjt., for the defendant, called Mr. Chamberlain, his attorney, to prove that Fisher employed him to defend the action.

Wilde, and *Jones*, Serjts., submitted, that this was not enough. The question is, whether the defendant had authority *at the time of the distress*. The subsequent conduct of Fisher cannot give him that authority, if he had it not before. If it could, a man, having committed a trespass, might, after action brought, get a confirmation of his conduct, by some person having a right, and thereby defeat the action.

BURROUGH, J. On the evidence as it now stands, Fisher is the landlord of Duncan, and he adopts the act of the party distraining. I am of opinion that the circumstance of Fisher's being the landlord, connected with the ratification is quite sufficient.

Verdict for the defendant on the third cognizance.

Wilde, and *Jones*, Serjts., and *Pratt* for the plaintiff.

Spankie, Serjt., and *Chitty*, for the defendant.

[Attornies—*Elkins & Son*, and *Chamberlain*.]

See the case of *Wooley v. Butte*, Vol. 2, of these Reports, page 417, and the case there cited.

*BURDON v. HALTON. Dec. 4.

If in an action on a bill of exchange, given for goods sold, it be proved that the bill was fetched away by the plaintiff's servant, from the house of a third person, after the commencement of the action, and only a short time before the trial, such evidence will not make it necessary for the plaintiff to prove that he, at the time of action brought, was the holder of the bill, and entitled to sue upon it.

ASSUMPT on two bills of exchange given for goods sold. The bills of exchange were given by the defendant to the plaintiff, and more than covered the amount of his demand. It appeared that about a fortnight before the trial, and some time after the commencement of the action, the bills in question were fetched by the plaintiff's servant (who went with a sealed letter, the contents of which did not appear) from the house of Messrs. Brown & Brind, in whose hands they were; but there was no evidence either of the mode in which they had obtained them, or when, or on what consideration. No money was paid by the plaintiff's servant when he brought them away.

Jones, Serjt., upon this contended, that as Messrs. Brown & Brind appeared to have been in possession of the bills at the time when the action was brought, and could have sued upon them, the plaintiff was not entitled to recover, as it was clear that the plaintiff could not be liable, on the same day, to two parties, the indorsee and the indorser.

BURROUGH, J., was of opinion, that, under the circumstances of the case, the plaintiff was entitled to a verdict.

Verdict for the plaintiff.

Andrews, Serjt., and *Wallinger*, for the plaintiff.

Jones, Serjt., for the defendant.

[Attornies—*Abraham*, and *Rawlinson*.]

In the ensuing Hilary Term, *Jones*, Serjt., moved for a new trial. He cited *175] *Kearslake v. Morgan*, 5 T. R. 513, *and *Dangerfield v. Wilby*, 4 Esp. 159 (a), and contended, that it lay upon the plaintiff to show that he was entitled to sue at the time of action brought, and that the evidence at the trial raised a presumption against him, which it was incumbent on him to rebut.

The Court were of opinion, that the point, with respect to the liability of the defendant, was not raised, as it was quite consistent with the evidence, to presume that the bills might have been sent to Messrs. Brown and Brind, only a few days before they were got back.

Rule refused.

(a) See Bayley on Bills, 4th Edit., p. 393.

BEFORE MR. JUSTICE GASELEE.

BARTRAM, Esq. v. PAYNE et al. Dec. 5.

A carriage finished and paid for before the bankruptcy of the maker, but suffered to remain on his premises at the request of the owner, on account of his being abroad, cannot be taken by the assignees as in the order or disposition of the bankrupt, although such bankrupt put it in his front shop, and actually sell it to another. In such case, an actual delivery of the carriage at the house of the person for whom it was made, is not necessary to constitute him the owner.

TROVER for a carriage.—The plaintiff was a Major in the 12th Lancers, and the defendants were the assignees of a Mr. M'Neil, a coachmaker, who became bankrupt in May, 1827. It appeared that the carriage in question was finished in the beginning of January, 1827, and on the 9th of that month the price of it was paid; but as the plaintiff was about to go with his regiment to Portugal, it was arranged that the carriage should remain, free of expense to the plaintiff, on the premises of the bankrupt, for six months, or longer, till the plaintiff should return to England. The crest of the plaintiff was painted on the panels, and embossed upon the handles of the doors. The carriage was placed in the front shop of the bankrupt; and while it was standing there the bankrupt sold it to a gentleman named Innes, and put his crest *upon it instead of the plaintiff's; but told him, at the time of the sale, that it was Major Bar- [*176
tram's carriage. The price of the carriage to the plaintiff was 260*l*.

A witness stated, that it is usual for coachmakers, when they have built a good carriage, to put in their show room, previous to sending it home to the parties for whom they made it.

Taddy, Serjt., for the defendants, contended that they had a right to detain the carriage, under the 72d section of the bankrupt act, 6 Geo. 4, c. 16. The words in the stat. of James were, "possession, order, and disposition;" in the present act they are "possession, order, or disposition." The fact of the bankrupt's selling the carriage is strong in the defendant's favour (a).

GASELEE, J. I do not think that the bankrupt's selling it makes any difference.

Taddy, Serjt. There will be a further question in the case, viz. whether there has been any delivery to Major Bartram; for if not, then the carriage passed to the assignees as a matter of course. He would not be the true owner till delivery. The question is not merely whether the possession of the article leads to a false credit, which was the ground of the original statute, but whether it is not so mixed up with the bankrupt's property, that no person can distinguish the one from the other.

GASELEE, J. This is a question of law. Upon the construction of the act of Parliament alluded to, I have no *hesitation in saying, that, in my [*177
opinion, the plaintiff is entitled to recover. The statute alluded to says, that if the true owner of an article allow it to remain in the custody, and subject to the disposition of a bankrupt, he shall suffer for his misconduct. But that does not apply to a case where the article is left for the usual purposes of trade. We all know, and it has been proved in the cause, that it is customary for coachmakers to keep carriages after they are made, and to put them in a front shop for the purpose of display, to show what kind of carriages they make,

(a) Sect. 72 enacts, that if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the Commissioners shall have power to sell, &c.

and what description of customers they have. Under these circumstances, I am clearly of opinion that this is not a case within the meaning of the act of Parliament.

Tuddy, Serjt. Does your Lordship think that there was any delivery?

GABELEEE, J. I think there was a delivery in this way. It seems that the carriage was finished on the 9th of January. The party was then told it was complete, upon which he paid the money, and the maker agreed to keep the carriage, without making any charge, for six months, or longer. I think this was as much a delivery as the nature of the case would admit. It would have answered no purpose to have sent the carriage to the plaintiff's house, and then to have brought it back to remain at the maker's.

Verdict for the plaintiff.

Wilde, Serjt., and *Comyn*, for the plaintiff.

Tuddy, Serjt., and *Platt*, for the defendants.

[Attornies—*Finero*, and *Allen & Co.*]

See the case of *Newport v. Hellings*, post, page 223.

*178]

*BEFORE MR. JUSTICE BURROUGH.

PHILLIPS *v.* CRUTCHLEY. Dec. 8.

Evidence that the defendant said to the plaintiff that he would marry her in *July*, and that he would marry her sooner were it not that he had arrangements to make, which would be completed by *July*, *if not before*; and also that he said to her once, in the month of *May*, on taking leave, "I hope in a few weeks to take you home," is sufficient, in an action for breach of promise of marriage, to support a count on a general promise.

BREACH of promise of marriage. The declaration contained four counts: two on promises to marry on request; one on a promise to marry within a reasonable time; and one on a promise to marry generally. The defendant said, that he would marry the plaintiff in *July*. That he would marry her sooner, were it not that he had to make some arrangements, to provide for his sister, who had been keeping his house, which he should be able to do by *July*, if not before. In the month of *May*, on taking leave of her once, he said, "I hope in a few weeks to take you home."

Wilde, Serjt., for the defendant, submitted, that neither of the counts was proved. The promise proved was to marry at a specific time, namely, in *July*, and there was no count to which that proof would apply.

BURROUGH, J. I think there is sufficient evidence of a general promise.

Verdict for the plaintiff.—Damages, 200*l*.

Tuddy, Serjt., and *Tbmlinson*, for the plaintiff.

Wilde, and *Andrews*, Serjts., for the defendant.

[Attornies—*Harmer* and *Virgo*.]

IN the ensuing Hilary Term, *Wilde*, Serjt., moved for a new trial ; but the Court thought the ruling at Nisi Prius right, and refused a rule.

See the case of *Potter v. Deboos*, 1 Stark. 82, cited *ante*, Vol. 1, p. 352 (n).

*ADJOURNED SITTINGS IN LONDON, AFTER MICHAELMAS TERM, 1827. [*179]

BEFORE MR. JUSTICE GASELEE.

(*Who sat for the Lord Chief Justice.*)

HEDGER v. HORTON. Dec. 10.

IN an action by the first indorsee against the acceptor of a bill of exchange ; the declarations of the drawer made before indorsement, showing that the acceptor received no value for his acceptance, cannot be admitted in evidence, if the drawer be living at the time of the trial, because in such case he might be called as a witness.

ASSUMPSIT on a bill of exchange, drawn by one Ansell, on, and accepted by the defendant, and indorsed by Ansell to the plaintiff.

Wilde, Serjt., for the defendant, on cross-examination, asked one of the plaintiff's witnesses, whether, in a conversation he admitted to have had with Ansell, at the time he was the holder of the bill, he learned for what consideration the bill had been drawn.

Adams, Serjt., for the plaintiff, objected.

GASELEE, J., was inclined to allow the question.

Cross, Serjt., as *Amicus curiæ*, mentioned the case of *Barrough v. White* (a), in which the Court of King's Bench had decided, that such evidence was not admissible.

Adams, Serjt. We are the holders of the bill, and it is to be presumed, that we are innocent and *bond fide* *holders for valuable consideration, till [*180] the contrary is proved. *Barrough v. White* is all fours with this case. Let them show we are not holders for value, let them impeach our title, and then they may bring in evidence of the declarations of Ansell.

Crowder, on the same side. The party himself, whose declarations are sought to be given in evidence, might be called as a witness, and this seems to be the principle on which such declarations are inadmissible.

Wilde, Serjt. The law presumes, when a bill is drawn and accepted, that it is drawn for value received by the acceptor ; and it is on this ground that a party is not called on to prove the consideration in the first instance, viz. the presumption of law, that consideration has been received by the defendant. But the moment the acceptor proves that the bill was drawn under circumstances which show that no value was given—

(a) 6 D. & R. 379. The point decided in that case was, that the right of an innocent indorsee for value to recover upon a promissory note made payable to the payee "or order, with interest, on demand," cannot be impeached by evidence of declarations, made by the payee, whilst the note was in his hands, and before indorsement, that it was given to him by the maker, without consideration, &c.

GASELEE, J. I do not think that the case of *Barough v. White* stands in your way (a); but my difficulty is upon that which Mr. Crowder has stated, viz. that the party is living and might be called as a witness.

Wilde, Serjt. We are constantly in the habit of calling bankers' clerks to prove a want of consideration, by conversations between the drawer and acceptor. My friend says, that we are to call Ansell. Why, my case is, that he is the real plaintiff seeking to recover in another's name. I propose to show, by communications between Ansell (the drawer) and the defendant (the acceptor), that at the time when the bill was in the hands of Ansell, it was not a bill that could be enforced; and I propose to do that by proving Ansell's declarations made against his own interest.

*181] GASELEE, J. I have always understood, that, with respect to real estates, the declarations of a party made before he parted with his interest, have been received in evidence, and not his declarations after. But I believe that this has been in cases where the party was dead (b). In this case, as the party is alive and might be called as a witness, I am of opinion that the evidence cannot be received (c).

Ansell was then called as a witness for the defendant, but failing to establish his case, the

Verdict was for the plaintiff.

Adams, Serjt., and Crowder, for the plaintiff.

Wilde, Serjt., and Hildyard, for the defendant.

[Attornies—*Spyer*, and *Sigel*.]

(a) See note (a) as to the point there decided. Nothing was produced at the trial but the marginal abstract of the case.

(b) Mr. Phillippa in his *Law of Evidence*, Vol. 1, p. 259, after speaking of declarations against interest by deceased occupiers of lands, &c. &c., says, "In all the cases which have been mentioned on this subject, the person who made the entry or declaration in question, was deceased at the time of the trial: if the rule were not confined to such cases, there would be great danger of collusion. It has, therefore, been held, that such evidence is not admissible where the person is incapable of attending from illness."

(c) In the case of *Barough v. White*, it was proposed to give in evidence the declarations of a person named Arnett, Bayley, J., said, "In no case can the declarations of a party who is alive, and may be called as a witness, be received to affect a third person, unless the latter is identified with such declarations. Now in this case there was nothing to identify the plaintiff with Arnett's declarations."

The rest of the Judges expressed opinions to the same effect upon that point.

*182] *DE VAUX and another v. SEWELL. Dec. 14.

The clerk of the bails of the Mayor's Court of London, in pursuance of a practice in that Court, refused to accept bail for a defendant, who was sued jointly with another person, unless it was also given for such other person: Held, that this refusal was no answer to an action against a serjeant at mace, from whose custody that defendant, for whom bail was offered, had escaped.

THE first count of the declaration stated, that one Nathaniel Goldstein, and Alexander Cohan Castle, theretofore, to wit, on the 3d of October, 1827, at, &c., were indebted to the plaintiffs in the sum of 1200*l.*, in respect of certain causes of action before then accrued to them against the said N. G. and A. C. C., within the jurisdiction of the Court thereafter next mentioned; and being so indebted, the plaintiffs, for the recovery of their said debt, afterwards, &c., to wit, &c., according to the course and practice of his Majesty's Court, before the Mayor and Aldermen of the city of London, in the Chamber of the Guildhall of the same city, duly caused an affidavit of the said debt to be made in the said Court.

and thereupon then and there, according to the course and practice of the said Court, duly affirmed their bill original against the said N. G. and A. C. C., for the said debt; and afterwards, to wit, on, &c., sued and prosecuted out of his said Majesty's Court, &c. against the said N. G. and A. C. C., according to the course and practice of the said Court, a certain mandate directed to the defendant, then and there being one of the serjeants at mace of the said Court, as such serjeant, or to any other serjeant at mace of the said Court, by which said mandate the said defendant was commanded to arrest the said N. G. and the said A. C. C., at the suit of the plaintiffs, according to the custom of the said Court, which said mandate was then and there duly marked for bail, for 1069*l*. By virtue of which said mandate, defendant so being serjeant, &c., to wit, &c. took and arrested the said N. G. by his body, and then and there had and detained him in his custody as such serjeant, &c. Yet the defendant being serjeant, &c. not regarding, &c., without the leave or license, and against the will of the plaintiffs, voluntarily suffered and permitted the said N. G. to escape, &c. The declaration then averred *that the said N. G. did not [*183 appear in the said Court of the said Mayor, &c. according to the practice of the said Court, but therein wholly failed, &c., by means of which the plaintiffs had been injured and delayed in the recovery of their debt, and were likely to lose the same, &c.

The second count was for *not taking* Goldstein. There were two other counts, and the plea was—Not guilty.

The plaintiff's demand was made up of five bills of exchange, and a promissory note; but, in the course of the cause, the claim was reduced to the demand on the promissory note alone.

The clerk to the plaintiff's attorney, who was also an attorney of the Mayor's Court, produced the affidavit of debt, and also a book, which he stated to be one in which entries are made of actions commenced in the Mayor's Court. It contained, among others, the following entry: "In the Mayor's Court, London, 3d October, 1827, Nathaniel Goldstein, and Alexander Cohan Castle, defendants, at the suit of De Vaux and another, trespass on the case, to the damage of, &c., on the oath of," &c. The witness stated that this entry was, according to the practice of the Court, called an original bill. Upon this, a mandate was made out, and delivered to a person named Newsom. It was in the following form:—

"In the Mayor's Court, London.

To Charles Sewell, one of the serjeants at mace, or } By the Mayor, &c.
to any other serjeant at mace of the same Court.

Arrest Nathaniel Goldstein, and Alexander Cohan Castle, } Case, 2000*l*.
defendants, at the suit of Charles De Vaux and Adol- } Sworn, 1069*l*.
phus Debraux, plaintiffs. } and upwards.

Tho. N. Williams, plaintiffs' attorney.

Lord Mayor's Court-office,
3d October, 1827."

*It appeared there were six serjeants at mace, but the defendant was [*184 the only one who had attended for two years previous. On this mandate Goldstein was arrested, and taken to a lock-up house, kept by a person named Walbanke; and it was proved to have been the practice, for a period of thirty years, for the serjeants at mace of the Mayor's Court, to take their prisoners to a lock-up house, having no place of custody of their own. It was from Walbanke's house that Goldstein escaped. Bail was offered for him, but the clerk of the bail refused to accept it unless the parties would become bail also for Castle, who was sued with him; and it appeared to have been the practice of the Mayor's Court, to require bail to be given in that manner. It also appeared that a petition had, shortly before the arrest in question, been presented to the Court of Aldermen, by the six serjeants at mace, praying for the appointment

of an assistant, and that in consequence the Court had appointed Mr. Newsom. A bill of charges had been made out in the name of the defendant. It was proved that the defendant, on being told that the action might be discontinued if he would re-take Goldstein, said, that he did not think he could, but he knew his own business best, and should act as he thought proper. It appeared that Goldstein offered to pay 10s. in the pound, and to give good bills; and it appeared also, that he had since become bankrupt.

Wilde, Serjt., for the defendant, submitted, that as Newsom was a regular officer properly appointed by the Court, he was responsible, as the warrant was delivered to him. He also contended, that the refusal of the clerk of the bails to take bail for Goldstein alone, was a discharge of the defendant; and further, that the plaintiffs had not made out any loss, as it did not appear that they would have obtained their money, if Goldstein had continued in custody.

*185] *Taddy, Serjt.*, for the plaintiffs, contended, that the defendant, as the officer of the Court employed to arrest Goldstein, having once got possession of his person, could only permit his discharge in the event of good bail being put in; and also, with respect to the damages, that the offer of Goldstein to give bills, and pay 10s. in the pound, was satisfactory evidence of the loss which the plaintiffs had sustained.

GABLER, J. The first question is, was Newsom acting as the deputy of the defendant? There is nothing in law against it; nor is it at all inconsistent. The petition to the Court was for the appointment of a deputy; and it seems that Newsom holds only during pleasure. I think that the defendant has not discharged his duty. Lock-up houses are not known to the law. An officer who is employed to arrest a party, does not do his duty by merely leaving him in custody in a lock-up house. It is said, that bail was offered and refused. I will not pronounce a decided opinion upon the subject; but I am inclined to think that the officer of the Court was not justified in refusing it. But I am clearly of opinion that his refusal is no answer to this action. You are bound to hold the officers to their duty. This, however, is not a gross case, as many cases of escape are. The act of the defendant is as venial as such an act can be. The plaintiffs could not declare till the other defendant, Castle, was in Court. They could not have got their judgment against Goldstein alone. But it seems that Goldstein offered to pay 10s. in the pound. It is for you to say what damage the plaintiffs have sustained; for, provided you are of opinion that Newsom was only an agent, I think, that, in point of law, this action may be maintained.

Verdict for the plaintiffs—Damages, 40s.

Taddy and Andrews, Serjts., and *Chitty*, for the plaintiffs.

*186] *Wilde and Jones, Serjts.*, and *Bolland*, for the defendant.

[Attorneys—*T. N. Williams*, and *E. Isaacs*.]

In the ensuing Hilary Term, *Wilde, Serjt.*, moved for a new trial, and contended, that as the non-appearance of Goldstein was not the result of the negligence of the defendant, but produced by the fault of the clerk of the bails, the action could not be maintained.

The Court said, that it was the duty of the officer employed to make an arrest to take care that the party was forthcoming, and that the plaintiff was not bound to look to any one except the officer. They also were of opinion, that, under the circumstances of the case, the Jury were perfectly right in giving only nominal damages.

Rule refused.

BENSON v. HIPPIUS. Dec. 17.

If the party employed by the consignee of a ship's cargo to sell it, undertake that he will "pay freight and primage, and demurrage, if any be due," and in every respect put himself in the place of the charterer, he will be liable, in an action by the owner, to pay damages for any delay in discharging the cargo beyond the number of days allowed for demurrage in the charter-party.

ASSUMPSIT on an agreement. The *second* count of the declaration stated, that a charter-party had been entered into between the plaintiff, as the owner of the ship 'Trusty, and one Bennett Thomas Gillam, merchant, whereby it was agreed that the said ship should, with all convenient speed, proceed to Quebec, and there load, from the factor of the said merchant, a full cargo of square masts, &c., and, being so loaded, should proceed to London and deliver the same, on being paid freight, as in the said charter-party mentioned; and that the freight should be paid on unloading and right delivery of the cargo, &c.; and that fifty running days should be allowed the said merchant (if the ship was not sooner despatched) for loading at Quebec, and unloading at London, and ten days on demurrage, over and above the said laying days, at 10*l.* per day, &c.; and *that the ship should discharge in the Docks, if required by the [187] freighter. It then averred that the ship loaded at Quebec, and proceeded to London, and was required to discharge in the Docks, and was ready to deliver, and that certain persons using the name and firm of *John Pirie & Co.*, to whom the cargo was consigned, *had requested* the defendant to sell the same for them; whereupon, afterwards, &c., *in consideration that the plaintiff, at the request of the defendant, would deliver to him the cargo, according to the terms of the charter-party, the defendant promised the plaintiff to pay him the freight and primage, and demurrage, if any demurrage should be due, and in every respect to put himself in the place of the said B. T. Gillam, the charterer of the said ship, so far as respected the agreement with the plaintiff for the said voyage.* It then averred that the defendant requested the plaintiff to discharge the cargo in the Docks; and that he, confiding in the defendant's promise, did afterwards do so; and that the ship was kept and detained in the loading at Quebec, and the unloading in London, for the space of fifty days beyond the fifty days mentioned in the charter-party, whereby a large sum of money, to wit, the sum of 100*l.* for ten of the said days over and above the said fifty running days, being at and after the rate of 10*l.* per day, became due from the defendant to the plaintiff, according to the terms of the charter-party, and the effect of the defendant's undertaking. It then proceeded—And the said plaintiff, for the detention for forty days, residue of said fifty days, and for being deprived of the use of the ship, &c., during the said forty days, reasonably deserved to have of the defendant, and the said defendant, according to his undertaking, became liable to pay, a certain large sum, to wit, the sum of 400*l.*, &c. There were other counts: and the plea was—The general issue.

By the charter-party, which was dated March 18th, 1825, and signed by Gillam and the plaintiff, fifty running days were to be allowed for loading and unloading, and *ten days on demurrage over and above the said laying [188] days, at 10*l.* per day.

The agreement signed by the defendant was in the following terms:—

"Mr. Thomas Benson,

Sir,—Messrs. John Pirie & Co., the consignees of your ship Trusty's cargo, having placed it in my hands for sale, I hereby engage to pay you the freight and primage (and demurrage, if any be due), and in every respect to put myself in the place of Mr. Gillam, the charterer, so far as respects the agreement for the said Quebec voyage. I am, &c.

C. J. HIPPIUS."

The ship had been detained at Quebec and in London about thirty-five days beyond the fifty running days. The master of the ship was called as a witness, and proved that the delay did not arise from any fault of his, but that such part of it as occurred at Quebec arose from the circumstance of the cargo's not being ready, and such part of it as occurred in London, from the crowded state of the Docks. The ship had not begun to unload at the time when the defendant's agreement was signed. The bill of lading to Messrs. Pirie & Co., the consignees, only provided for the payment of freight: 100*l.* had been paid into Court.

Wilde, Serjt., for the plaintiff. It has been several times determined, that where there is one period for running days, and another period for demurrage, from whatever cause any delay arises, the ship must be restored to the owner, fit for further use; and if it is not, he is entitled to damages. And in this case, as the plaintiff by his agreement has put himself in the place of the charterer, he will be bound to pay such damages himself.

Taddy, Serjt., for the defendant, (to the Jury). I admit that, as between Gillam and the plaintiff, the original parties to the charter-party, if the delay arose from the *state of the Docks, without any fault of the master, the *189] charterer may be liable, provided there be an express covenant, as in the cases alluded to. But those cases have been decided upon the nature of the covenant, which might have contained an exception, if the party had pleased to insert it. But this is not a question between the plaintiff and Gillam, but between him and a third person, under peculiar circumstances. Pirie & Co., the consignees, contract merely to pay freight, and not demurrage. We have paid into Court enough to cover what is properly demurrage, which is that provided for in the charter-party, viz. ten days at 10*l.* per day. The contract is dated September 21st, at which time the ship had not begun to unload, and when it was not known what delay might arise. It will be for his Lordship to say, on the words "if any be due," whether it means any more than that which was due at that time. I submit, *first*, that there is no sufficient consideration between the plaintiff and defendant apparent on the face of the contract; and *secondly*, if there is, it is not properly stated in the declaration, because, there it is said, "in consideration that they *would* deliver," and the agreement is, Messrs. Pirie & Co. *having* delivered. The undertaking is for demurrage; and that does not extend to the contingent damages for future detention, but is merely for the demurrage due at the time of signing.

GASELEE, J. The undertaking does not refer to the bill of lading. I consider the words "in every respect," &c., make the defendant liable for all that Gillam was. I am of opinion that the plaintiff is entitled to a verdict, but I will give you leave to move to enter a nonsuit.

Verdict for the plaintiff, 300*l.*

Wilde, Serjt., and *Holroyd*, for the plaintiff.

Taddy, Serjt., and *Platt*, for the defendant.

[Attornies—*Chapman*, and *Reardon & D.*]

*190] In the ensuing Hilary Term, *Taddy, Serjt.*, moved, pursuant to the leave given at the trial. The cases of *Wain v. Warlters* (a), and *Saunders v. Wakefield* (b), decide, that there must be a consideration moving from the plaintiff to the defendant, and in this case there is none. The words of the agreement are, "your ship Trusty's cargo." In the case of an implied contract between the owner and the charterer, the crowded state of the Docks would be a circumstance from which the Jury might infer what was the intention of the

parties; although it would not be so in the case of an express covenant; a *fortiori* should that circumstance be taken into account in the case of a third person. Demurrage, in the sense alluded to, is for ten days' demurrage only, according to the terms of the charter-party, and not for contingent damages for delay beyond that period.

The Court expressed their opinion, that the verdict was right on the second count: and therefore they

Refused a rule.

See the cases of *Leer v. Yates*, 3 Taunt. 387; *Randall v. Lynch*, 12 East, 179; *Rodgers v. Forresters*, 2 Camp. 483, and *Burmester v. Hodgson*, 2 Camp. 488.

FANSHAWE, Clerk, v. HEARD. Dec. 18.

If a declaration aver, that in pursuance of an agreement, an action was discontinued, evidence that, since the agreement, no steps had been taken in the cause, is not sufficient to support the allegation.

ASSUMPT on an agreement, by which the defendant undertook to pay certain costs, in consideration that the plaintiff would discontinue an action which he had commenced against him.

The declaration averred that the action had been discontinued.

The only evidence given was, that no further proceedings had, since the agreement, been taken in the cause.

**Storks*, Serjt., submitted, that this was not proof of a discontinuance.

Tuddy, Serjt., contended, that as the witness said, that no further proceedings had been taken, it was quite sufficient. [*191]

BURROUGH, J. Here is an action depending, and there is a known way of discontinuing actions, which has not been adopted in this case; I think the plaintiff must be nonsuited, but I will give you leave to move.

Tuddy, Serjt., then proposed to go on the account stated, and produced a letter written by the defendant's attorney, stating that it was hardly worth while to tax the bill, but that there would be a sum to be taken off, which would leave 11l. 12s. remaining, which sum the defendant was "ready and willing to pay."

Storks, Serjt. This letter refers to the agreement, and does not dispense with any conditions to be performed on the part of the plaintiff; it is merely written on the supposition that all the proper steps would be taken; it assumes the agreement as its basis.

BURROUGH, J. Thought that the letter was not sufficient.

Nonsuit, with leave to move.

Tuddy, Serjt., and *Erle*, for the plaintiff.

Storks, Serjt., for the defendant.

[Attornies—*Keene*, and *Jones*.]

In the ensuing Hilary Term, *Tuddy*, Serjt., moved to set aside the nonsuit, but the Court refused a rule.

*PETER GODEFROY v. JAY and another. Dec. 18.

In an action against attorneys for negligence in not making a motion to set aside proceedings for irregularity, if the declaration aver, as the consequence of the neglect, a judgment by default and further proceedings and final judgment and execution, an examined copy of the record must be given in evidence, to prove both the judgments; and it is not enough to produce entries in the Prothonotary's book, and the inquisition with the Prothonotary's *allocator*. *Semble*, that, in such a case, the judgments are of the gist of the action, and not merely special damage.

Semble also, that a writ intended for the father, served upon the son, who answers to the name of the father, that being his own name also, is sufficiently served, if it come to the hands of the father before its return.

THE first count in the declaration stated, that before the time, &c. a certain notice in writing was delivered to, and served upon him the said Peter, stating in substance, and to the effect, that a declaration was filed with the Prothonotaries of the Court of Common Pleas against him, at the suit of one Stephen Dubois, &c. That he the said Peter had *never been served with any writ or process, or copy of any writ or process* issuing out of the said Court, against him at the suit of the said Stephen Dubois, nor had he been arrested, &c. That he thereupon applied to the defendants, who were then and there attorneys at law, &c., and delivered to them the said notice, and retained and employed them as his attorneys to take the necessary and proper steps in the premises, and that in consideration of such retainer, &c., the defendants undertook faithfully to discharge their duty, &c. It then proceeded as follows: "And the said Peter in fact says, that it afterwards became and was the duty of the said defendants, as the attorneys of and for him the said Peter in the premises, to have applied or caused application to be made to the said Court of our said lord the King of the Bench, in due time, to have the proceedings in the said action, at the suit of the said Stephen Dubois, against him the said Peter, set aside, by reason and on the grounds, that he the said Peter had never been served with any writ or process, or copy of writ or process at the suit of the said S. D. issuing out of this Court, nor had been arrested at the suit of the said S. D. by virtue of any writ or process issuing out of the said Court, against him the said Peter, whereof the defendants had notice. Yet they, not regarding their duty in that behalf, but contriving and intending to injure the said Peter, *did not make or cause to be made application* to the said Court of our said lord the King of the Bench here, in due time, for the purpose aforesaid, or take any *193] other proper steps in the premises, as the attorneys of and for the said Peter, but wholly neglected and omitted so to do; *by reason and in consequence whereof*, and by and through the neglect and default of the defendants in that behalf, afterwards, to wit, on the 18th day of April, in the year 1826, to wit, at, &c. *judgment by default was signed against him the said Peter* in the said action, and such further proceedings were had in the said action, that afterwards, to wit, in Easter Term, in the seventh year of the reign of our lord the now King, *it was considered and adjudged* in and by the said Court of our said lord the King of the Bench here, that the said S. Dubois should recover against the said Peter a large sum of money, to wit, the sum of 31*l.* 5*s.*; and *execution was afterwards*, to wit, on the 9th day of May, in the year last aforesaid, to wit, at, &c., *issued upon the said judgment*, and he the said Peter, in order to satisfy the said execution, was forced and obliged to pay, and afterwards, &c. did pay to the said S. Dubois *the money so recovered* as aforesaid, and another large sum of money, to wit, the sum of 5*l.*, the costs and expenses of, and occasioned by, the said execution, and has also been greatly injured in his credit." &c. There were other counts in the declaration, but they all averred a judgment by default,—further proceedings,—final judgment,—execution, and payment, in the same form as they were averred in the first count.

The defendants pleaded the general issue.

A witness was called, who stated, that, in Hilary Term, 1826, he went to the office of the defendants, accompanied by the plaintiff's son, and took them a notice of declaration, which had been served upon the plaintiff in an action at the suit of Dubois; and at the same time told them that the copy of the writ had been served on the plaintiff's son, and not on himself; and requested them to move the Court to set aside the proceedings; which they promised to do, that he called several times afterwards, and was told that a brief had been delivered, and a motion *made, but that no rule was drawn up, as the brief could not be found in the hands of the officer of the Court, or of [*194 the serjeant, to whom it had been given.

The witness admitted, that, in the month of October, 1825, very shortly after the service of the writ upon the son, he had a conversation with the father, in which he acknowledged that he knew what the action was for, and that his son had been served, as he supposed, instead of himself, in consequence of his opening the door, and answering the party inquiring, that his name was Peter Godefroy. A book was produced from the Prothonotaries' Office of the Common Pleas, which the clerk, who produced it, said, was the book in which they entered all judgments by default. The entry was thus: in the margin was L. for London, then came the name of the cause, *Dubois v. Godefroy*, then a private mark or letter, and the figures 10 carried out. The inquisition was put in, with the Prothonotary's *allocatur* of the costs; but it appeared that the roll had not been carried in.

Wilde, Serjt., for the defendant, submitted, that the evidence offered of the judgment by default was not the best evidence, as interlocutory judgment is just as much signed as final judgment is, and should be proved in the same way, by the production of the record, or an examined copy of it. He also contended, that evidence should be given of the final judgment.

Comyn. These are not allegations necessary to be proved, they merely go to the consequential *damage*, and not to the *gist* of the action. The gist is the *negligence*.

Wilde, Serjt. There is no cause of action independent of the consequences of the omission complained of. No cause of action arises from the not setting aside an informal service of a writ, if no proceedings followed in the action in which that service took place. With respect to the judgment by default, the entry in the book does not at *all satisfy the allegation in the declaration; it merely contains the county, the names of the parties, and the [*195 fee received in the office, or to be accounted for by it; what was the nature of the judgment does not in any way appear.

BURROUGH, J. I am clearly of opinion that the plaintiff cannot get on, he has no evidence of the judgment.

Tudley, Serjt. The writ recites the judgment.

BURROUGH, J. I think it will not do. There is no injury sustained without the judgment.

Comyn. The execution is an injury.

BURROUGH, J. But the execution is upon the judgment.

Comyn. That part of the declaration is merely a statement of special damage.

BURROUGH, J. I think it goes to the whole. There is no pretence for this action. With respect to the technical objection there is nothing at all in it. The son received the writ for the father, and the father was aware of the service long before the writ was returnable. The application could not have been successful, if it had been brought before the Court. I am of opinion that the plaintiff must be called.

Nonsuit.

Tudley, Serjt., and *Comyn*, for the plaintiff.

Wilde, Serjt., and *Tomlinson*, for the defendants.

In the ensuing Hilary Term, *Taddy*, Serjt., moved for a new trial; but the Court were of opinion, that, as the *plaintiff in the original action might
 *196] have been compelled to make up the record, an examined copy of such record was the proper evidence in proof of both the judgments, and therefore Refused the rule.

On the question, whether, in an action against an attorney for negligence, it is necessary to prove that the plaintiff had a good cause of action against the original defendant, see the cases of *Lee v. Ayton*, one, &c. Peake N. P. C. 161; *Russell v. Palmer*, 2 Wils. 325; *Pitt v. Yelden*, 4 Burr. 2060; *Gunter v. Cleyton*, 2 Lev. 85; and *Alexander v. Macauley*, 4 T. R. 611. With regard to the service of non-bailable process, Mr. Justice Bayley says (*Thomas v. Pearce*, 4 D. & R. 317), "The rule to be collected from the cases is, that the person serving the copy of a writ, is not bound to show the original, unless it is demanded; but if it is demanded, it must be shown." But, however, the demand need not be at the very time of the service; for in the case of *Westley v. Jones*, 5 Moore, 162, where the party was served with a copy of a *capias*, and in a quarter of an hour afterward demanded to see the original, which was refused by the officer, it was held, that, as the sight of the original was demanded, and that demand was not complied with, the service was irregular. An admission by the tenant in possession, that he has received the declaration in ejectment, before the *essoign* day, is sufficient proof of service, though it was in fact not served personally on him or his wife. *See dem. Hambrook v. Des*, 14 Ea. 441.

HAYTHORN and another v. LAWSON. Dec. 19.

In a joint action for a libel by two partners, damages cannot be given for any injury to their private feelings, but only for such injury as they may have sustained in their joint trade or business.

ACTION for a libel on the plaintiffs as bankers, and copartners at Bristol.

Wilde, Serjt., for the defendants, in allusion to some remarks made by *Taddy*, Serjt., observed. No damages can be given for any injury to the private feelings of the two plaintiffs. The joint action is only maintainable for injury to that in which the plaintiffs have a joint interest.

GASELEE, J. In an action for false imprisonment brought by two persons
 *197] jointly, it was held, that the *action would lie for money which they had jointly paid in order to procure their enlargement; but that damages could not be given for the particular injury and inconvenience which they had personally suffered in their individual capacity. And the principle on which that case was decided, is applicable to the circumstances of this. The plaintiffs, therefore, can only recover damages for the injury which they have sustained in their joint trade as bankers.

Verdict for the plaintiffs, for nominal damages.

Taddy, and *Mercether*, Serjts., and *George*, for the plaintiffs.

Wilde, Serjt., and *Platt*, for the defendant.

[Attornies—*Philpot & S.*, and *Platt*.]

See the note to the case of *Goldstein v. Foss*, Vol. 2, p. 253, of these Reports, and the cases there mentioned.

BEFORE MR. JUSTICE PARK.

MOTT v. MILLS et al. Dec. 22.

Seemle, that under the provisions of the new bankrupt act, 6 Geo. 4, c. 16, s. 59, a bankrupt in custody, by insisting on his discharge, previous to proof of a debt, does not estop himself from disputing the validity of the commission against him.

TROVER for deeds, &c. brought by a bankrupt against his assignees, to try the validity of his commission. The conversion was admitted.

Bosanquet, Serjt., for the defendants. The plaintiff is not in a situation to take any objection to the validity of his commission, because he has appeared to it; and when certain creditors, by whom he was detained in custody, came to prove their debts, he applied for and obtained his discharge out of custody. In the case of *Goldie* *v. *Gunston* & others (a), which was an action similar to the present, Lord *Ellenborough* says, "I think the plaintiff, having [*198 taken the benefit of the commission in procuring his discharge under it, is precluded from contesting its validity in a Court of law" (b). And in the case of *Watson* v. *Wace* (c), Lord *Tenterden*, at Nisi Prius, took the same course which was taken by Lord *Ellenborough*, and nonsuited the plaintiff; and, on application to the Court of King's Bench, the nonsuit was confirmed. In the present case, application was made to the Commissioners and not to the Court of King's Bench; but that, I submit, does not make any difference. The new bankrupt act allows that to be done by the Commissioners, which was previously done by summons before a judge. The Commissioners would have expunged the debt, if the authority had not been given for the discharge, and accordingly it was given. The right is precisely the same under the new act, as under the act of the 49th of Geo. 3. It is not necessary that the bankrupt should claim the benefit of a certificate; but it is enough if he claims the benefit of his discharge. The principle I take to be this: If you say that the proceeding against you is wrong, then you must remain in custody; but if you take the benefit of a discharge under that proceeding, then it must be considered as an admission that the proceeding is right.

The learned Serjeant then proved, by the books kept by the clerk of the papers at the King's Bench prison, that the plaintiff was in custody at the suit of a person named Wood, in the month of January, 1827, and that *he [*199 was discharged as to that action on the 25th July, 1827. He then called the attorney to the commission, who stated that he was at Guildhall at the meeting for the choice of assignees, on the 20th of July; that the plaintiff was there; and on Wood's applying to prove his debt, the plaintiff said, "Mr. Wood, you must give me my discharge before you prove your debt." The plaintiff also complained that two creditors, named Frances and White, had previously proved, without giving him a discharge, and the Commissioners directed the witness to expunge the debt, if the discharge was not given. It appeared that the plaintiff told the Commissioners that it was his intention to dispute the commission, on the ground that he was not a trader.

Taddy, Serjt., for the plaintiff. This does not prejudice the plaintiff, nor

(a) 4 Camp. 381.

(b) His Lordship added—"I conceive he may still apply to the Great Seal to have it superseded; but I cannot hear him say that he has not been lawfully adjudged a bankrupt, after he has declared that he was so lawfully adjudged, and on that ground obtained his discharge from several actions brought against him. The mere surrender to the commission, I think, would not be enough," &c.

(c) 5 B. & C. 153, reported also in 7 D. & R. 633, and Vol. 2 of these Reports, p. 171.

prevent his bringing this action. The new bankrupt act differs from the old, as to the discharge out of custody. Under the old acts the bankrupt was to make his election, and if he applied to be discharged, he was asking for a benefit and favour under the commission; but the new statute makes the discharge a *condition precedent* to the proof of the debt. The act of Parliament says (a), *200] that no creditor, who has brought any *action against a bankrupt, shall prove a debt under his commission, without relinquishing his action; and in case the bankrupt shall be in custody at the suit of such creditor, *he shall not prove* without giving a sufficient authority in writing for his discharge. The bankrupt in this case, therefore, merely reminded the Commissioners of what ought to be done under the act of Parliament. He requires no favour; but merely refers to the provisions of the act. The cases cited went upon the ground, that a man should not be allowed to do an inconsistent act. This is not an inconsistent act, any more than the act of surrendering is. Under the old acts, the discharge is to be applied for by the bankrupt; under the new, it is a thing that must be done by the creditor, as a qualification for proving his debt.

Wilde, Serjt., on the same side. If your Lordship adverts to the form of the surrender, it is much stronger than the present act relied on.

PARK, J. The answer to that is, that it has been held that the surrendering is not a bar.

*201] Wilde, Serjt. The use I make of it is this: Both the *surrender and the discharge are acts done in the regular prosecution of the commission; and upon the same principle they are both equally inconclusive. The argument is strongest as to the discharge, because it is in favour of liberty. This is a question of *quo animo*. A bankrupt has two months in which to dispute his commission. Is he bound to wait till the end of that time? The plaintiff petitioned, and, as far as intention goes, his petitioning was notice that he did not acquiesce in the validity of the commission.

PARK, J. I have considerable doubt upon this subject. All the cases cited were before the present act. I wish not to decide this question at Nisi Prius; but I will give my brother *Bosanquet* leave to move to enter a nonsuit.

Bosanquet, Serjt. The ground of the argument on the other side is, that the bankrupt, in the former cases, came to receive a benefit, and that in this case it is not so. But in this respect the old acts and the present are precisely the same; for the creditor, if he proves, is to relinquish his action.

PARK, J. Suppose the solicitor to the commission had known the fact, and had said to the Commissioners, "this man is in custody," would not the Commissioners themselves have said to the creditor, you must discharge the man before you can prove your debt; but it is too delicate for me to take upon myself

(a) 6 Geo. 4, c. 15, s. 59. This section enacts—"That no creditor, who has brought any action, or instituted any suit against any bankrupt, in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the commission, against such bankrupt, shall prove a debt under such commission, or have any claim entered upon the proceedings under such commission, without relinquishing such action or suit: and in case such bankrupt shall be in prison or custody at the suit of or detained by such creditor, he shall not prove or claim as aforesaid, without giving a sufficient authority in writing for the discharge of such bankrupt; and the proving or claiming a debt under a commission by any creditor, shall be deemed an election by such creditor to take the benefit of such commission, with respect to the debt so proved or claimed: Provided that such creditor shall not be liable to the payment to such bankrupt or his assignees, of the costs of such action or suit so relinquished by him; and that where any such creditor shall have brought any action or suit against such bankrupt, jointly with any other person or persons, his relinquishing such action or suit against the bankrupt shall not affect such action or suit against such other person or persons: Provided also, that any creditor who shall have so elected to prove or claim as aforesaid, if the commission be afterwards superseded, may proceed in the action as if he had not so elected, and in bailable actions shall be at liberty to arrest the defendant *de novo*, if he has not put in bail below, or perfected bail above, or if the defendant has put in or perfected such bail, to have recourse against such bail, by requiring the bail below to put in and perfect bail above within the first eight days in Term, after notice in the London Gazette of the superseding such commission. and by suing the bail upon their recognizance, if the condition thereof is broken."

the proper construction of the act of Parliament upon this point. You shall have leave to move to enter a nonsuit.

The case then proceeded, and when it was going to the Jury, upon the question of whether he had been proved to be a trader, the plaintiff elected to be

Nonsuited (a.)

* *Tuddy and Wilde*, Serjts., and *Hill*, for the plaintiff.

Bosanquet and Andrews, Serjts., for the defendants.

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[Attornies—*Robinson*, and *Palmer & France*.]

(a) In consequence of this, it became unnecessary to move the Court upon the point reserved, but as the present is the first occasion on which the question has been raised, the inclination of the learned Judge's opinion appears to us of importance, and therefore we have thought it right to insert the case, though it is not to be considered as an express decision on the subject.

BATTY et al. v. M'CUNDIE, BALDEY, et al. Jan. 17.

If one of several partners be concerned in preparing the prospectus of a projected newspaper, which prospectus states, that he and others will act as treasurers and managers, and also that the subscribers are not to be partners, nor to be answerable for more than their subscription; and be also aware, that a particular individual is to be sole nominal proprietor; the firm of which such partner is a member (although he has not taken any share in the paper), cannot sue the subscribers who have taken shares, for the price of goods furnished for the paper.

ASSUMPSIT for goods sold and delivered. The plaintiffs were stationers; and the action was brought for the price of stamps and paper, furnished for a newspaper, called *The London Free Press*. It appeared that all the defendants had taken shares in the paper; but that they had so done in consequence of a prospectus, which Col. Jones, one of the plaintiffs, was concerned in preparing; and which stated, that the subscribers were not to be partners, and were not to be liable for more than their subscription. At the bottom of the prospectus was the following note, "Col. Jones, of No. 7, Upper Gloucester Street, Dorset Square, and two other gentlemen, will act as treasurers and managers." Col. Jones had not taken any shares. A person named Low was stated to be entered at the Stamp Office, as sole proprietor of the paper; and, to prove this, a certified copy of the affidavit, made in pursuance of the statute 38 Geo. 3, c. 78 (a), was offered in evidence.

**Russell*, Serjt., objected, that the certified copy was not admissible, [*203 it being only made evidence by the statute against the party signing and swearing the affidavit, and the persons mentioned as proprietors in it (b).

PARK, J. I am inclined to admit this affidavit; I do not go on the act of Parliament, though I am not sure that the words are not sufficiently comprehensive, if it were necessary to rely on them. The ground on which I decide is, that it is quite clear that Col. Jones must have known, as a person connected with the management of a newspaper (for every man must be supposed to know the law on the subject of his particular occupation), that it was absolutely necessary to have this affidavit made before the paper could be published; and it seems that, in point of fact, it was made the day before the first publication of the paper.

(a) By this act, it is declared to be illegal for any person to print or publish a newspaper, until an affidavit or affirmation, signed by the party making it, specifying the names, &c., of every person intended to be printer or publisher, as well as of the proprietors, &c., shall have been delivered to the Commissioners of Stamps, or some officer appointed by them.

(b) S. 9. See also sect. 14, as to the mode of proving the certificate.

It was proved that Col. Jones, and the other gentlemen referred to in the note to the prospectus, did actually support the paper according to their undertaking; that before Low had been appointed as nominal proprietor, it had been proposed that a person named Miller should take a variety of shares for persons whose names were not to appear; that, under this first arrangement, Col. Jones was to have taken shares, and that he knew that Low was to be the sole nominal proprietor.

Wilde, Serjt., for the defendant Baldey, submitted, that as he and the rest of the parties concerned in supporting the paper could not have recovered any of the profits of it, after holding out Low to the world as the sole proprietor, so neither were they liable to answer generally for the paper; and that Col. Jones, knowing that this was the case, was bound by the arrangement, and was not in a situation to sue.

*204] *Spankie*, Serjt., for the other defendants. It will be a *question in this case, whether Low was not to be a trustee for all the unnamed proprietors (Col. Jones among the rest), as Miller was to have been under the arrangement previously proposed. Col. Jones, by the prospectus, has invited and induced these defendants to take shares, on the understanding that they were not to be responsible; and, under these circumstances, he cannot maintain this action against them.

PARK, J. (in summing up), said, the question is, whether Col. Jones, having a knowledge of all the circumstances, can maintain the action; for it is clear that his knowledge is the knowledge of all the plaintiffs. There is no doubt that the defendants were proprietors; but that will not make them partners. The question is, whether Col. Jones did not know that these persons, though called proprietors, were not to be deemed partners, and whether he did not give them an assurance that they would not be liable for more than their subscriptions. The prospectus states, that the subscribers are not to be partners; and it is proved, that he knew of that prospectus, and acted as treasurer under it. How can he, after this, say that the defendants are liable? The question for your consideration is, whether Col. Jones does not accede to the proposition, that the defendants are not liable, and undertake that he will not look to them as responsible. If you believe the evidence, in the view that I have taken of it, I tell you, that, in point of law, the plaintiffs are not entitled to recover.

Verdict for the defendants (a).

*205] **Russell*, Serjt., and *Patteson*, for the plaintiffs.
Wilde and *Jones*, Serjts., for the defendant, Baldey.
Spankie, Serjt., and *Busby*, for the other defendants.

[Attornies—*Parton*, and *Dobie*,—*Elkins & Son*.]

(a) In the course of the cause, *Park*, J., inquired of Mr. *Knapp*, the Associate, if the defendants appeared by different attornies. Mr. *Knapp* replied, that there were separate attornies, and also separate issues. His Lordship intimated, that, notwithstanding the separate issues, if the defendants had appeared by one attorney, he should not have suffered more than one counsel to address the Jury for them.

BEFORE MR. JUSTICE BURROUGH.

GREGORY v. HARMAN and another. Jan. —.

Where an account of the residuary estate of a testator has been made out by the executors, and signed by the parties interested, under which account all of them have been paid except one, such one may recover his proportion, with interest, in *assumpsit*, against the executors.

ASSUMPSIT.—The declaration contained a special count, the usual money counts, an account stated, and a count for interest. The plaintiff was one of the residuary legatees, under the will of a person named Patrick, and the defendants were executors of that will, and the action was brought to recover a sum of 3310*l.*, with interest, which the plaintiff claimed under the will. An account of the residue had been signed by all the parties interested. The last item in the account was of the date of the 3d of March, 1821, and it appeared that, in the same month, a commission of bankrupt was issued against the plaintiff, which commission, however, was finally superseded on the 15th of August, 1827. The other legatees had been paid their proportions of the residue.

Taddy, Serjt., for the defendants, submitted that the action was not maintainable. The account is an account of the residue rendered to the parties, who are residuary legatees, and money had and received cannot be maintained in such a case. In *Deekes & Wife v. Strutt (a)*, Lord *Kenyon* says, "I believe that no action, till lately (except one in the time of the Commonwealth), for a legacy, has been supported in a Court of law. The arguments which have of late years been advanced in support of this action, are founded on the supposed justice of *the case, and the convenience of the parties; but when it is [*206 considered in what manner a Court of equity interposes in suits for legacies, in taking care that provision is made for the different parties entitled, and what inconvenience, and even ruin, to private families, would have ensued from determining that an action can be brought in a Court of law for a legacy, I think that those who have wished to support the action in a common law Court, would hesitate before they came to the conclusion that the action can be maintained," &c.

BURROUGH, J. I will reserve the point.

Taddy, Serjt., then put in two notices, which had been sent to the defendants. The first was dated 21st August, 1827, from Messrs. Bicknell & Roberts, stating their intention to issue another commission against the plaintiff, and requiring them to hold the money till the rights of the assignees should be ascertained. The second notice was from the same parties, and was dated the 3d September, 1827. It stated that the plaintiff had been arrested at the suit of Messrs. Parker & Walsh, and cautioned the defendants against paying the plaintiff while he was in custody, as he might commit an act of bankruptcy.

It was then proved that the defendants had been Exchequer-bill brokers, who had retired from business about six or seven years, and that they had retained the money in their own hands.

Taddy, Serjt., then submitted, that interest could not be recovered.

BURROUGH, J. (in summing up), said—There is no doubt but that the action will lie. There has been an account signed, and the other legatees have been paid; and it is no longer after this to be deemed a part of the residuary estate, but as so much money for the plaintiff *in the hands of the defendants. [*207 I remember the case cited; but the facts of this case go beyond it.

With respect to interest, I think, on these facts, that it is quite clear that interest ought to be paid; but the rate of payment is a matter for your consideration. It seems that the defendants mixed the money with their own, and you will say what, in the common course of business, they were likely to make of it.

Verdict for the plaintiff, for the principal sum, and interest at 5 *per cent.*, subject, &c.

Wilde, Serjt., and *R. V. Richards*, for the plaintiff.

Taddy, Serjt., and *Comyn*, for the defendants.

[Attornies—*Vansandau*, and *Fuller & S.*]

In the ensuing Hilary Term, *Taddy*, Serjt., moved, pursuant to the leave given at the trial; but the Court

Refused a rule.

See the cases of *Davis v. Wright*, 1 Vent. 130; *Smith v. Johns*, Cro. Jac. 257; and *Atkins v. Hill*, Cowp. 288.

PROMOTIONS.

In Trinity vacation, 1827, Sir ANTHONY HART, Vice Chancellor, was appointed Lord Chancellor of Ireland, vice Lord MANNERS resigned; and LAN-CELOT SHADWELL, Esq., one of his Majesty's counsel learned in the law, was appointed Vice Chancellor, vice Sir ANTHONY HART.

In Hilary Term, 1828, Sir C. *Wetherell*, Knt., was re-appointed his Majesty's Attorney-General, vice Sir J. *Scarlett*, Knt., resigned.

1827.

BEFORE MR. JUSTICE LITTLEDALE AND MR. BARON VAUGHAN

STAFFORD ASSIZES.

BEFORE MR. JUSTICE LITTLEDALE.

ATTWOOD v. SMALL et al. Aug. 9.

An agreement contained by itself less than 1080 words, but there was in it a stipulation, that a clause in a previous agreement, which was duly stamped, should be taken as part of the new agreement: Held, that, although with the clause referred to, there would be more than 1080 words, a 1*l.* stamp was proper, as that clause ought not to be reckoned.

Assumpsit for interest due on a sum of money agreed to be paid under three written agreements entered into by the plaintiff, with the defendants for the sale of certain mines, &c.

The first agreement was put in, and to that there was no objection.

The second agreement varied the terms of the first, and bore a 1*l.* 15*s.* stamp. This was also read.

The third agreement varied the terms of the second, and contained a stipulation, that one of the clauses in the second agreement relative to referring disputes to arbitration, should extend to the third agreement, in the same manner as if such or the like clause had been inserted in that agreement.

The third agreement bore a 1*l.* stamp.

Campbell, Ludlow, Serjt., and R. V. Richards, for the defendants, objected, that the third agreement could not be read, as it contained more than 1080 words, and therefore ought to have borne a 1*l.* 15*s.* stamp. They admitted, *agreement by itself, contained a less number of words than 1080; but [*209 as the clause of the second agreement relative to arbitrations was referred to in the third agreement, and thereby made part of it, the words of that clause ought to be counted as part of the third agreement, which would make up a greater number than 1080.

LITTLEDALE, J. I think that the 1*l.* stamp is proper. It is admitted, that the third agreement, taken by itself, is properly stamped, and that that refers to another agreement; and I am of opinion, that clauses of other agreements, which are referred to as this is, do not come within the words of the stamp act, "every schedule, receipt, or other matter put or indorsed thereon, or annexed thereto (a).

Verdict for the plaintiff—Damages, 16,230*l.*

Scarlett, A. G., Jervis, Russell, Serjt., and Whateley for the plaintiff.

Campbell, Ludlow, Serjt., and R. V. Richards, for the defendants.

[Attornies—Simcox, and Martineau & M.]

(a) The words of the stamp act, 55 Geo. 3, c. 184, imposing a duty on agreements, will be found, ante, p. 26.

COURT OF KING'S BENCH.

BEFORE LORD TENTERDEN, C. J., BAYLEY, HOLROYD, AND
LITTLEDALE, JS.

In Banc. Nov. 8.

Campbell now moved for a rule nisi for a new trial, on the ground that the third agreement required a stamp of 1*l.* 15*s.*, as, by being referred to, the arbitration clause, contained in the second agreement, must be taken to be part of it, the same as if it had been repeated *verbatim* in the third agreement.

*210] *Lord TENTERDEN, C. J. I suppose that there was a proper stamp on the second agreement.

Campbell. Yes, my Lord; but I do not resort to the words of the stamp act respecting schedules indorsed or annexed; but submit, that the referring to this clause is the same in legal effect as repeating it in the agreement; and that, if there had been an award made on any thing respecting this third agreement, and that award had not been performed, the pleader, in drawing a declaration for such non-performance, must have gone upon this clause so referred to, as if it had been a part of the third agreement; and as a clause so referred to is as operative as if it were contained in the agreement, it ought to be stamped accordingly; and if that were not so, parties might, in a dozen words, agree according to the terms stated in such and such pages of some printed book on conveyancing, which would be a complete fraud on the revenue.

Lord TENTERDEN, C. J. I have no doubt about this case. Whether the duties may be evaded I do not know. I must take the law as it is. Now, the legislature has put a duty on the number of words contained in the instrument itself, or in a schedule indorsed thereon, or annexed thereto: now this is neither one nor the other; and therefore the 1*l.* stamp is sufficient.

The rest of the Court concurred.

Rule refused.

*211]

*BEFORE MR. BARON VAUGHAN.

REX v. JOSEPH MARTIN. Aug. 6.

A party, causing the death of a child, by giving it spirituous liquors, in a quantity quite unfit for its tender age, is guilty of manslaughter.

MANSLAUGHTER.—The indictment charged the prisoner with giving a quartern of gin to Joseph Sweet, a child of tender age, to wit, of the age of four years, which caused his death. The indictment averred the quantity of gin to be excessive for a child of that age. It appears that the father of the deceased kept a public-house at Wolverhampton, and that the prisoner went there to drink, and having ordered a quartern of gin, he asked the child if he would have a drop; and that, on his putting the glass to the child's mouth, with his left hand, as he held the child with his right, the child twisted the glass out of his hand, and immediately swallowed nearly the whole of the quartern of gin, which caused his death a few hours after.

VAUGHAN, B. As it appears clearly that the drinking of the gin in this quantity was the act of the child, the prisoner must be acquitted; but if it had appeared that the prisoner had willingly given a child of this tender age a quartern of gin, out of a sort of brutal fun, and had thereby caused its death, I should most decidedly have held that to be manslaughter, because I have no doubt that the causing the death of a child by giving it spirituous liquors, in a quantity quite unfit for its tender age, amounts, in point of law, to that offence.

Verdict—Not Guilty.

Corbet, for the prosecution.

Mr. Justice *Foster* lays down (*Discourse on Homicide*, 261) that "if an action, unlawful in itself, be done deliberately, and with intention of mischief or great bodily harm to particular persons, or of mischief indiscriminately, fall it where it may, and death ensue against or beside the original intention of the party, it will be murder. But if such mischievous intention doth not appear, which is matter of fact, and to be collected from circumstances, and the act was done heedlessly and incautiously, it will be manslaughter, not accidental death, because the act upon which death ensued was unlawful."

SHREWSBURY ASSIZES.

BEFORE MR. BARON VAUGHAN.

PRITCHARD v. WALKER. Aug. 13.

If the plaintiff subpoena the defendant's attorney to produce books, the latter is not entitled to receive any thing from the plaintiff for expenses or loss of time in attending as a witness. If a person is named in a turnpike act, as one of the trustees of a turnpike road, and has acted as such, and been recognized as a trustee by the plaintiff, the Judge, at the trial of a cause, in which the goodness of his title to act is not the matter directly in issue, will take him to be a good trustee, and will not allow evidence to be given on the part of the plaintiff, to show that the person has not taken the oath prescribed to be taken by trustees of roads before they act as such.

Assumpsit by the plaintiff, who had been clerk to the trustees of the Shrewsbury and Wrexham turnpike roads, against the defendant as one of the trustees, to recover a balance of salary due to him as clerk. Plea—General issue.

To show that the plaintiff acted as clerk to the trustees, the defendant's attorney, who had succeeded the plaintiff as clerk of the trustees, was called to produce certain books of the trust, under a *subpoena duces tecum*. The defendant's attorney asked for his expenses; but the plaintiff's counsel objected to paying him any thing, as he came to the Assizes as the attorney of the defendant.

VAUGHAN, B. I do not think that I ought to allow the witness any thing under these circumstances.

The witness was examined, and he also produced the books.

*For the defence, an order of the trustees was produced. It was contained in one of the books put in by the defendant's attorney. This order, to be valid, ought to have been signed by five trustees. It bore the signatures of five individuals, named as trustees in the local act. [213]

Campbell, for the plaintiff, wished to show that Mr. Matthews, one of the five, had no right to act as a trustee, as he had not qualified himself to act by taking the oath prescribed in the 62d section of the general turnpike act, 3 Geo.

4, c. 126, which enacts, that no person shall be "qualified, or capable of becoming or acting as a trustee or commissioner, in the execution of any act of Parliament for making, repairing, or maintaining any turnpike road," unless he shall be possessed of certain property, and unless he shall, before he shall act as such trustee or commissioner, take and subscribe the oath there set forth.

Taunton, *contra*, relied on the case of a justice acting without having qualified, and contended, as Mr. Matthews was one of the trustees named in the local act, he was merely liable to a penalty if he had acted without taking the oath of qualification.

VAUGHAN, B. (having looked at the book produced by the defendant's attorney.) I find Mr. Matthews constantly acting as a trustee, and the plaintiff treating him as such all the while he was clerk to the trustees. I therefore think I cannot try the goodness of his title to act as a trustee, by way of collateral issue. The turnpike act only says, that persons who have not qualified as trustees shall not be capable of acting; but it does not say that their acts are to be void. Mr. Matthews has acted as a trustee; the plaintiff himself has acknowledged him as such; and I am of opinion, that I must take him to be a good trustee.

The order was read.

Verdict for the plaintiff.

*214] **Campbell, Russell, Serjt., and Justice*, for the plaintiff.
Taunton, for the defendant.

[Attornies—*Pritchard, and Morrell.*]

ANDERSON v. J. W. WATSON, Gent. One, &c. Aug. 13.

A. placed money in the hands of his attorney to invest for him, giving the attorney an unlimited discretion to do what was best; the attorney advanced the money to B. on mortgage, but discovering that the security was bad, the attorney sued out a bailable writ in A.'s name against the borrower for the amount, without A.'s knowledge: Held, that B. could maintain no action against the attorney for arresting him without the authority of A., if the attorney acted *bonâ fide*, and A. afterwards approved of what he had done.

CASE.—The declaration (which consisted of only one count) stated, that the defendant had wrongfully and injuriously sued out a bailable *capias* against the plaintiff, in the name of one Ann Rowlands, without her authority, and that by virtue of that writ the plaintiff was arrested and imprisoned, and forced to give bail, to the damage, &c. (The count did not aver the termination of the suit) (a). The writ, the arrest, and the execution of the bail-bond, were proved. But the witness, who proved the latter, in his cross-examination, proved a conversation between the plaintiff and the defendant, from which it appeared, that a sum of 200*l.* belonging to Mrs. Rowland, had been lent to the plaintiff on mortgage, through the medium of the defendant, who was her attorney; and that the defendant, having received information that the property mortgaged by the plaintiff had been previously settled on the plaintiff's wife, sued out a writ, and arrested the plaintiff for the amount in the name of Mrs. Rowland. To prove the want of authority, Mrs. Rowland was called on the part of the plaintiff; and she stated that she had placed the money in the defendant's hands, for him to invest for her, and that she knew nothing of the plaintiff, and had never

(a) Such an averment is necessary in declarations for malicious arrest; but it seems that it is not so in a count framed like the present.

given the defendant any authority to arrest him, and in fact knew nothing of the arrest till after it had happened; but, in her cross-examination, she stated, that *she had put the money into the defendant's hands, and that, if it [215] had been lost, she should have looked to him for it; and she also stated, that she left every thing to the defendant, and he was to do for her as he thought best; and that, as soon as she heard the whole of the matter, she approved of what he had done.

VAUGHAN, B. I am of opinion, that, if Mrs. Rowland placed her money in the attorney's hands, confiding in him to do what was best, and putting an unlimited discretion in him, and he acted honestly and *bona fide*, supposing that the money would be lost, provided he did not do as he has done, the present action must fail.

Nonsuit.

Curwood and Batner, for the plaintiff.

Tawnton, Russell, Serjt., and *Justice*, for the defendant.

[Attornies—*Bowdler*, and *In person*.]

MORRIS v. DAVIES, and HARRIET, his Wife. Aug. 14.

Every child born in wedlock, the husband and wife being in England, and not separated by any sentence of divorce, is presumed to be legitimate; but this presumption may be repelled, by proof of such facts as satisfy the Jury that no sexual intercourse took place between the husband and wife, at a time when the husband could, by possibility, be the father of the child; and the Jury, before they can find against the legitimacy, must be convinced that no such sexual intercourse took place, by irresistible evidence, and not by a mere balance of probabilities. If such intercourse did take place, the adultery of the wife is immaterial; and if there was an opportunity of sexual intercourse between the husband and wife, the law presumes that such intercourse did take place, unless the contrary be satisfactorily proved.

Issue directed by the Lord Chancellor, to determine whether the plaintiff was the legitimate son of William and Mary Morris.

This case had been tried at the Spring Assizes for the county of Salop, when a verdict was found for the plaintiff; but Lord LYNCHBURST, C., wishing the case to be further considered, and also wishing to have the opinion of the Jury specifically taken on certain questions, directed a new trial.

The questions were these:—*First*, Whether the Jury *were satisfied, [216] that there had been no sexual intercourse between Mr. and Mrs. Morris, at a time when, by the course of nature, Mr. Morris might have been the father of the plaintiff?

Second, Whether the Jury believed the evidence of Mary Evans?

Third, Whether the Jury were satisfied, that the sleeping of Mr. and Mrs. Morris, at Garthllwydd, which was proved by Mrs. Lloyd, took place at the time spoken to by Mary Evans?

On the part of the plaintiff it was proved, that Mr. and Mrs. Morris were married in the year 1778, and that they lived together at Shrewsbury, till the year 1788, when they parted under articles of separation; Mr. Morris going to reside at a place called the Argoed, and Mrs. Morris at Llanfair, which places are fourteen miles asunder. Previous to the separation, Mrs. Morris was delivered of a daughter, who was one of the defendants; and on the 5th of January, 1793, Mrs. Morris was delivered of the plaintiff, who, a few hours after his birth, was carried on horseback, in the night, to the town of Wem, a distance of between twenty and thirty miles, and was there brought up under the name of Austin, at the house of a weaver of that name.—To show access, on the part of Mr. Morris, eighteen witnesses were called, who proved, that he was frequently

at the house of Mrs. Morris, at Llanfair, in the years 1790, 1791, and 1792, and a witness, named Mary Evans, proved, that in the spring of 1792, Mr. Morris came to the house of his wife, and after they had met at the door, they kissed and embraced, and then went into the parlour, and there remained three hours; and that after this, they left the house and went in a direction towards Garthllwydd, and Mrs. Morris did not return till the next day;—and it was proved by Mrs. Lloyd, of Garthllwydd, that on *one* occasion, but to which *she* could affix no sort of date, Mr. and Mrs. Morris slept at her house, and she had no reason to suppose that they did not sleep together.

*217] *For the defendants, evidence was given, which went clearly to show, that Mr. Morris was wholly ignorant of the existence of the plaintiff; and that, on all occasions, he spoke of and treated Mrs. Davies as his only child;—and, besides this, very distinct evidence was given, that Mrs. Morris, after the separation, kept a servant named William Austin, who was subsequently a captain in the 90th regiment of foot; and that an adulterous intercourse subsisted between Mrs. Morris and this servant. And the defendants' counsel much relied on the circumstance of the plaintiff being, in all respects, treated as the son of Captain Austin; on the circumstance of the personal resemblance, that was proved by several witnesses to exist between him and the Captain; and also on the facts of Mrs. Morris carefully concealing his birth, and of her having, on one occasion, when Mr. Morris had said that she had had a child, fallen on her knees, and asserted, with a dreadful imprecation, that she had never had any child but Harriet (Mrs. Davies).

VAUGHAN, B. (in summing up to the Jury.) Every child born in wedlock, the husband and wife being in England, and not being separated by a sentence of divorce *a mensâ et thoro*, is presumed to be legitimate; but that presumption may be repelled by circumstances. However, these circumstances must be such as shall most clearly satisfy you, that there was *no* sexual intercourse between the husband and the wife, at a time when the husband could, by possibility, be the father of the child. It must not rest on a mere balance of probabilities, but the negative of the legitimacy must be proved by irresistible evidence. You must, therefore, be satisfied that *no* such intercourse took place between the husband and wife, before you can find a verdict for the defendants; for if there was *any* sexual intercourse between the husband and the wife, at a time when, by the course of nature, the husband *might* be the father of the child, any infidelity

*218] *that she might be guilty of would not vary the case; and it matters not that "the general, camp, pioneers and all, had tasted her sweet body," (if I may be allowed that expression); because the law fixes the child to be the child of the husband. I ought also to tell you, that if there was *any opportunity* for sexual intercourse, the law presumes it to have taken place, as between the husband and the wife; and if there was such an *opportunity* of sexual intercourse between the husband and the wife, in this case the law presumes that it occurred. It does not lie on the plaintiff to show, that there *was* actual sexual intercourse, but the defendants must show that there *was not*. A good deal of time has been occupied in showing, that an adulterous intercourse subsisted between Mrs. Morris and the servant, William Austin, and of that fact there can be no doubt; but still, the question here must be governed by the rules I have laid down; and if, from any sexual intercourse between Mr. Morris and his wife, the plaintiff *could* be the son of Mr. Morris, it does not signify how often she might have been guilty of adultery, or whether the plaintiff was really the son of the adulterer, or not.

The Jury found a verdict for the defendants.

VAUGHAN, B. Then, gentlemen, you are not satisfied of the sexual intercourse between the husband and the wife?

Sir R. Chamber Hill (the foreman of the Special Jury). We do not think that there was sexual intercourse.

VAUGHAN, B. Gentlemen, I should wish to ask you, whether you believe the testimony of Mary Evans?

Sir R. *Chambre Hill*. We do not place any confidence in Mary Evans.

*VAUGHAN, B. Do you believe the account of the sleeping at Garthll- [*219
wydd to relate to the same time?

Sir R. *Chambre Hill*. We do not, my Lord.

Russell, Serjt., *Curwood*, and *Whateley*, for the plaintiff.

Tuunton, *Cumpbell*, *Peake*, Serjt., and R. V. *Richards*, for the defendants.

[Attornies—*Watson & Harper*, and *Rumsey*.]

In the ensuing Term, *Russell*, Serjt., made an application to the Court of Chancery, to direct a new trial—on the ground, that the verdict was against evidence, and against the opinion of the learned Baron who tried the cause. This application was argued; but the law, as laid down by the learned Baron at the trial, was not questioned by either party.

On the subject of legitimacy, see *St. Andrew's v. St. Bride's*, 1 Str. 51. and the authorities there cited; *Bract. lib. 1, fo. 6, c. 4*; 43 *Edw. 3*, 18 (b) 20; 1 *Hen. 6*, 3; *Pendrell v. Pendrell*, 2 Str. 925; *Lomax v. Holmden*, Id. 946; *Rex v. Reading*, Rep. temp. Hard. 79; *Rex v. Roake* 1 Wils. 340; *Doe dem. Goodright v. Saul*, 4 T. R. 359; *Rex v. Luffe*, 8 Ea. 193; *Rex v. Ke* 11 Ea. 132; *Head v. Head*, Sim. & Stu. 150; *S. C.* on appeal 1 Turn. 138.

For the resolutions of the Judges on the question of legitimacy in the Banbury Peerage, see Sim. & Stu. 153; but an abstract of them will be found in 2 *Selw. N. P. tit. Ejectment*, p. 738.

DOE on the demise of LLOYD v. EVANS. Aug. 17.

An admission made by a party before an arbitrator, may be used as evidence on the trial of another cause, and is not to be considered as an admission made with a view to a compromise.

The mere circumstance of a witness being too ill to attend the trial, is no sufficient ground for reading his deposition taken in Chancery.

EJECTMENT by the lessor of the plaintiff, to recover certain lands which had belonged to Gwin Lloyd, Esq.

The lessor of the plaintiff claimed under the same title *as he did in [*220 the case of *Doe dem. Lloyd v. Passingham* (which see *ante*, Vol. ii. p. 440); and the defendant was a tenant of Colonel Passingham, who was the defendant in that case; and this case, as well as the former, turned on the same question, whether Colonel Passingham's mother was the legitimate daughter of Gwin Lloyd, Esq. To show seisin in Gwin Lloyd, Esq., in the lands in question, Mr. Pownall, the attorney for the lessor of the plaintiff, produced an abstract of the title of the estate in question, which had been furnished by Mr. Sandys, the then attorney of Colonel Passingham, for the purpose of being used on an arbitration, the parties to which were the father of the lessor of the plaintiff, and Colonel Passingham.

Russell, Serjt., and E. V. *Williams*, objected, that as this abstract was furnished for the purposes of an arbitration, it was not admissible in evidence, any more than any other admission made with a view to a compromise.

VAUGHAN, B. I think that if an admission is made when a case is before an arbitrator, it is not more privileged than a similar admission would be, if there

were a cause in Court. An arbitration-room is any thing but a forum of confession; and the whole difference between that and a Court of justice is, that it is a tribunal chosen by the parties themselves; but still, a matter comes as adversely before an arbitrator as before any other tribunal.

The evidence was received.

Taunton, for the plaintiff, wished to give in evidence the deposition of a witness, named Martha Mills, who had been examined in the Court of Chancery, in a suit between the father of the lessor of the plaintiff, and Colonel Passingham.

*221] To let in this evidence a witness proved, that he saw *Martha Mills a few days before the trial, and that she appeared to be nearly one hundred years of age, and was bed-ridden, and quite unable to attend any trial.

Taunton. I submit, that, under these circumstances, the deposition is admissible. If you can prove a witness to be abroad, or out of the reach of process, the same rule applies as if he were dead, or had fallen sick by the way. This was laid down in the case of *Kinsman v. Crooke (a)*.

VAUGHAN, B. These things are, in cases of issues out of Chancery, regulated by an order of that Court, that the depositions of particular witnesses may be read; but I think, that the mere circumstance of the witness being unable to attend here by reason of sickness, is no sufficient ground for admitting a deposition. This is generally a ground for postponing the trial.

The evidence was rejected (b).

Much of the evidence given on both sides, at the former trial, was again adduced, and the Jury found a

Verdict for the defendant.

Taunton, Campbell, and R. V. Richards, for the lessor of the plaintiff.

Russell, Serjt., and E. V. Williams, for the defendant.

[Attornies—*Poonall and Roake.*]

(a) Ld. Raym. 1166.

(b) The authorities on this subject will be found in Phill. Law of Ev. 360.

*222]

*HEREFORD ASSIZES.

BEFORE MR. BARON VAUGHAN.

REX v. JAMES. Aug. 22.

If a party has been held to bail, or committed for more than twenty days, on a charge of *felony*, and the Grand Jury ignore the bill for the *felony*, and find a bill for a *misdemeanor*, in attempting it; the party is entitled to traverse.

The prisoner had been held to bail, for the capital offence of rape, more than twenty days; but the Grand Jury ignored the bill for the capital offence, and found a true bill for an assault, with intent to commit a rape.

The defendant's counsel applied to traverse.

VAUGHAN, B., allowed the defendant to traverse, on the ground, that he had not been on bail for twenty days, on the charge of misdemeanor, upon which he was to take his trial.

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Curwood, for the prosecution.

C. Phillips and Godson, for the defendant.

[Attornies—*Dangerfield*, and *Devereux*.]

This point has been ruled by the Judges on other Circuits. By the stat. 60 Geo. 3, and 1 Geo. 4, c. 4, s. 3, it is enacted, that where any person prosecuted for a misdemeanor, by indictment, shall have been in custody, or held to bail to answer *such offence*, twenty days before the Session, he shall not be entitled to traverse. The words of this section will be found in Carr. Supplem. p. 59.

*NEWPORT v. HOLLINGS. Aug. 23.

[*223]

If a person, who is in fact assignee of a bankrupt, be sued in trover, and it appear that he claims the goods as property belonging to the bankrupt; in making out this defence, he need not give evidence of the trading, &c. unless there has been notice of disputing the commission, although he be not, in point of form, *sued as assignee*.

If an innkeeper borrow a chaise from a coach-maker while he has a new chaise making, and use it in the course of his trade, but does not have his name painted upon it, under the stat. 4 Geo. 4, c. 62, s. 11, this is not such a reputed ownership of the borrowed chaise, as will entitle the assignees of the innkeeper to detain it from the coach-maker.

TROVER for a post-chaise. The plaintiff was a coach-maker at Worcester, and it appeared that a person named Cooper, who kept the George Inn at Ledbury, wishing to commence the posting business, ordered a post-chaise of the plaintiff; but while that chaise was fitting up, it was agreed that the plaintiff should lend him an old chaise to use till the new one was got ready. This old chaise, which was the subject of the present action, was accordingly lent to Cooper; and it was let out by him to his customers in his business of an innkeeper: but his name was not painted on it in pursuance of the stat. 4 Geo. 4, c. 62, s. 11, which compels owners of post-chaises to have their names painted on them. Cooper became bankrupt, and his assignee, who was the present defendant, claimed to hold this chaise as property in the order and disposition of the bankrupt, at the time of his bankruptcy, under the 72d sect. of the bankrupt act, 6 Geo. 4, c. 16.

To support this defence, the commission of bankrupt against Cooper, dated on the 8th of April, 1827, was put in, and the assignment to the defendant as assignee.

Campbell, for the plaintiff, objected, that the trading, petitioning creditor's debt, and act of bankruptcy should be proved.

Russell, Serjt. This is an action against an assignee, and no such proof is required, as there has been no notice of disputing the commission.

Campbell. We sue the defendant as a wrong doer; we do not sue him as the assignee of Cooper (a).

**VAUGHAN*, B. My impression is, that it is not necessary for the de- [224] fendant to prove the trading, &c., and I shall hold so; for although the defendant is not formally sued as assignee, yet the plaintiff knew that he was acting as such, and claimed to keep this chaise on that very ground.

To show the reputed ownership, several witnesses were called, who stated, that the chaise was used precisely as if it had been Cooper's own; and that it was used by his customers about a dozen times; and that it was reputed to be his chaise by those who were his neighbours.

VAUGHAN, B. This does not appear to me to be any thing like a case of

(a) By the stat. 6 Geo. 4, c. 16, sect. 90, it is enacted, "that in any action by or against any assignee" no proof shall be required of the petitioning creditor's debt, &c., unless the notice of disputing them has been given."

reputed ownership. This chaise, it appears, was used about a dozen times, and it must often happen that when an innkeeper's chaises are repairing, he must borrow of his coach-maker; but still this is not at all like a case of reputed ownership, nothing like the case of a man making a secret bill of sale of all his goods, and then being allowed by the vendee to gain credit by retaining possession of them and dealing with them as his own. I take it to be clear, that where property is delivered for a particular and special purpose, to one who becomes bankrupt, it does not pass to the assignee as goods in the order and disposition of the bankrupt, such as bills deposited with bankers, and entered short, or the like. A strong fact in this case against the reputed ownership, is, that although innkeepers are bound, by an act of Parliament, to put their names and a number on their chaises, yet the bankrupt, by never putting his name on this chaise, clearly indicated that he never meant to assert that the chaise was his own; and, at the same time, gave all those who saw it good reason to suppose that the chaise was not in fact his property.

Verdict for the plaintiff—Damages 8*l*.

*225] **Campbell*, and *Godson*, for the plaintiff.
Russell, Serjt., and *Malkin*, for the defendant.

[Attornies—*Godson*, and *Higgins*.]

In the ensuing Term, *Russell*, Serjt., applied for a new trial, on the ground that there was not sufficient evidence of a conversation; but the Court

Refused a rule.

Bull-Baiting (a).

COURT OF KING'S BENCH.

Ex parte JOHN HILL. Nov. 28.

Bull-baiting is not punishable under the stat. 3 Geo. 4, c. 71, for preventing cruelty to cattle, as bulls are not included in that statute. If a writ of *habeas corpus* be granted, on the ground that the party has been illegally committed by a magistrate, the Judge will not make it a part of the rule for issuing the writ, that the party shall not bring an action against the magistrate.

CURWOOD moved for a writ of *habeas corpus* to bring up the prisoner, who had been committed to Stafford gaol on a warrant under the stat. 3 Geo. 4, c. 71 (commonly called Mr. Martin's act), which charged, that he "did, on, &c., at, &c., unlawfully, wantonly, and cruelly abuse and ill-treat certain cattle, to wit, a bull, by then and there baiting, and causing the said bull to be baited, with dogs, contrary to the statute made" in the 3d Geo. 4 (b). He contended, that the commitment was illegal on two grounds: *First*, that it appeared on the face of the warrant, that the offence there charged was bull-baiting, which
*226] he was prepared to show was a lawful sport; and *secondly*, that *a bull

(a) This being a case of very considerable importance, and it being probable that it will not be reported in any other work, we have thought right to insert it: we have been favoured with this report, by one of the counsel engaged in it.

(b) By this stat., "If any person or persons shall wantonly and cruelly beat, abuse, or ill-treat any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep, or other cattle," such person or persons are made liable to a penalty, not exceeding 5*l*., nor less than 10*s*.

was not within the provisions of the stat. 3 Geo. 4, c. 71, upon which the conviction was founded.

Lord TENTERDEN, C. J., suggested, that a rule to show cause should be granted, and that, as it was the last day of Term, cause should be shown at chambers, during the vacation; which suggestion was acted upon by the Court.

Dec. 6.—IN the following week *Starkie* and *Holroyd* showed cause before BAYLEY, J., and contended, that the bull was included in the stat. 3 Geo. 4, c. 71, under the term "other cattle," and that as cock-fighting had been declared to be an illegal sport, it followed that bull-baiting was so likewise.

Curwood, contra, argued, that it was a rule in the construction of acts of Parliament, that where there was an enumeration, beginning with the lower degrees, and general words, embracing others *ejusdem generis* at the end, these general words did not include a superior degree, which was not named in the act; and he cited the case of the Archbishop of Canterbury, 2 Rep. 46, where it was held, on the stat. 13 Eliz. c. 10, which mentions deans and chapters, parsons and vicars, and *all other persons whatsoever having spiritual promotion*, that the words did not extend to bishops, a superior order, who were not named therein; and he contended therefore, that as, in the statute now in question, the enumeration began with ox, cow, and heifer, omitting bull, and concluded with other cattle, it did not include a bull, the bull and the bishop standing *in pari statu*, with reference to the words of those statutes respectively. With regard to bull-baiting being unlawful, he stated, that bull-baiting was expressly named in *Pulton De pace regis et regni* among the sports lawful for the people of England to enjoy (a); and being* recognized as lawful, nothing could alter [227] it but the legislature; and his Lordship would recollect the fate of several bills for the abolition of bull-baiting.

Starkie. This statute begins with mentioning the horse, which is a superior animal to the bull; and therefore the bull is included in the general words.

BAYLEY, J. Horse, mare, and gelding, are one class; ox, cow, heifer, and steer, are another class: and in my opinion the bull is not included in this act of Parliament; and if that be so, the prisoner is entitled to be discharged. However, I will consult with my brother LITLEDALE, and if his opinion coincides with mine, I shall grant a writ of *habeas corpus*.

His Lordship having consulted with Mr. Justice LITLEDALE, directed a writ of *habeas corpus* to issue.

On the following day, the attorney for the magistrate applied to Mr. Justice LITLEDALE, to make it part of the rule for the writ of *habeas corpus*, that the party should be restrained from bringing any action against the magistrate for false imprisonment.

*LITLEDALE, J. If the imprisonment is illegal, I cannot restrain [228] the party from pursuing his remedy by action (b).

Rule absolute.

Curwood, in support of the application.

Starkie and *Holroyd*, for the magistrate.

[Attornies—*Fellowes*, and *Spurrier & Ingleby*.]

(a) *Pulton* lays down, under title "Riot," p. 261, that "an assembly of three persons or more, which is not to the terror of the people, nor to do some act with force and violence against the peace, is not unlawful. The watch in London upon Midsummer's night is lawful; and so be such like in other cities and towns. Assemblies be lawful that be used upon May-day to fetch in May boughs or flowers; and so be assemblies at church ales, Whitsun and Midsummer ales. Assemblies at the fetching home, setting up, or dancing round a May-pole; and assemblies at the baiting of a bull or bear, and at the mowing or making a doll or revel mead; and assemblies of minstrels and their fellows at certain places and times of the year, allowed by ancient custom, are also lawful; and assemblies to play at cards, tables, bowles, clash, bucklers, wasters, half-sword, tennis, quoits, cailes, or such other games, be likewise, by the common law, tolerable; and assemblies to run at quinn-ball, sand-bag, base, foot-ball, stool-ball, hand-ball, and such like disports, be likewise lawful."

(b) There were five other cases; and we are informed that the magistrate paid the parties convicted a compensation in each case.

CASES

AT

NISI PRIUS.

COURT OF COMMON PLEAS.

ADJOURNED SITTINGS IN LONDON, AFTER TRINITY TERM 1827.

BEFORE LORD CHIEF JUSTICE BEST.

LAWRENCE and another, Assignees of TOLSON, a Bankrupt, v.
CROWDER and another (a). July 21.

IN an action by the assignee of a bankrupt, a plea was delivered to the plaintiff's attorney by a clerk of the defendant's attorney, who, through mistake, omitted to deliver with it a notice to dispute the bankruptcy. A few hours after, as soon as the omission was discovered, the plea was fetched away on the pretence that there was some error in it; and, in the course of the same day, a fresh plea was delivered, accompanied by a notice: It was held, at *Nisi Prius*, that, although the term for pleading had not expired, the notice was not sufficient under the 90th section of the 6 Geo. 4, c. 16; but the Court of Common Pleas, under the circumstances, granted a new trial, on payment by the defendant's attorney of the costs as between attorney and client.

TRIVER for goods stated in the first count to have been the property of the bankrupt before the bankruptcy; and in the second, laid as the property of the plaintiffs, the assignees. Plea—Not Guilty.

It became a point in the cause, whether a notice had been given to dispute the act of bankruptcy under the 90th section of the 6 Geo. 4, c. 16 (b), which requires it to be delivered at or before pleading. The time for pleading expired on the 27th of February; and on the 26th, a clerk of the defendants' attorney delivered a plea, without any notice attached to it, at the office of the plaintiff's attorney; and a few hours afterwards he went there again, and said there was a mistake in the plea he had delivered, and got it back, and, about half an hour after that, delivered a fresh plea, with a notice,

(a) This and the eleven following cases were omitted in the last part on account of motions for new trials, &c. not having been argued.

(b) This section enacts, "That in any action by or against any assignee, or in any action against any commissioner or person acting under the warrant of the commissioners for any thing done as such commissioner, or under such warrant, no proof shall be required at the trial of the petitioning creditor's debt or debts, or of the trading or act of bankruptcy respectively, unless the other party in such action shall, if defendant, at or before pleading, and, if plaintiff, before issue joined, give notice, in writing, to such assignee, commissioner, or other person, that he intends to dispute some, and which of such matters," &c.

saying, that was the plea which it was intended to deliver, but not saying that any notice had been added. The clerk to the plaintiffs' attornies, on receiving it, said, "Very well." When the plaintiffs' attornies discovered that a notice had been added, they sent back the plea, accompanied by a letter, stating that they had no objection to any alteration in the plea, but that they objected to the notice, as being out of time. The defendants' attorney's managing clerk was called, and stated, that it was never intended to deliver the plea without the notice; that it was done altogether by mistake, without the knowledge of his principal; and that, when he ascertained what was done, he immediately directed it to be fetched away, and sent another in its stead.

Wilde, Serjt., for the plaintiffs, contended, that this was not a sufficient notice. He cited *Poole v. Bell* and others (a).

* *Tuddy*, Serjt., for the defendant, submitted, that it was.

BEST, C. J. I am of opinion, that a plea having been delivered, a [*231] notice to dispute the bankruptcy of Tolson could not be afterwards given. If I have put an erroneous construction on the act, the Court will set me right.

Verdict for the plaintiffs.

Wilde, Serjt., and *Fish*, for the plaintiffs.

Tuddy, Serjt., and *Comyn*, for the defendant.

[Attornies—*Green & A.*, and *Hyde*.]

IN the ensuing Michaelmas Term, a rule *nisi* was obtained, which came on to be argued in Easter Term, 1828. The Court, as it appeared that there was ground for disputing the act of bankruptcy, granted a new trial, on payment by the defendants' attorney of the costs as between attorney and client, and on the condition, that if the act of bankruptcy should be proved to the satisfaction of the Judge who should try the cause, the plaintiff should have judgment of the Term. By this rule of the Court, the opinion given by the Chief Justice at *Nisi Prius*, is confirmed.

(a) 1 Stark. N. P. C. 328. In this case, which was an action by the assignee of a bankrupt, the defendant had pleaded the general issue, without notice of his intention to dispute the bankruptcy, but before the time for pleading expired, he delivered the general issue *afresh*, accompanied by such notice. Lord *Ellenborough* held, that the notice was insufficient, saying, that the first plea was good and effectual to all purposes, and the defendant ought to have moved for leave to withdraw it, in order that he might plead *de novo*.

The case of *Bernasconi v. The Earl of Glangall*, 1 Mann. & Ryland, 396, decides, that in an action by assignees of a bankrupt, if the defendant does not give notice to dispute the trading, &c., he cannot dispute the validity of the commission itself.

*ADJOURNED SITTINGS AT WESTMINSTER, AFTER [*232]
TRINITY TERM, 1827.

BEFORE LORD CHIEF JUSTICE BEST.

FOLKS v. SCUDDER and another. Oct. 4.

The correctness of the bond given to the Lord Chancellor under the 13th section of the Bankrupt Act, cannot be disputed at *Nisi Prius*, in an action to try the validity of the commission, in the case in which it was given. Nor can it be considered there, whether the defendant's

attorney has agreed to accept a notice to dispute which had been delivered after the time mentioned in the act of Parliament.

TRESPASS by Mary Folks, a bankrupt, against Scudder and Harris, the executors of the petitioning creditor, to try the validity of the commission against her.

Adams, Serjt., for the plaintiff, stated, that the bond given to the Lord Chancellor under the 13th section of the bankrupt act, was incorrect, and could not be supported.

Best, C. J. I shall not inquire into that here. That is a matter for the Lord Chancellor. I shall take it for granted, that the Lord Chancellor has not issued the commission improperly.

Adams, Serjt. I am in a condition to show, that the bond has been altered.

Best, C. J. That will not alter my opinion. If there was no bond at all, I should not take any notice of that circumstance. That is all for the Lord Chancellor.

The plaintiff's attorney was then called to prove that notice to dispute the act of bankruptcy had been delivered. He stated that it was not delivered till after the issue joined (a), but added, that the defendants' attorneys had said

*233] "that it was of no consequence, the notice was sufficient, and would do very well, or something to that effect.

This, it was contended by *Adams*, Serjt., on the part of the plaintiff, was sufficient to make it incumbent on the defendants to prove the act of bankruptcy.

Best, C. J. I think you will find yourself in this difficulty—supposing all this to be true, am not I bound to take the law from the act of Parliament? I doubt whether the matter can be inquired into at *Nisi Prius*. The most convenient course is, that it should not be. The Court, on application, may make the defendants' attorneys pay the costs of a new trial, if they have acted in the manner stated. I think the fair thing would be, for the defendants' attorneys, if they really accepted the notice, to withdraw their opposition now; but if they will not, are we to try at *Nisi Prius* the credit of these witnesses, as to the fact whether there was an acceptance or not? I think I ought to nonsuit the plaintiff.

Wilde, Serjt. I mean to contradict the fact, as stated by the plaintiff's attorney, and have the witness here.

Best, C. J. That is what I wish to avoid.

Miller, for the plaintiff. Are not the defendants bound by the act of their attorneys?

Best, C. J. They may or may not be bound by it; but this is not the place where that question is to be decided.

Miller. As to the other point, the Lord Chancellor has ordered the bond to be produced here; and I submit that the validity of the commission, as depending upon it, is a question to be decided by the Jury.

Best, C. J. I remember a case, in which my Lord **Kenyon* told me, *234] that on such a point I could not be heard at *Nisi Prius*. I never knew the validity of such a bond as this disputed in a Court of Common Law.

Nonsuit.

Adams, Serjt., and *Miller*, for the plaintiff.

Wilde, Serjt., and *Comyns*, for the defendants.

[Attornies—*R. P. Smith*, and *Baddeleys*.]

In the following Term, a rule nisi for a new trial was obtained on affidavits, which in Easter Term, 1828, was discharged after argument.

(a) See sect. 30 of the 6 Geo. 4, c. 16, in a note to the preceding case of *Lawrence v. Crowder*!

* See the case of *Bernasconi v. The Earl of Glengall*, 1 Man. & Ry. 326, which was an action by the assignees of a bankrupt. No notice had been given to dispute the trading, &c.; and the recital in the commission, that the party became bankrupt, within the intent and meaning of the bankrupt act then in force, was held to be conclusive of the fact of the commission of an act of bankruptcy since the passing of that act. Lord *Tenterden*, in the course of his judgment, said, "We cannot presume the fact to be otherwise, seeing it, as we do, asserted and attested by the affixing the Great Seal to the commission; and if such a question can be raised at all, the proper mode of raising it would be by an application to the Lord Chancellor."

ROBINSON v. HOFFMAN. Oct. 4.

One of several joint-tenants may sign a warrant of distress, if the others do not forbid him. If they, when applied to, merely *decline to act*, that will not prevent him from proceeding.

REPLEVIN.—The cognizance relied on by the defendant, was stated in the plea to be as bailiff of Henry Marchant, Samuel Cullum, and Stephen Cullum. The warrant authorizing the distress was signed only "Henry Marchant, Landlord." The lease under which the plaintiff held, was granted by the three persons mentioned in the cognizance, they holding the property as joint tenants.

Wilde, Serjt., for the plaintiff, contended, that the *appointment by Henry Marchant alone did not constitute the defendant bailiff of the three [*235 persons, as mentioned in the cognizance. He cited Year Book, 7 H. 4, fol. 34, pl. 1.

Storks, Serjt., for the defendant. Adoption will do in the case of joint-tenants. If one joint-tenant is at liberty to make the distress on his own account, he may also, by himself, appoint a bailiff; but adoption is not necessary.

Fish, on the same side, referred to the case of *Pullen v. Palmer* (a).

BEST, C. J. I think it will be better to reserve the point for the opinion of the Court.

Wilde, Serjt., then called Mr. Samuel Cullum, who stated, that he was applied to to sign the warrant of distress; but he declined to sign it, and had not subsequently recognized the act of Mr. Marchant. He stated, that the ground of his not signing was, because he understood that the rent was due to a person named Willats.

BEST, C. J. Upon this evidence, I shall let the plaintiff have a verdict, subject to a motion for a nonsuit. I think, that, in general, one joint-tenant may distrain; but where he is distinctly told that he must not do it, that puts an end to his authority, and distinguishes the case from that which has been referred to.

Verdict for the plaintiff.

Wilde, Serjt., and *Platt*, for the plaintiff.

Storks, Serjt., and *Fish*, for the defendant.

[Attornies—*Arrowsmith*, and *Lane*.]

*In the ensuing Michaelmas Term, a rule *nisi* was obtained, pursuant to the leave given. The case of *Lee v. Shepherd* (b), which was not mentioned at *Nisi Prius*, was cited, in addition to that of *Pullen v. Palmer*.

(a) 3 Salk. 207. That case decides, that one joint-tenant may distrain, but that he cannot avow alone.

(b) 5 J. B. Moore. 297. The two points decided in that case are, *first*, that one of several co-heirs in gavelkind, may distrain for rent due to himself and his co-heirs, without an expresse authority from them so to do; and, *secondly*, that an avowry by him in his own right, and a cognizance as the bailiff of the others, is sufficient, without averring any authority from them to distrain.

The rule came on to be argued in Easter Term, 1828, and was then made absolute, the Court saying that, as the witness Cullum *merely declined signing*, the case was not distinguishable in principle from that of *Lee v. Shepherd (a)*.

(a) It may be worthy of consideration, whether the inclination of the opinion of the learned Chief Justice at *Nisi Prius* is not the most correct, according to the evidence of Mr. Cullum. That gentleman stated, that he declined to join in the warrant, because he understood that the rent was due to another person; and it seems rather difficult to say that such conduct was not expressive of an opinion that the distress ought not to be made; and if so, then in substance and effect it amounted to a prohibition.

FURTHER ADJOURNED SITTINGS IN LONDON, AFTER TRINITY TERM, 1827.

BEFORE LORD CHIEF JUSTICE BEST.

PINCHON *v.* CHILCOTT. Oct. 11.

A verbal agreement was made for the purchase of some turnips growing in a field. After the purchaser had removed the principal part, the seller said to him, "You owe me 3*l.*;" to which he replied, "I will send it before I draw any more turnips." He afterwards drew all the turnips, but did not send the 3*l.*: Held, that it was recoverable on the account stated.

Assumpsit for goods sold, with the money counts, and an account stated.—
 *237] The action was brought to *recover the sum of 3*l.*, being the balance due for a quantity of turnips sold, by a verbal contract, while they were in the ground. The principal part of the turnips had been removed by the defendant, when the plaintiff said to him, "You owe me 3*l.*" The defendant replied, "I will send it before I draw any more turnips." He afterwards drew the remainder of the turnips, but did not send the money. The ground had been measured for the purposes of the agreement.

Wilde, Serjt., for the defendant, contended, that, as it appeared that the turnips were sold while they were in the ground, and were drawn by the defendant, the contract related to an interest in the soil, and could not be made the subject of an action for goods sold. The 3*l.* does not appear to be due for the part which was actually delivered, but for that part which was remaining in the ground. It seems, also, that the ground was measured, and not the turnips.

BEST, C. J. What do you say to the account stated?

Wilde, Serjt. That is answered by the nature of the thing—the connection with the soil. The agreement relates to an interest in the land.

Chitty, for the plaintiff. With respect to the 3*l.*, it is spoken of as a sum actually *due*, and that must be taken to be for the part which had been delivered. I submit, that this is quite sufficient, upon the account stated.

BEST, C. J. I think that the plaintiff may recover upon the account stated.

Verdict accordingly.

Chitty, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attornies—*Smith, L. & Co.*, and *Miller.*]

*[In the ensuing Michaelmas Term, *Wilde*, Serjt., obtained a rule nisi for setting aside the verdict; and *Jones*, Serjt., afterwards showed cause against it; but the matter was eventually arranged by the entry of a *stet processus*.

See the case of *Knowles v. Michell*, 13 East, 249, which decides, that an admission by a defendant that a certain sum was agreed to be paid to the plaintiff for the sale of standing trees, made after the trees had been felled and taken away by the defendant, will support a count on an account stated, but not a count for goods sold and delivered.

BATTHEWS v. GALINDO. Oct. 12.

A woman, who lives in a state of concubinage with a man, and passes as his wife, is a competent witness for him in an action brought against him, and is not under the same incapacity of giving evidence in his favour, as she would be, if she were really his wife.

ASSUMPSIT on a bill of exchange. Defence—Usury. The witness, who was called to prove the usury, on her cross-examination, said, that she lived in the same house with the defendant, and had had several children by him.

BEST, C. J. I shall not receive the evidence of this witness. I am of opinion, that she ought not to have been called. A woman living with a man, as his wife, has precisely the same interest as if she were his wife. In the case of *Campbell v. Twemlow* (a), the late Lord Chief *Baron, then Mr. Baron [*239] *Richards*, mentions an instance in which Lord *Kenyon* refused to admit such a person as a witness in a criminal prosecution. The only difficulty is in getting at the fact. I doubt whether I was not wrong in allowing the question to be asked of her as to the children; but if you prove it by any other witness, I will not receive her evidence. After Lord *Kenyon* refused, in a case of life and death, to permit a woman, living with a man as his wife, to give evidence to protect his life, I shall certainly not admit her as a witness for the purpose of protecting his property.

A person was then called, who stated, that he had frequently seen the defendant and the witness walking arm in arm together, and that, on one occasion, they had a child with them.

BEST, C. J., left it to the Jury to say, whether the witness was in the situation in which she was said to be; and directed them, if they thought she was, to find a verdict for the plaintiff.

Verdict for the plaintiff.

Wilde, Serjt., and ———, for the plaintiff.

E. Lawes, Serjt., for the defendant.

[Attornies—*Orchard*, and *Ritchin*.]

(a) 1 Price, 81. This was a case before an arbitrator, in which he had refused the evidence of a woman similarly circumstanced with the witness in the present case. The instance alluded to is thus mentioned in page 83:—

Richards, B. I remember a prosecution tried at Chester, before my Lord *Kenyon*, in 1782, at a time when he was perhaps in the zenith of his legal knowledge, wherein his Lordship sanctioned the doctrine of the inadmissibility of the evidence of a person in the situation of this witness. The prisoner, in that case, was tried on a charge of forgery. Being a man of competent education, he addressed the Court in his defence with considerable effect. In the course of his speech, he frequently alluded to a woman, who then accompanied him, and whom he spoke of as his wife; and he concluded by offering her evidence in corroboration of some facts which he had stated. When the objection of her being his wife was taken, he said, that they were not, in fact, married; but his Lordship would not permit him to call her, after having spoken of, and represented her as his wife. And he was convicted and executed.

The case was determined upon another point; and the Court abstained from giving any opinion on the question of the admissibility of the woman's evidence.

IN the ensuing Term, *E. Lawes*, Serjt., obtained a rule *nisi*, for a new trial ;
 *240] which came on to be argued in Easter Term, 1828, when *Best*, C. J.,
 admitted, that his ruling at *Nisi Prius* was wrong, and stated, that he
 had been led into it by the incorrect decision of Lord *Kenyon* (a).

The rule for a new trial was therefore made absolute (b).

(a) Lord Chief Baron *Thomson*, in his judgment in *Campbell v. Twemlow*, said, " Every thing, both in law and in fact, must, in this instance, have been referred to the arbitrator. He has adjudged the case ; and he has decided on not calling this woman, who was tendered as evidence on the part of the plaintiff," &c. " It was certainly a doubtful question ; and the case alluded to by my Brother *Richards* shows, that the course pursued by the arbitrator on this occasion has been sanctioned by my Lord *Kenyon*, whose opinion must ever be held in respect and reverence."

(b) See 1 *Moore & Payne*.

In the case of *Cundell v. Pratt*, which was tried the same day, *Spankie*, Serjt., was observing on the testimony of a woman, who had been called as a witness, and saying that she was protected by the rules of law from answering such questions as might disparage her character, *Best*, C. J., said, " I, for one, till I hear it decided by the House of Lords, shall not go so far. I shall only prevent your asking such questions as may subject witnesses to a prosecution for crime, but not such questions as merely tend to degrade them in their character."

CRISDEE v. BOLTON. Oct. 16.

In an agreement for the sale of a public-house, it was stipulated, that the seller should not be concerned in carrying on the business of a publican, within a mile from the house he had parted with, " under the penal sum of 500*l.*, the same to be recoverable as and for liquidated damages." Notwithstanding this, he opened a public-house, about three quarters of a mile off. No evidence of actual damage was given by the plaintiff, but for the defendant some witnesses stated that the plaintiff had spoken of the injury as not considerable. It was held at *Nisi Prius*, that the whole sum was recoverable as stipulated damages, but left to the Jury to state what was the actual damage. The Jury found for the whole sum, and the Court of Common Pleas refused to grant a new trial.

SPECIAL assumpsit—The defendant had sold to the plaintiff the lease and goodwill, &c., of a house called the Blenheim Tavern, and the action was brought to
 *241] recover damages for a breach of the following clause in the *agreement
 made between the parties on the subject of that sale :—

" And it is fully agreed by the above-named parties, that the said William Bolton shall not, either directly or indirectly, take or be in any way concerned in carrying on the trade of a licensed victualling-house, within the distance of one mile of the above house, during the time the same is occupied by the said Jethro Crisdee, or any part of his family, under the penal sum of 500*l.*, the same to be recovered as and for liquidated damages."

It appeared that the defendant had taken a house called the Montpelier, about three quarters of a mile from the Blenheim Tavern. No evidence was given on the part of the plaintiff, of the actual damage sustained by him, as he sought to recover the whole 500*l.* But on the part of the defendant, some evidence was given of loose conversations, in which the plaintiff was represented to have spoken of the injury as not considerable.

Wilde, Serjt., for the defendant, submitted, that the 500*l.* was not to be considered as liquidated damages, and that it was for the Jury to say; under all the circumstances, what was the damage which the plaintiff had actually sustained. In the case of *Riley v. Jones* (a), which may appear to be an authority against

(a) 8 J. B. Moore, 244, S. C. 1 Bing. 302. This was an action of *assumpsit*, on an agreement for the sale of the lease of a public-house. There was a clause in the agreement, that law expenses, &c., should be paid by the parties, in equal moieties, " and that either of them not fulfilling all and every part, the party not fulfilling" should "pay unto the other, the sum of 500*l.*," thereby "settled and fixed as liquidated damages." It was held that the 500*l.* was not

me, the agreement is different from the present. In the case of *Davis v. Ren-ton*, the Court remarked upon the introduction of the word "penal." (a) Lord *Tenterden* says, "whoever *framed this agreement, does not appear to have had any very clear idea of the distinction between a penalty and [*242 liquidated damages; for the sum of 500*l.* is described in the same sentence as a penal sum, and as liquidated damages. Now both expressions cannot be satisfied. We must therefore look to the whole of the agreement, in order to ascertain whether the 500*l.* was intended to be a penalty or liquidated damages; and considering the whole agreement, we think it was clearly intended as a penalty to secure such damages as the party injured ought to receive." He also cited the case of *Randall v. Everest* (b).

BEST, C. J. The law relative to liquidated damages has always been in a state of great uncertainty. This has been occasioned by Judges endeavouring to make better contracts for parties than they have made for themselves. I think that the parties to contracts, from knowing exactly their own situations and objects, can better appreciate the consequences of their failing to obtain those objects than either Judges or Juries. Whether a contract be under seal or not, if it clearly states what shall be paid by the party who breaks it to the party to whose prejudice it is broken, the verdict in an action for the breach of it should be for the stipulated sum. A court of justice has no more authority to put a different construction on the part of an instrument ascertaining the amount of damages, than it has to decide contrary to any other of its clauses. Our office is to ascertain the intent of the parties, and, if not contrary to law, to carry their intent into execution. In *the present case no evidence has been adduced of the amount of damage [*243 sustained by the plaintiff. In this, and in most other cases of this sort, it would be impossible to give such evidence as would enable Juries to do complete justice. The claim for damages must depend not only on things which have been done, which are difficult of proof, but on what may be done, which it is impossible to prove, on the value of the customers which the conduct of the vendor of the lease has attached to him, and what number his future conduct in the house that he has taken, is likely to draw to him. We can have no safer guide to go by in deciding on the amount of compensation for breach of contract in such cases, than that estimate which the parties, each knowing all the circumstances of the case, and anxiously taking care of their respective interests, have agreed on. I cannot subscribe to the doctrine attributed to Lord *Tenterden*, in *Randall v. Everest*. If it be doubtful from the terms of the contract, whether the parties mean that the sum mentioned in it shall be a penalty or liquidated damages, then I should incline to consider the clause as creating a penalty, and not giving stipulated damages. So if but one sum is mentioned, and there may be several breaches, and it is not distinctly stated that this sum is to be paid on each breach, I should hold, as the Court held in *Astley v. Weldon* (c), that the sum mentioned was to be considered only as a penalty. In this case the sum of 500*l.* is to be paid for the doing of one thing only, viz. setting up a victualing-house within one mile of the house transferred to the plaintiff. It is called a *penal* sum, and I will admit that the parties considered it as something more than compensation; but they have expressly agreed that this penal sum shall be recovered as and for stipulated damages. When the defendant has so

a mere penalty to cover the actual damage, but a sum to be recovered on any breach of the agreement.

(a) 6 B. & C. 216. The words in that case were, "in the penal sum of 500*l.*, to be recoverable for breach of the said agreement, in any Court or Courts of law, as and by way of liquidated damages."

(b) Vol 2, of these Reports, p. 577, S. C. 1 Moo. & Malk. In that case Lord *Tenterden* said, that in actions on agreements, which are not under seal, whatever may be the expressions used by the parties, the plaintiff ought to recover such damages as, upon a view of the whole case, the Jury think fit to give, and no more.

(c) 2 Bos. & Pul. 346.

unequivocally agreed, that if he ever did what it has been proved that he did, he would pay 500*l.*, what right has he now to say that the verdict against him ought not to be to this amount? The verdict must therefore be taken for the whole sum; but I will desire the Jury to say what damages they think, *244] in point of fact, the plaintiff is entitled to; and if they should find a less sum than 500*l.*, I will give the defendant leave to move to reduce the verdict to the sum found by the Jury.

The Jury found for the plaintiff—Damages, 500*l.*

Jones, Serjt., and *Hutchinson*, for the plaintiff.

Wilde, Serjt., and *Steer*, for the defendant.

[Attornies—*Robinson & Son*, and *Elkins*.]

In the ensuing Michaelmas Term, *Wilde*, Serjt., obtained a rule *nisi* for a new trial, which, in Easter Term, 1828, was discharged, the Lord Chief Justice observing, that it was left to the Jury to find what damages they pleased, and he could not say that they were excessive. So that the opinion given at *Nisi Prius* was not considered by the Court.

SITTINGS IN LONDON, AFTER MICHAELMAS TERM, 1827.

BEFORE MR. JUSTICE PARK.

(*Who sat for the Lord Chief Justice.*)

PHILPOTT v. J. W. BRYANT. Nov. 30.

It is not necessary in an action against the drawer of a bill of exchange, payable *after date*, to aver acceptance or notice of refusal to accept, but proof of presentment for payment is sufficient. If a bill is accepted payable at a particular place, and the acceptor dies before it becomes due, it is sufficient, in an action against the drawer, to prove presentment at the specified place, and it is not necessary to show presentment at the house of the deceased's representative.

ASSUMPSIT on a bill of exchange, dated the 16th of September, 1822, at six months after date, drawn by the defendant on his father John Bryant, and accepted by him payable at No. 18, Bishopsgate Street. The plaintiff was *245] the holder. The declaration stated, that the bill was in due manner presented to the drawee *for payment*.

A notary's clerk proved, that he presented the bill *for payment*, at No. 18, Bishopsgate Street; and it appeared that John Bryant, the drawee, died about a fortnight before the bill became due, leaving his widow his executrix.

Curwood, for the defendant, objected that the plaintiff could not recover, as he had merely averred and proved presentment to the drawee *for payment*. To make the drawer liable, there must be default on the part of the acceptor; and if the drawee has not been required to accept, he cannot be guilty of default in neglecting to pay.

PARK, J. I am clearly of opinion, that what has been done is sufficient. I

should destroy half the trade of the city of London, if I were to hold, that bills made payable so many days after *date* must be presented for acceptance as well as for payment. If they are made payable after *sight* it will be otherwise.

Curwood then submitted, that the drawee being dead before the bill became due, the plaintiff was bound to prove presentment at the house of the executrix, because she might not be conusant of the existence of any such bill.

PARK, J. No. I think not. It is presented where it is made payable, and I am of opinion that that is sufficient.

Verdict for the plaintiff, subject to a motion on another point.

Wilde, Serjt., and *Thesiger*, for the plaintiff.

Curwood, for the defendant.

[Attornies—*A. Clarke*, and *Eicke*.]

*ADJOURNED SITTINGS AT WESTMINSTER, AFTER MICHAELMAS TERM, 1827. [*246]

BEFORE MR. JUSTICE BURROUGH.

ALLISON v. HAYDON. Dec. 4.

Admission as a member of the Royal College of Surgeons, does not entitle a man, since the stat. 55 Geo. 3, c. 194, to charge for medicines administered by him while attending a patient suffering under *typhus fever*.

But a surgeon may charge for medicine administered in a surgical case, where the medicine is subservient and subordinate to the discharge of his duty as a surgeon.

ASSUMPSIT.—The plaintiff was a member of the Royal College of Surgeons, but had not been in practice as an apothecary, before 1815, nor had been licensed to practise by the Apothecaries' Company. The charges were made for medicines furnished, and attendances given in the shape of calls on the defendant, who had the typhus fever, and whose house was three miles distant from that of the plaintiff. The whole of the demand had been paid with the exception of 4*l.* 14*s.* After the action had been commenced, the defendant offered to pay the balance, but objected to paying any costs.

E. Lawes, Serjt., for the defendant, submitted, that under the statute 55 Geo. 3, c. 194 (a), the plaintiff not being an apothecary was not in a situation to recover.

Taddy, Serjt., contra, contended, that as he was a surgeon, and licensed to practise as a surgeon, he was entitled to a verdict.

BURROUGH, J., was of opinion, that the words of the statute were clear against the plaintiff, and that he must *therefore be nonsuited. He however [*247 gave permission for a motion to set aside the nonsuit.

Taddy, Serjt., and *Talfourd*, for the plaintiff.

E. Lawes, Serjt., for the defendant.

[Attornies—*Salkeld*, and *Wright*.]

(a) S. 21, which enacts, that no apothecary shall be allowed to recover "any charges claimed by him," unless he proves on the trial that he was in practice before August, 1815, or has "obtained a certificate" to practise, from the Master, Wardens, &c., of the Apothecaries' Company.

In the ensuing Michaelmas Term, *Tuddy*, Serjt., obtained a rule *nisi* for setting aside the nonsuit, which, in Easter Term, 1828, came on to be argued.

E. Lawes, Serjt., showed cause, and contended, that the 21st section of the 55 Geo. 3, c. 194, was decisive upon the subject, and that it was not controlled by the 28th or 29th sections of the same statute (a). He also contended, that a case of typhus fever was not a case which came regularly within the province of a surgeon, which was stated in the dictionaries to be confined to manual operations.

*248] *Tuddy*, Serjt., in support of the rule. The 29th section excepts the College of Surgeons from the operation of the act. The business of an apothecary is to sell drugs and medicines, and not to attend people when they are ill. The balance is claimed for attendances, and not for medicine. All the medicine has been paid for. The statute intends that the superior degree of a surgeon shall be subject to the College of Surgeons, and the inferior degree of an apothecary to the control of the Apothecaries' Company, but it was never intended that a regularly qualified surgeon should not be allowed to act both as a surgeon and apothecary. It has been said from the Bench, that an apothecary cannot charge for attendances. The question is, Does the word apothecary in the act of Parliament, apply to a surgeon who furnishes medicines. It would be subjecting surgeons to a very degrading necessity, if they were required to undergo an examination at Apothecaries' Hall. An apothecary is a person selling medicines generally without attendances, not a person who merely supplies them in the particular cases which he attends.

PARK, J. I take it that an apothecary is not merely to make up medicines, he is to have a certain portion of competent skill for the administering of them. There are four degrees in the medical profession, physicians, surgeons, apothecaries, and chymists and druggists.

GASKLER, J. May not the exception in the statute be complied with by applying it only to matters ancillary to surgical practice? There may be some small medicines necessary in the case of a manual operation, which a surgeon would be justified in administering.

BEST, O. J. I have a great respect for the medical profession, and should be sorry to lay down any rule which had a tendency to injure any branch of it.

*249] In my opinion, *we best consult the honour of this profession, and, what is of higher importance, we secure the health of the people, by strictly enforcing the laws which provide, that those who practise any branch of this art, should be regularly educated in that branch. I cannot agree with my Brother *Tuddy*, that the Legislature intended to give to surgeons, on account of their superiority to apothecaries, the privilege of practising in physic as well as surgery, nor can I accede to the statement of my Brother *Lawes*, that the business of a surgeon is confined to manual operations. The exception in this statute, which, it has been insisted, authorizes surgeons to practise physic, only allows them to administer medicines in surgical cases. For some disorders, relief is sought from medicine, for others from topical applications. A different education is necessary to prepare men to undertake the cure of either of these different

(a) S. 28 provides, that nothing in the act shall extend to affect the business of a chymist and druggist.

S. 29 is as follows:—"That nothing in this act contained shall extend or be construed to extend to lessen, prejudice, or defeat, or in any wise to interfere with any of the rights, authorities, privileges, and immunities heretofore vested in, and exercised and enjoyed by, either of the two Universities of Oxford or Cambridge, the Royal College of Physicians, the Royal College of Surgeons, or the said Society of Apothecaries, respectively, other than and except such as shall or may have been altered, varied, or amended, in and by this act, or of any person or persons practising as an apothecary previously to the 1st day of August, 1815; but the said Universities, Royal Colleges, and the said Society, and all such persons or person shall have, use, exercise, and enjoy all such rights, authorities, privileges, and immunities, save and except as aforesaid, in as full, ample, and beneficial a manner, to all intents, and purposes, as they might have done before the passing of this act, and in case the same had never been passed."

descriptions of complaints. To attain a proper proficiency in either branch, requires undivided attention. The first description belongs to the physician and apothecary, the second to the surgeon. The professors of each branch of medicine must sometimes go beyond their proper limits. It may be necessary for the apothecary to use the lancet, and the surgeon to administer medicines, either to prevent the necessity of an operation, to prepare the patient for it if necessary, or to recover him from its effects if performed. In these cases, the apothecary cannot be considered as infringing the laws made for the regulation and protection of surgeons, or the surgeon such as relate to the apothecary. The exception relied on by the plaintiff's counsel, was introduced into this act to protect surgeons in such cases, and in such cases only. In some neighbourhoods, there is not sufficient business to support both a surgeon and an apothecary. The same person must, in such places, act in both characters; and from the necessity of the case, patients must be satisfied with the skill and knowledge in each, which such a practitioner can acquire. In these cases the practitioner must be *educated as a surgeon, and as an apothecary, and before he is permitted to practise, he must obtain certificates [*250] of his competency from the proper authorities in each profession. The plaintiff has no license from the Apothecaries' Company to practise as an apothecary. The malady he undertook the cure of was a typhus fever, which is not a disease that belongs to the surgeon's branch of medicine, and he cannot therefore recover for his attendances on a patient suffering under it.

PARK, J. It appears to be the object of the act of Parliament to keep the practice of an apothecary distinct from any other. The title of the act is "An Act for better regulating the practice of Apothecaries throughout England and Wales." A chymist could not recover for advice and administering medicine. It appears to me that this plaintiff, being only a surgeon, was called in to act as an apothecary, and is not in a situation to recover.

BURROUGH, J., concurred.

GASELEE, J. I believe that in point of fact, when persons act in the capacity of both surgeon and apothecary, they are examined both at Surgeons' and Apothecaries' Hall.

Rule discharged.

DOBREE v. EASTWOOD. Dec. 8.

If a letter, giving notice of the dishonour of a bill, is put into the two-penny post-office, in time to be delivered on the proper day, in the ordinary course of business, but, from some delay in the office, does not reach its destination till afterwards, such delay in the office will not prejudice the party by whom the notice was given.

If there are several indorsers of a bill, and the last indorsee and holder resorts in the first instance to the first of such indorsers, he is not entitled to as many days as there are indorsers to give notice of dishonour in, but must give it within the same time as he would have been obliged to do it in, if he had resorted at first to his own immediate indorser.

ASSUMPSIT on a bill of exchange for 100*l.* drawn by the defendant, and indorsed by him to Lawford, by *Lawford to Pope, by Pope to Parker, [*251] and by Parker to the plaintiff. According to the evidence at the trial, it appeared, that the bill became due and was dishonoured on the 27th October, 1826. A witness proved, that on the 28th, which was a Saturday, he put, on the part of the plaintiff, a notice of the dishonour in the two-penny post, in Berners Street, Oxford Street, directed to the defendant, at Belvidere Wharf, on the Lambeth side of Westminster Bridge. He stated that he put it in the post about 5 or 6 o'clock in the evening. One of the post-marks on the letter was of the date of the 30th.

Wilde, Serjt., for the defendant, contended that the notice was not sufficient. It ought to have been so given as to reach the party to whom it was addressed, on the 28th, and the post-mark of the 30th shows, that it was not delivered till that day. The principle is this, that a party in a case like the present, where the residence of the drawer is so near, may either send a special messenger, or use the two-penny post, but if he chooses to use the post instead of the special messenger, he must take care so to use it, that the party to whom he is sending may not be delayed by it. He cited *Smith v. Mullett(a)*, and *Lawson and another v. Sherwood (b)*.

BURROUGH, J. Supposing the letter to have been put into the post on the 28th, early enough to be delivered on that day in the ordinary course of business, but that
*252] from some delay in the office, it was not delivered till the 30th, *I apprehend that the fault of the post-office is not to prejudice the plaintiff.

Wilde, Serjt. It is to be presumed, that the post-office does its duty regularly, as a public office, and it is upon this supposition that the sending a letter by the post is evidence of notice at all.

E. Luwes, Serjt., and *Curwood*, for the plaintiff. The notice was clearly in time on the 30th. The defendant was fourth indorsee, reckoning from the plaintiff the holder. All the plaintiff was bound to do was to give notice to his immediate indorser on the next day after the dishonour, but not to the defendant, who stood four off from him. He was entitled to time for inquiring as to the residence of a person who was not his immediate indorser. They cited *Scott v. Lifford (c)*.

Wilde, Serjt. The case of *Scott v. Lifford* is mentioned in the case I cited, and ruled not to apply.

The witness was then called up again, and said that he put the letter into the post-office *before 5 o'clock*.

BURROUGH, J. I will leave it to the Jury to say whether the letter was put in early enough to reach the defendant on the 28th.

Wilde, Serjt., then addressed the Jury. If the holder of a bill applies to his
*253] immediate indorser, that immediate *indorser has a day to give notice to his immediate indorser, but if the holder chooses, in the first instance, to apply to the drawer, he is not to have as many days as there are indorsers, to give his notice in, but must give it within one day, as he would have been obliged to do, if he had applied to his immediate indorser. The law presumes that all public offices discharge their duty properly, in the absence of proof to the contrary. And it is so with respect to the post-office. The plaintiff is bound to prove that the letter was put in at such a time as would cause it, in the regular course of business, to be delivered on the 28th. But the post-mark shows that it was *in the office*, at some part of the day on the 30th. What ground is there for supposing that the post-office did not do its duty in this particular instance? I submit that, under all these circumstances, the defendant is clearly entitled to a verdict.

BURROUGH, J. The holder of a bill may, when it has been dishonoured, either resort to his immediate indorser, and then he must give him notice within the proper time, or he may resort to the drawer, and then he must give him notice within the same time. It is not that the holder of the bill has as many days as

(a) 2 Camp. 208. That was an action by the fourth against the first indorsee of a bill, all the parties lived in London; the plaintiff received notice of dishonour on the 20th, and gave notice to his immediate indorser on the 21st, by a two-penny post letter, which was put in so late in the evening, that it was not delivered till the 22d, and it was held that the notice was not sufficient.

(b) 1 Stark. 314.

(c) 1 Camp. 246. This case, *inter alia*, decided, that where a bill of exchange, all the parties to which resided in the same town, became due on the 4th, when it was presented for payment by the payee's bankers, and returned to him dishonoured on the 5th, a letter sent by him to the drawer on the 6th, giving notice of the dishonour, was in time. This point was confirmed in banc. See 9 East, 347.

there are indorsees, but that each indorser has his own day (a). If the letter was put into the post-office at such an hour on the 28th as that it could be delivered in the course of that day, then the notice will be sufficient, otherwise it will not.

His Lordship then left the question to the Jury, who stated it as their opinion, that, if the letter was put in on the 28th, it was not put in in time to reach the defendant that night, and found their

Verdict for the defendant.

E. Lawes, Serjt., and *Curwood*, for the plaintiff.

Wilde, and *Andrews*, Serjts., for the defendant.

[Attornies—*Willis*, and *Rogers & Son*.]

In the ensuing Hilary term, *E. Lawes*, Serjt., applied to set aside the verdict, and the Court granted a rule, which, on another point distinct from those decided at *Nisi Prius*, was made absolute for a new trial.

(a) In *Marsh v. Maxwell*, mentioned in a note in page 210, of 2 Camp., Lord *Ellenborough* held, that, upon the dishonour of a bill, it is not enough that the drawer or indorser receives notice in as many days as there are subsequent indorsees, unless it is shown that each indorser gave notice within a day after receiving it.

RADBURN v. MORRIS and another. Dec. 15.

In an action of trover, for a barge, brought against barge-builders, who claimed under a person named Wilson, who had put it into their custody for repairs, and who made title under a purchase from a person named Buckman, who was alleged by the plaintiff to have previously sold to him.—Buckman was called as a witness on the part of the defendants:—Held, that a release from Wilson was sufficient to render him competent, and that a release from the defendants was unnecessary.

TROVER for a barge called the Thomas. The plaintiff's title rested on a purchase from a person named Buckman. To prove the payment of part of the purchase-money, a receipt by Buckman for it was put in, and his handwriting proved by the attesting witness.

Bompas, Serjt., for the defendant. As against third persons the receipt is not evidence. It is a mere declaration of Buckman at the time, and he ought to be called as a witness.

BURROUGH, J., was of opinion, that the receipt was admissible.

*The defendants were barge-builders, and claimed the barge under a person named Wilson, who was alleged to have subsequently bought of Buckman (the barge having been allowed by Radburn to remain in his possession), and who had put it into their custody for repairs.

Bompas, Serjt., for the defendants, called Buckman as a witness, for the purpose of supporting their claim to the barge.

Wilde, Serjt., for the plaintiff, objected to him as incompetent.

Bompas, Serjt., referred to *Nix v. Cutting* (a), and *Ward v. Wilkin*.

(a) 4 Taunt. 18. That case decides that in trover for a horse, a witness is competent to prove that the plaintiff agreed that he (the witness) should take the horse as a security, and sell it, if the plaintiff did not pay him by a certain day, and in consequence of which he did sell it to the defendant; because the verdict obtained on his evidence will not avail him in any action to be brought by the plaintiff against him.

son (a), and he contended that the witness stood indifferent, as he would be liable over to the plaintiff, if the defendants succeeded, and to the defendants, if the plaintiff should have a verdict.

Wilde, Serjt. The witness is called to impeach the sale to the plaintiff. If there should be a verdict against the defendants, then this record would be evidence against him, in an action by the defendants, of the amount recovered; as in the instance of servants and masters in cases of negligence. It would not be evidence of the circumstances but of the amount of the verdict. *Blund v. Ainsley* (b). The plaintiff says the witness sold the barge to *him. The defendants say, he did not. Suppose the plaintiff fails in his action, the verdict will prove nothing for him: it will not be evidence against the witness. But it will be evidence for the defendants if the plaintiff should recover.

BURROUGH, J. This man has sold what was said to be his own property to the plaintiff, and now he has come to say that it was not his property. I am clearly of opinion that he cannot be received to give the evidence proposed. It seems to me quite clear, that, in the event of the verdict being for the plaintiff, the record would be evidence of the amount of the damages recovered.

A joint and several release to Buckman by Wilson, and the defendants, was then tendered by *Bompas, Serjt.*: it contained only one stamp.

Wilde, Serjt., objected that it was not sufficient, as the different parties had distinct interests.

BURROUGH, J. As far as we can see now, these parties have distinct interests, which it will require separate deeds to release.

Bompas, Serjt. Where the release applies to one and the same transaction, though it is by different persons, one stamp is sufficient. This is one transaction alone, and the release applies to it. The case of creditors, where it is admitted that one general release will do, is in point in the present case.

Wilde, Serjt. This is a general release of all claims by the particular parties respectively, and is not in respect of any thing which shows a community of interest. In the case of creditors, the mutuality of the release creating the consideration makes the distinction.

The witness was then rejected, and other evidence was given, but in the progress of the case, another release was tendered, which was executed by Morris only (the other defendant not being then present). This, it was contended, would operate as a release by both, they being in partnership.

Wilde, Serjt. Tort feazers cannot claim contribution. The defendant, who has not signed, may have execution levied individually on him, and he must therefore individually release to the witness.

BURROUGH, J., thought that the release would not do.

A separate release by Wilson was also put in, but objected to as not sufficient, and the objection allowed.

The case went on, and terminated eventually in a

Verdict for the plaintiff.

Wilde, Serjt., and *Ryland*, for the plaintiff.

Bompas, Serjt., for the defendant.

[Attornies—*B. Lewis*, and *Ridout*.]

In the ensuing Hilary Term a rule *nisi* for a new trial was obtained, on the ground that the witness ought to have been received. This rule came on to be argued in Easter Term.

(a) 4 B. & A. 410. In trover by A. against B., C. is a competent witness to prove property in himself.

(b) 2 N. R. 331. That case decides, that in an action of trespass against the sheriff, for taking the goods of A. in execution for the debt of B., where the question is, whether the goods had been previously assigned by B. to A. or not: B. is not a competent witness to disprove the assignment to A.

In showing cause against it, it was contended that the witness was not indifferent, as he had a stronger interest in the success of the defendants, than in that of the *plaintiff, because, if the plaintiff succeeded, the defendants might recover against Wilson, the value of the barge and the costs of one action; and Wilson could recover against the witness, the value of the barge and the costs of two actions; whereas, on the contrary, if the defendants succeeded, the witness would only be liable to the plaintiff for the value of the barge. The cases of *Adamson v. Jarvis* (a), *Piesely v. Von Esch* (b), and *James v. Halfield* (c), were cited. The objections made at *Nisi Prius*, to the releases, were also repeated. [258]

In support of the rule it was argued, that the interest of the witness, if any, was too remote to render him incompetent, and therefore there was no necessity for any release at all. The cases of *Abrahams v. Bunn* (d), and *Carter v. Pierce* (e), were relied on.

The Court did not positively decide whether any release was necessary, but they were clearly of opinion, that as Wilson was the only person who could sue the witness, in the event of the plaintiff's having a verdict, the release from him was quite sufficient, and any release from the defendants was altogether unnecessary. Therefore the rule for a new trial was made

Absolute.

(a) 4 Bing. 66.
(c) 1 Str. 548.
(e) 1 T. R. 164.

(b) 2 Esp. 606.
(d) 4 Burr. 2254.

*ADJOURNED SITTINGS IN LONDON, AFTER MICHAELMAS TERM, 1827. [259]

BEFORE MR. JUSTICE GASELEE.

ROBERTSON v. MACDOUGALL. Dec. 21.

In an action for a libel, contained in a printed paper, circulated in a sale room, previous to the sale of an arbitration bond given by the defendant to the plaintiff as a surety for a third person, and which was advertised as an ordinary money bond, pending a writ of error and a suit in equity,—it appeared, that the printed paper charged the plaintiff with an intention of extorting money by threats, and spoke of the sale as a "wicked expedient." And it also appeared, that the plaintiff, before the writing of the paper, said, on the refusal of the defendant to pay him a certain sum, which he demanded, that he would advertise the bond, and the defendant should see the advertisement under his nose at breakfast. It was left to the Jury at *Nisi Prius*, to say whether, under all the circumstances, the defendant was acting *bonâ fide*, and the objectionable remarks were relevant, and exceeding only from warmth of feeling the bounds of moderation, or whether they were wholly irrelevant, and he went out of his way purposely to slander the plaintiff. The Jury found for the defendant; but the Court of Common Pleas granted a new trial, on the ground, that the defendant's expressions went far beyond the limits of a privileged communication, and must be considered as clearly libellous, without any proof of express malice.

LIBEL.—The declaration stated, that before the time, &c., the defendant made his certain bond, &c., by which he became bound to the plaintiff and another, in 1000*l.*, and that the plaintiff being desirous of selling his interest in it, caused it to be put up to auction by one C. L. Hoggart, yet the defendant well knowing, &c., and contriving to injure, &c., and to cause it to be suspected, that the plaintiff had been guilty of misconduct, &c., and that he had no interest in the bond, and

that nothing was due on it, and that it was of no value, and for the purpose of hindering him from selling it, published a certain libel concerning the plaintiff and the bond, &c., in which was contained the following matter, &c. [Here the libel as stated in the account of the facts, was set out.] The declaration, in concluding, averred, that the plaintiff, by reason of the premises, had been greatly injured in his credit, and that many persons were prevented by the libel from bidding for the bond, who would otherwise have done so.

The defendant pleaded the general issue, and several special pleas, which it is not necessary to set out, as no evidence was given upon them.

The facts were as follow:—The defendant, as surety for one Morrison, had entered into a bond for the *performance of a deed of submission to arbitration of matters in dispute between him and the plaintiff. The deed contained a proviso, that the arbitration should continue to go on, notwithstanding the parties who made the submission should die during its progress. Morrison died in September, 1823, and the defendant gave notice to the plaintiff's agent, that he considered himself discharged from his suretyship. After this the arbitration went on, and an award was made, and proceedings were taken upon the bond, and judgment obtained in the King's Bench, in the month of January, 1827. The defendant brought a writ of error in the Exchequer Chamber, and filed a bill in equity; and pending these proceedings, the plaintiff applied to Mr. Hoggart, an auctioneer, to put up the bond to auction. Mr. Hoggart wrote to the defendant, to inform him of the intended sale. The defendant, in reply, sent the following letter:

“ 11th April, 1827.

“ Sir,—I have to acknowledge the receipt of your favour of this date, and have to thank you for the courtesy of the communication. I have no doubt you know me well enough to be assured, that if I owed to Mr. Robertson any money on bond, there would be no occasion for him to resort to the wicked expedient he is now attempting. His object is, either to extract money out of the pocket of an unwary purchaser, or, what is more likely, by means of this threat of publication, to extort money from me. That the bond is not worth one farthing, is clear to demonstration, and as there is an existing suit in equity to set it aside, I imagine you will not think you acquit yourself properly to the public, without you add to the advertisement for the sale that there is a suit in dependence. You ask me, whether I would choose that the bond should go into the market? I have no means of preventing your carrying into the market an article of no value; but if, by your putting to me the above question, you meant that I should *offer to become the purchaser, I have only to add, that if you *were to offer it me for 10*l*. I should hesitate about accepting the offer.

I am, &c.

A. MACDOUGALL.”

The defendant, on the day of sale, caused to be circulated in the sale room, a printed paper in the following terms, which paper was the libel complained of:—

“ The 1000*l*. bond advertised for sale, by Mr. Hoggart of Broad Street.

“ The above is advertised as if it were a money bond of a responsible gentleman; and how Mr. Hoggart can reconcile it to his character to suppress the facts, with which he was perfectly acquainted, is for him to explain. The short circumstances are these:—Mr. Aeneas Morrison, of Glasgow, now deceased, and John Robertson, of London, recently a bankrupt, had occasion to refer to arbitration certain disputed accounts; each party procured a friend to enter into a surety bond in 1000*l*., for the due performance of the award to be made. Pending the arbitration, Mr. Morrison died, and intimation was given that the surety considered himself discharged. Mr. Robertson, however, forced the matter to proceed, and the arbitrators having differed, he procured from an umpire an award in his own favour. Proceedings have been instituted in equity

in this country, and also Scotland, to set aside this award, and of course to have delivered up to be cancelled the bond of the surety for the performance of it. This is the very bond now offered for sale! The following letter will show that Mr. Hoggart was perfectly aware of the circumstances previously to advertising it. [Here was added the letter of the 11th of April, as above.]

It appeared that the plaintiff had said, in consequence of the defendant's having refused to agree to certain terms of negotiation, in which the plaintiff had demanded 1,250*l.*, "I will advertise the bond, and he shall see the advertisement under his nose when he comes to his breakfast." This observation came to the defendant's knowledge before he wrote the letter to Mr. Hoggart. The bond was advertised in this form:—"The bond of *Alexander [*262 Macdougall, Esq., Solicitor. On, &c., at, &c., by Mr. Hoggart. The bond of the above respectable gentleman for 1000*l.*, on which the judgment of the Court of King's Bench has been obtained, but payment of which may be put off by Mr. Macdougall for about twelve months longer, &c."

GASELEE, J., to the plaintiff's counsel. What is the nature of this libel? it seems to me, to be the greatest part of it slander of title.

Spankie, Serjt., for the plaintiff. We proceed upon *personal* slander, and I submit that, for that, we are entitled to recover. I allow that the law is very tender where a man, having a *bond fide* claim, sets it up against another made under circumstances in which a reasonable man, though mistaken, might fairly oppose it. But that will not justify slander of the person. If a man mixes up the assertion of his claim with personal slander of his opponent, the law gives him no indulgence. He has no right to make insinuations against the character of the individual. The defendant in this case insinuates, that the plaintiff is no better than a swindler; and that is not slander of title, but clearly slander of the person. He charges him with an intention to extract money from the pockets of an unwary purchaser, or to extort money by means of threats from him.

GASELEE, J. The only question that can be left to the Jury, will be, whether these insinuations were meant to impute improper motives to the plaintiff, or whether they arose naturally out of all the circumstances of the case.

Wilde, Serjt., for the defendant. The defendant's notice was moderate, such as it was his duty as an honest man to give. The plaintiff had no right to put up the bond to sale. The sale was wholly illegal and void, and no contract for it would be binding on the purchaser. The *law says, that a man shall [*263 not sell a pretended claim, because, if such claims were saleable, rich men might buy them up (a). Macdougall was advised, whether rightly or not is immaterial, that the bond was void. Should he, under such circumstances, permit the sale to take place without doing any thing? There is no proof of publication anywhere but in the sale room. It is manifest, that the defendant had an interest in the subject-matter. There is scarcely a case in which slander of title is not mixed up with personal slander. There is the case of the adulterated beer, where the plaintiff was charged with being a cheat; and the case in which the counsel accused the attorney of dishonesty. In *Pitt v. Donovan* (b), Lord *Ellenborough* says, "if what the defendant has written be most untrue, but nevertheless he believed it, if he was acting under the most vicious of judgments, yet, if he exercised that judgment *bond fide*, it will be a justification to him in this case." In the same case, speaking of the defendant's conduct, he says, "but the question does not turn upon his conduct; and this is a case, the decision of which is to govern other cases where the question of slander of title may occur; in which case the *bona fides* of the communication, and not whether a man of rational understanding would have done so and so, is the question." If Juries hold too tight a rein upon language in cases like the present, it will go

(a) 15 Vin. tit. "Maintenance," pl. 29. Godb. 81.

(b) 1 M. & S. 639.

to prevent men from asserting their rights at all. The plaintiff advertised the bond, as free from all objection; and that was not a fair advertisement, but might be considered as inserted for the purpose of taking in the unwary. The words lead to the conclusion that the bond was a money bond, not subject to any condition, and that delay was the defendant's only object. The defendant wrote the letter originally to Hoggart, and did not intend at first to publish it.

*264] No evidence has been given to show that Macdougall *was running about circulating slanders on the plaintiff, or that he was actuated by malice or by any other motive than that of preventing the sale. Though there may be excess in his expressions, yet he will be justified if that excess be relevant to the subject-matter. He cited also *Hargreave v. Le Breton* (a).

GASELLE, J. (in his address to the Jury, said), The material question for you to consider is, whether the particular paragraph complained of is a libel or not, whether it is intended to impute misconduct or fraud to the plaintiff. There are very few cases of actions for slander of title, but it is quite settled, that there must be malice either express or implied. If the party does not do what he does with a malicious view to injure the individual, it will not be material, though what he says should turn out not to be strictly true. In *Hargreave v. Le Breton*, the message was not strictly complied with, yet the Court held, that it was not such a variance as to furnish the ground of an action. Let us look at the facts of the present case. There is a bond, not a money bond, but a bond for the performance of an award. The deed of submission is recited in the bond, and in that deed there is a clause providing that the arbitration shall continue, though the parties to the submission die. Whether such a proviso is valid or not is not a question to be discussed to-day. It has been decided, in several cases in the King's Bench and Common Pleas, and in the Exchequer

*265] Chamber between the *present parties, that it is (b). We may take it for granted, as the law stands at present, that the award which has been made is good. But yet that law may be altered by the House of Lords. The question has been discussed for the first time within these few years. I am not prepared to say, or desire you to say, that a man who defends on such objections is defending upon frivolous grounds. Unless you are satisfied that all this was for delay, Macdougall not thinking that he had any real defence, I am of opinion, that he was *justified* in the course he took of giving notice at the sale. It is enough to say this, without going out of the case to say whether it was his *duty* or not. If the bond were a money bond, the delay no doubt would be frivolous; but on looking at the nature of this bond, I do not think that Mr. Macdougall's delay was at all of that character. There has been a case lately, where a decision was suffered to proceed through all the courts, and was at last overturned in the House of Lords (c). In the declaration, the bond is stated as an absolute bond for 1000*l*. It appears that the letter complained of was written to Hoggart in answer to one from him. The words "wicked expedient," might certainly as well have been omitted. The plaintiff's expression about the defendant's having the advertisement under his nose, must mean this—if you do not pay me what I ask, I will expose you. Therefore, we must make reasonable allowance for the expressions used by the defendant in a letter written after such an observation. The arrangements for the sale went on notwithstanding the letter, and Macdougall had a right to go to the sale and state to the parties what had taken place. The first part of the paper, which he

(a) 4 Burr. 2422. In that case the slander of title complained of, consisted of a message delivered by the defendant, an attorney, as coming from his client. It appeared that the defendant had exceeded his authority, and added an observation which he was not instructed to make. Two questions were raised, *first*, whether the action would have lain if the attorney had delivered the message precisely in the client's words; and the Court were clearly of opinion that it would not; and *secondly*, whether the variation he made from those words would subject him to it; and upon this the Court thought the variation was not a material one.

(b) For the arguments and decision in the Exchequer Chamber, see 1 Moore & Payne, 147.
(c) *Fletcher v. Lord Sondes*.

circulated there, seems rather a reflection on Mr. Hoggart, than on the plaintiff. Before publishing the letter, the defendant ought certainly in strictness to have expunged those parts *about extracting and extorting money. But it is [*266 for you to say, whether he intended, by the use of them, to impute fraud to the plaintiff. If you think, under all the circumstances, that the defendant was acting *bonâ fide*, and that the objectionable remarks were relevant to the subject in hand, and exceeding the bounds of moderation only from warmth of feeling, then I am of opinion that you should find your verdict for him; but if, on the other hand, you consider that the expressions were totally irrelevant, and that the defendant went out of his way for the purpose of slandering the plaintiff, then I am of opinion that your verdict should be for the plaintiff.

Verdict for the defendant, on the general issue.

The Jury were discharged from giving any verdict upon the special pleas.

Spankie, Serjt., and *Hutchinson*, for the plaintiff.

Wilde, Serjt., *Manning*, and *Henderson*, for the defendant.

[Attornies—*Willis & Co.*, and *In Person*.]

In the ensuing Hilary Term, *Spankie*, Serjt., obtained a rule *nisi*, which in Easter Term was made absolute, for a new trial; the Court being of opinion, that the defendant's expressions went far beyond the limits of a privileged communication, and must be considered as clearly libellous, without any proof of express malice.

*FURTHER ADJOURNED SITTINGS IN LONDON, AFTER MICHAELMAS TERM, 1827. [*267]

BEFORE LORD CHIEF JUSTICE BEST.

ROUTLEDGE v. GRANT. Jan. 18.

A. proposed to B. to give him a certain sum for a *thirty-one years' lease* of a house, with possession on the 25th of July, and a definitive answer was to be given within six weeks. B. about three weeks after the proposal wrote that he accepted it, and would give possession on the 1st of August. A. in a few days wrote, withdrawing his proposal. Some time after this, and just before the end of the six weeks, B. wrote that it was by mistake he had offered possession on the 1st of August, and stating that he was ready to give it according to the proposal: Held at *Nisi Prius*, that the letter of B. offering possession in August, was not an acceptance of A.'s proposal, and that A. had a right afterwards to retract his offer, and having done so, the second letter of B. amending the offer of possession, was too late. The declaration in the first and third counts alleged the possession of the whole interest by B., and in the second, the possession of a contract for it. It appeared that there had been some conversation between B. and the owner of the freehold, about granting a thirty-two years' lease, but there was no written contract, nor did it appear that there was any positive verbal agreement upon the subject. The only interest which B. had in the premises, at the time of the proposal and retraction was a ten years' interest: Held, both at *Nisi Prius* and in Banc, that there was a material variance between the declaration and the proof.

Assumpsit.—The first count of the declaration stated, that at the time of the promise by the defendant, &c., the plaintiff was lawfully possessed for the residue of a certain term of years, to expire on the 25th of December, 1856, of a certain

dwelling-house, &c., and thereupon, theretofore, to wit, on the *29th day of April*, 1825, by a certain agreement then and there made between him and the defendant, it was agreed that the defendant should pay a premium of 2,750*l.*, upon receiving a lease of the said premises for twenty-one years, &c., with the option, upon giving six months' notice, of having the time extended to thirty-one years, &c., and that by the said agreement possession was to be given on or before the 25th day of July then next, &c., as by the said agreement, &c., would more fully appear. It then averred mutual promises, and that, up to the 6th day of April, the plaintiff was ready to grant a lease pursuant to the terms of the agreement, but that the defendant then and there discharged him from it. It afterwards averred a sale by auction of the premises, and a loss in consequence of 2,230*l.*, which it alleged the defendant was liable to pay.

*268] "The second count stated that at the time, &c., the plaintiff was entitled, under and by virtue of a certain contract, to a certain term of thirty-two years from the 25th day of December, 1824, of a certain dwelling-house, &c., which was contracted and agreed to be granted to him by one J. A. Hermon, who then and there had lawful authority in that behalf; and that afterwards, to wit, on the *18th day of March*, 1825, the defendant proposed and agreed to pay a premium of 2,750*l.*, upon receiving a lease for twenty-one years, with the option, &c.; and that a definitive answer to such proposal should be given by the plaintiff within six weeks from the time of making the said agreement. It then averred, that the plaintiff, within the six weeks, to wit, on the *29th day of April*, returned a definitive answer, that he acceded to it. It then further averred the granting by Hermon, within the six weeks, of a lease to the plaintiff for thirty-two years, &c.

The third count was nearly similar to the first. It averred the tender of a lease, and the defendant's refusal to accept it and to pay the premium. There were the usual money counts; and the plea was *non assumpsit*.

It appeared that the defendant, being desirous of treating for the purchase of a house in Saint James's Street, on the 18th of March, 1825, having previously had a conversation with the plaintiff on the subject, made him this proposal in writing:—

"To pay a premium of 2,750*l.*, upon receiving a lease for twenty-one years, with the option, upon giving six months' previous notice to the landlord, of having the time extended to thirty-one years, paying the same yearly rent as before, for such further time; rent, 250*l.* Mr. Grant to take the fixtures at a valuation. Possession to be given on or before the *25th of July next*; to which time all taxes and outgoings are to be paid up by Mr. Routledge; and a definitive answer to be given within six weeks from this *18th of March, 1825*."

*269] "On the *6th of April*, the plaintiff sent the following letter in reply:

"Mr. Routledge begs to say that he *accepts* Mr. Grant's offer for his house in Saint James's Street, and that he will *give Mr. Grant possession on the 1st of August next*.

"Mr. R. will esteem it a particular favour, if Mr. Grant will not mention the subject to any one."

On the next day the defendant wrote to the plaintiff as follows:—

"Arlington Street, 7th April, 1825.

"Sir,—I received your note last night, and hasten to acquaint you, that having considered as confidential the negotiation respecting your house, I had mentioned it to no one; but upon consulting with a friend this morning, in whose opinion I place more confidence than in my own, I am advised, for some reasons that had not occurred to myself, not to think of taking a house in Saint James's Street, for a dwelling-house. May I therefore request you will permit me to withdraw the proposal I made to you about it. I am in hopes you will make no hesitation to

do this, when you consider the spirit of candour and openness in which it was made to you; but should it be otherwise, I am one of the last that would willingly act with inconsistency, or be considered capable of doing an improper act. I will willingly refer the question to friends for their decision, and abide by their opinion of the case. I am, &c.,

A. GRANT."

To this letter the plaintiff sent the following answer:—

"8th April, 1825.

"Sir,—In answer to your letter of yesterday, I beg to state, that, relying upon your performing the agreement for the purchase of my house in Saint James's Street, I have taken another house, and made arrangements, which I cannot, without great loss, relinquish. I hope therefore that you will not wish me to withdraw it. I am, &c.,

THOMAS ROUTLEDGE."

*This gave rise to the following letter from the defendant in reply:— [270]

"9th April, 1825.

"Sir,—Your note of yesterday surprised me, being altogether at variance with your conversation with me, two or three hours previous to your note, dated on the evening of the 6th, in which you must recollect, you one moment declared yourself off, and finally you went away to have the opinion of Mrs. Routledge, about the answer you were to send me. How, therefore, you can, under such circumstances, suffer loss and inconvenience, from my declining to proceed further in the treaty, I am at a loss to imagine: and I was in hopes you would have been satisfied with what I had stated in reply to your first note, to have had the liberality of letting the matter drop. But if that should not be your intention, I have only to add, that you may proceed with your claim for 'loss and inconvenience,' as you may think most advisable. I am, &c.,

ALEXANDER GRANT."

Some further correspondence took place between the parties and their attorneys, and on the 29th of April the plaintiff wrote to the defendant as follows:—

"Sir,—Upon referring to my letter to you of the 6th instant, accepting your offer for my house, No. 59, Saint James's Street, I perceive that I, by mistake, stated, that I will give you possession on the 1st of August next. By your offer you state, that possession is to be given on or before the 25th of July next; and I now inform you that I am ready to give you possession according to your proposal."

The plaintiff had not, at the time of the proposal, viz. 18th March, 1825, more than *a ten years' interest* in the premises, but he subsequently obtained a lease for thirty-two years from the owner of the freehold, which was dated the 21st of April.

*It appeared from the evidence of the landlord, that, previous to the granting of this lease, some conversation respecting it took place between [271] the plaintiff and him, but no written contract was entered into, nor did it appear, that there was any positive verbal agreement upon the subject. It was admitted, that a draft of a lease, according with the terms of the proposal, and also the key of the house, were sent to the defendant on the 25th of July, and that they were returned by him on the following morning. The premises were sold by auction, and fetched only 520*l*.

Taddy, Serjt., for the plaintiff. The six weeks mentioned in the proposal apply only to the plaintiff and not to the defendant. The words must mean, I am bound by this offer, if you accept it within six weeks. The defendant was bound during the whole six weeks, and the plaintiff was to have that time for consideration. In the defendant's letter of the 7th of April, he does not allude to the difference between the 1st of August and the 25th of

July. But if he had, it would not have made any difference, for, within the six weeks, viz. on the 29th of April, the plaintiff offered possession, according to the terms of the proposal. The case nearest in point is that of *Adams v. Lindsell* (a).

Wilde, Serjt., for the defendant. The ground of decision in *Adams v. Lindsell* is, that till acceptance there is a continuing offer; but if there be an express rescinding of the offer, then it is not continuing. Before the plaintiff had accepted the defendant's proposal, the defendant had *a right to withdraw it; and *272] the plaintiff's letter, written on the 6th of April, cannot be considered an acceptance, as it offers possession at a different time to that which is stated in the proposal. The learned Serjeant cited the case of *Payne v. Cave* (b). He also contended that there was a variance between the interest alleged in the declaration and that which the plaintiff was possessed of.

Barr, C. J. What had the plaintiff to sell on the 18th of March? He could not grant a lease for thirty-one years, for he had then only an interest for ten years.

Taddy, Serjt. It is not necessary that a party should always be ready with his title.

Barr, C. J. At the time of the retraction by the defendant, you had not the lease for thirty-one years. The lease is dated the 21st of April; and, before that time, namely on the 9th, the defendant had withdrawn his proposal.

Taddy, Serjt. The proposal does not suppose that we actually had the thirty-one years' term, but merely that we had the power of obtaining it; and that we had that power, is shown by the fact that we did afterwards obtain it. If it is to be said, that the contract is defeated, because we had not the title at the precise moment, then there are few contracts that might not be put an end to.

Jones, Serjt., on the same side. This is not a case of fraud. The question is, whether the party must have, at the moment, the complete and consummate technical title, which he contracts to communicate. I submit that he need not.

*273] All that is required is, that he should be able *to fulfil his contract at the time appointed for its execution. There would be danger in almost all titles, on account of incumbrances, trusts, &c., if it were held that the strict legal estate must be in the party at the time of the contract.

Barr, C. J. (stopping *Wilde, Serjt.*) It is not necessary for me to decide whether the letter of the 7th of April be a repudiation of the contract by the defendant, or only amounts to a request to be relieved from it. In the letter of the 9th of April, the defendant unequivocally declares, that the bargain is at an end, and defies the plaintiff to proceed for any compensation that he may think himself entitled to. The defendant, on the 9th of April, had a right to retract his offer, it not having been at that time accepted by the plaintiff. The offer was on the condition that possession should be given *on or before the 25th of July*. The answer to that offer proposed to give possession *on the 1st of August*. An acceptance on terms differing from the offer cannot be a final arrangement, and it is therefore not a valid acceptance. Although the defendant gave the plaintiff six weeks to accept his offer, yet as there was no express stipulation that, for the chance of the plaintiff's acceptance, the defendant should, during that six weeks, be bound not to retract, the defendant might retract at any time before the plaintiff accepted. The language in which the judgment of the Court of King's Bench is expressed, in the case referred to, proves that this is the law. The Court say, that, until an acceptance, the party is supposed to be continually repeating his offer. The presumption of a repetition of the

(a) 1 B. & A. 681. A. by letter offered to sell B. certain specified goods, receiving an answer by return of post. The letter being misdirected, the answer notifying the acceptance arrived two days later than it ought to have done. On the day following that on which it would have arrived, if the original letter had been properly directed, A. sold to a third person: Held, that there was a binding contract from the moment the offer was accepted.

(b) 3 T. R. 148. That case decides that a bidder at an auction may retract his bidding at any time before the fall of the hammer.

offer is rebutted by a declaration that the offer is retracted. It is not just, that one party should be bound when the other is not. I also think, that the objection on the ground of variance is sufficient to prevent the plaintiff from recovering. He states in one count, that he had, at the time of his agreement with the defendant, a contract for a lease. That means, *such a contract as may [274] be enforced in a Court of law. Now there certainly was no contract in writing; and I cannot collect, from the testimony of the landlord, that there was even a parol contract. There had been some conversation about renewing the lease, but nothing seems to have been concluded upon between the landlord and the plaintiff. It is stated, in the other counts, that the plaintiff had a lease that would expire in 1856, whereas, the lease which he had, would expire in 1835. That difference between the lease which the plaintiff had, and the lease set out in the declaration, is a substantial difference. I do not decide whether a man may assert in his contract that he has goods, or an estate, which he has not, if he be ready with such goods as he sells at the time they are to be delivered, or with a good title to the estate, at the time it is to be conveyed. I think the plaintiff must be nonsuited, on account of the repudiation of the contract before it was complete, and of the variance in the description of the thing bargained for.

Nonsuit.

Taddy, and *Jones*, Serjts., and *Wightman*, for the plaintiff.
Wilde, Serjt., and *Patteson*, for the defendant.

[Attornies—*Rivington*, and *Forbes*.]

In the following Term, a rule *nisi* was obtained for a new trial; but the Court were of opinion that the nonsuit was clearly sustainable on account of the variance between the declaration and the proof, as to the nature of the interest which the plaintiff had in the premises; and the rule, therefore, was eventually Discharged.

See the cases of *Kennedy v. Lee*, 3 Meriv. 454; *Cooks v. Osley*, 3 T. R. 653; and *Cornick v. Blagrove*, 4 J. B. Moore, 303, and 1 B. & B. 536.

*ADJOURNED SITTINGS AT WESTMINSTER, AFTER [275]
 HILARY TERM, 1828.

BEFORE MR. JUSTICE PARK.

(*Who sat for the Lord Chief Justice.*)

DOE dem. SAVAGE v. STAPLETON. Feb. 16.

A party took possession of premises on the 1st of August, and at the Michaelmas following paid the half quarter's rent, and continued afterwards to pay quarterly, on the usual feast-days: Held, that in such case a notice to quit at Michaelmas was sufficient, and that although the landlord had at first given a notice expiring with the half quarter, it was not necessarily to be presumed from that circumstance that the tenancy was one from year to year, commencing with the half quarter.

EJECTMENT.—The defendant came into possession of the premises in question in the cause, on the 1st of August, 1825, and at Michaelmas in that year he paid the rent from the 1st of August to that time, and afterwards paid it quarterly, on the usual quarter-days. A notice to quit on the 1st of August, 1827, was at first given by the lessor of the plaintiff, but he conceiving that such notice was not correct, afterwards gave a second notice to quit at the Michaelmas following, and he received the rent up to that time. The defendant said that he would not quit, unless he had a notice expiring at the half quarter.

V. Lawes, Serjt., for the plaintiff, relied on the case of *Doe dem. Holcomb v. Johnson* (a).

Russell, Serjt., for the defendant. A tenancy commences from the time at which the tenant goes in, without reference to any quarter-day, and the law requires a notice to quit at the expiration of a year from that particular time, unless there is any thing to take it out of the usual course. The terms on which the parties stand, is a question for the Jury under all the circumstances, and it is quite clear, that the parties in this case contemplated a holding from the 1st of August, the day of the defendant's coming in. The notice to quit on that day, originally given by Savage, shows, what was the understanding on the subject. That notice is waived by the receipt of rent to Michaelmas, and the second notice is not for the proper time. The learned Serjeant cited the cases of *Kemp v. Derrett* (b), and *Doe dem. Wadmore v. Schwyn* (c).

PARK, J. In my opinion, there is nothing in this objection. In the case of *Doe v. Johnson*, the very distinction was taken by my Lord *Ellenborough*, who says, that "if the tenant comes in in the middle of a quarter, and he afterwards pays his rent for that half quarter, and continues then to pay from the commencement of a succeeding quarter, he is not a tenant from the time of his coming in, but from the succeeding quarter-day." He never supposed that the tenancy was to begin from the half quarter. In the present case, the rent has been received up to Michaelmas-day, and the defendant has had the benefit of occupation up to that time. I am therefore of opinion, that the plaintiff is entitled to a verdict for nominal damages.

Verdict for the plaintiff.—Damages, 1s

V. Lawes, Serjt., and *Holroyd*, for the plaintiff.

Russell, Serjt., and *Ferard*, for the defendant.

[Attornies—*Argill & M.*, and *Ferard*.]

(a) 6 Esp. 10. That case decides, that if a tenant comes in at the middle of a quarter, and afterwards pays rent for the period of time previous to the beginning of the next regular quarter, from which time he pays half-yearly, his tenancy commences from that regular quarter-day to which he so paid up.

(b) 3 Camp. 510. In this case the defendant became tenant on the 29th October, and was "always to be subject to quit at three months' notice." It was contended that that notice must expire on the 29th of October, or some other quarter-day corresponding with that date. And Lord *Ellenborough* was of this opinion: his Lordship said, "the defendant might have been made to hold from the preceding or succeeding general quarter-day; but, in the absence of all evidence to the contrary, I must presume that he held from the time when he entered as tenant."

(c) Adams on Ejectment, p. 129.

[277] *The case of *Doe dem. Pitcher v. Donovan*, 1 Taunt. 555; and 2 Camp. 78, decides, that in a tenancy from year to year, determinable by a quarter's notice, the quarter's notice will not be sufficient if given for any quarter-day, but must expire at a quarter-day corresponding with that on which the tenancy commenced.

EDWARDS, Gent., One, &c., v. COOPER. Feb. 16.

A dispute between A. B., a married woman, and C. D., was referred to arbitration. After the reference had proceeded for some time, an additional matter was submitted by the attorneys for the parties. C. D.'s attorney signed the submission in his presence. A. B.'s attorneys signed in the presence of C. D.'s attorney, but without any authority from their client. The award was afterwards set aside, and C. D.'s attorney sued him for the expenses of the arbitration: Held, that he had not been guilty of such negligence, in not requiring to see the authority of A. B.'s attorneys, as would prevent his recovering the amount of his bill.

ASSUMPSIT for work and labour as an attorney. The retainer, and the delivery of a signed copy of the bill, pursuant to the act of Parliament, were admitted. It appeared that there had been disputed accounts between the defendant, who was a coach-builder, and one Lady Ramsay, which were referred to arbitration; and the arbitration bond was signed by Lady Ramsay, and, as she was a married lady, by her brother as her surety. After the arbitration had proceeded for some time, a dispute arose about a carriage; and it was agreed to add the question, for the decision of the arbitrator, whether or no Lady Ramsay should be compelled to purchase the carriage. This agreement was signed by the plaintiff on the behalf of the defendant, in his presence, and by Messrs. Dawes and Chatfield, who attended as solicitors for Lady Ramsay, in the presence of the plaintiff, but without any authority from her ladyship. This agreement was made a rule of Court, and the award was made upon it. A rule *non* was afterwards obtained for setting aside the award, on the ground of the absence of any authority for the submission with respect to the carriage. The matter stood over for a while under a suggestion from the Court, to see if the parties could agree to a second reference, and the rule was eventually made absolute. The rule itself was put in, and stated, that no cause was shown. A witness was about to state what occurred in Court, previous to the rule being made absolute, for the purpose of showing that some discussion took place about it, but he was stopped by

*PARK, J., who said, I cannot take the testimony of the witness in opposition to the rule of Court. I was myself subpoenaed the other day [*278] in the Court of King's Bench, to prove what passed in this Court on a motion. And my Lord *Tenterden* said to the defendant, who was conducting his cause in person, "I need not keep my learned Brother here, because I cannot take his account of what passed in the Court of Common Pleas; I can only look to the rule of Court itself."

Wilde, Serjt., for the defendant, then submitted, that the plaintiff was not entitled to recover. In consequence of the negligence of the plaintiff, the defendant has lost all the benefit he expected to derive from his services. The negligence complained of was, I admit, an oversight, and not any thing which reflects on the general character of the plaintiff for attention and respectability. But the rule of law is perfectly clear. If an individual, whether a professional man or a tradesman, performs service for another, and that service is *productive to any extent*, negligence in doing it must be the subject of a cross action; but if the negligence is such, that the service is *wholly unproductive*, then the right to recover is taken away. In the case of *Montrou v. Jefferies* (a), which, like the present, was an action on an attorney's bill, Lord *Tenterden*, in his summing up, said, "The question is, whether you think that the expense was brought upon the parties by the inadvertence of the plaintiff." And the learned counsel who led for the plaintiff in that case, was so fully satisfied of the correctness of the mode in which the question was about to be left to the Jury, that he elected to be nonsuited. It was the bounden duty of the plaintiff in this case to see that the party to whom his client was opposed, was bound by the reference with respect to the purchase of the carriage. It does not appear that

*279] any *evidence was given to show that Messrs. Dawes and Chatfield had authority to do any thing more than attend and prosecute the reference under the original submission. The plaintiff should have required some proof of their authority to sign the second submission, especially as it was the case of a married woman and her surety, in which no general authority could by law be implied. Sureties are not bound by implication, but only by express authority.

PARK, J. The judge arbitrator was equally guilty with Mr. Edwards; was he not? He ought to have known what the law upon the subject was.

Wilde, Serjt. That may or may not be; but I submit that the attorney who was to be paid was bound to see that his client was not injured. Whether or not the arbitrator, looking at the rank of the parties, might choose to confide in their honour, I do not know; but he would have been well warranted in so doing, as they were represented by respectable attorneys. But Edwards was the especial agent of the defendant, paid to exercise that care, the want of which alone has deprived the defendant of the benefit which would have resulted from his services. It was not a matter of any difficulty. The plaintiff might easily have asked for the authority of Dawes and Chatfield, as the parties had personally signed the original submission. It appears that Dawes and Chatfield saw the second submission signed by the plaintiff in the presence of the defendant; therefore they were sure that the defendant was bound. The authority of Lady Ramsay, she being a married woman, would not be sufficient.

PARK, J. Then were not the Court of King's Bench wrong in recommending a reference? They must have known that a married woman could not give such authority.

*280] Wilde, Serjt. I submit not. If a matter be doubtful, *or even if it be clear, provided the Court think the legal objection a harsh one, they may properly suggest, while the parties are in a state of suspense as to the final result, that the matter should go before the same arbitrator, to prevent the necessity of any decision. I submit with confidence, that the plaintiff is not entitled to recover. Here is he, as an attorney, charging 100*l.*, for procuring an award which is not now in existence, because of the want of authority in Messrs. Dawes and Chatfield, which authority it was the plaintiff's duty to see that they possessed. There is nothing of more importance in cases of arbitration, than that the attorneys should see that the reference proceeds upon proper authority.

PARK, J. It is admitted in this case, that the plaintiff is a highly respectable member of the profession, and that he has not been guilty of any thing wicked, but merely of inadvertence. The question is this, Is Mr. Edwards to be paid his bill or not? I am of opinion that there is not a colour for preventing his recovering. I agree perfectly with what is said by my Lord *Tenterden* in the case which has been cited. It is not to be imagined that Messrs. Dawes and Chatfield were playing the rogue, and endeavouring to entrap Mr. Edwards. There was a case tried in this Court, in which the present Lord Chief Justice, then at the bar, was counsel, and he argued in the same manner as my brother *Wilde* has to-day, but the Court were of opinion against him. The question is this, Could this plaintiff, Mr. Edwards, could any honourable or even any cautious man suppose, at such a time, when the reference had proceeded so far, that this objection would be afterwards taken in the Court of King's Bench? If you think,—and now I come to the words used by my Lord *Tenterden* in the case of *Montrieu v. Jefferies*,—if you think that the plaintiff has brought all the expense upon the party by his improper conduct, you will, under that impression, find your verdict for the defendant. If you do *not, you will find *281] for the plaintiff, and in that case the damages will be 100*l.*

Verdict for the plaintiff.—Damages, 100*l.*

Taddy, Serjt., and *Malby*, for the plaintiff.

Wilde, Serjt., for the defendant.

CROFTS, Assignee, &c., v. STOCKLEY and another. Feb. 16.

The declaration in an action on a bail-bond, stated the issuing from the Common Pleas of a writ for the arrest of the principal, by which the sheriff was commanded to have his body "*before the justices of our said lord the king, at Westminster,*" &c., to answer, &c., and also, that he might answer, &c., "*according to the custom of his said Majesty's Court,*" &c., and alleged the condition of the bond to be for the appearance of the principal, "*according to the exigency of the said writ in the said Court,*" &c., and also to answer, &c., "*according to the custom of his said Majesty's Court of Common Bench.*" The condition, as proved at the trial, was for the appearance of the principal, *before our said lord the king at Westminster,*" &c., to answer, &c., and also to answer "*according to the custom of the king's Court of Common Bench.*" Held, that there was not any material variance.

DEBT on a bail-bond. The declaration stated, that the plaintiff (Josiah Crofts) had sued and prosecuted "out of the Court of our lord the now king, before the Right Honourable Sir *W. D. Best*, Knight, and his companions there, his Majesty's justices of the bench, at Westminster, in the county of Middlesex, a certain writ of our said lord the king," &c., "against one William Wright, directed to the sheriff of Northamptonshire, by which said writ our said lord the king commanded the said sheriff, that he should take the said William Wright if he should be found in his bailiwick, and him safely keep, so that the said sheriff might have his body before the justices of our said lord the king, at Westminster, on the morrow of All Souls then next ensuing, to answer the said Josiah of a plea of trespass; and also that the said William Wright might answer the said Josiah, according to the custom of his said Majesty's Court of Common Bench, in a certain plea of debt," &c. It then averred, that the writ was properly delivered, and that the sheriff arrested Wright, and before the return of the writ took the bail of the defendants for his appearance; and that they entered into a *bail-bond, the condition of which was, "that if the [282] said William Wright should appear, *according to the exigency of the said writ, in the said Court*, on the morrow of All Souls, to answer the said Josiah in a plea of trespass, and also that the said William Wright might answer the said Josiah, *according to the custom of his said Majesty's Court of Common Bench*, in a certain plea of debt for 400*l.*," that then the said obligations should be void, &c. It then averred that Wright did not appear according to the exigency of the writ, whereby the bond became forfeited, and the sheriff assigned it to the plaintiff. The plea was *non est factum*.

The condition of the bond was in the following terms:—

"The condition of this obligation is such, that if the above bounden William Wright do *appear before our said sovereign lord the king, at Westminster, on the morrow of All Souls next coming*, to answer Josiah Crofts in a plea of trespass; and also, that the said William Wright may answer the said Josiah, *according to the custom of the King's Court of Common Bench*, in a certain plea of debt for 400*l.*, that then this present obligation to be void and of no force; otherwise to stand and remain in full force, vigour, and effect."

Ludlow, Serjt., for the defendants, contended, that there was a material variance. He cited *Mill v. Pollon (a)*, *Impey v. Taylor (b)*, and *Sheldon v. Whitaker (c)*.

*PARK, J. I will direct a verdict for the plaintiff, and give my brother [233] Ludlow leave to move for a nonsuit.

Verdict accordingly.

(a) 1 J. B. Moore, 19, and 7 Taunt. 271. In this case it was held that the words "*Court of the Bench*," in a plea of judgment recovered, could not be construed as descriptive of the Court of King's Bench, but could only be considered as describing the Court of Common Pleas.

(b) 3 M. & S. 166. An allegation, that an action was depending in his Majesty's Court of the Bench at Westminster, was held in this case not to be sustained by proof of a pluries bill of Middlesex, because the allegation must be taken as describing the Court of Common Pleas.

(c) R. & M. 266. This was an action against the sheriff, on the 8 Ann. c. 14. The declaration stated, that the sheriff, by virtue of a "*writ of our said lord the king, before the king himself*," took the goods, &c. The writ in point of fact issued from the Common Pleas, and it was held to be a material variance.

Merewether, Serjt., and *Comyn*, for the plaintiff.
Ludlow, Serjt., for the defendant.

[Attornies—*Fuller & S.*, and *Collyer*.]

In the ensuing Easter Term, *Ludlow*, Serjt., moved, pursuant to the leave given. He cited, in addition to the cases referred to at *Nisi Prius*, the case of *Renalds v. Smith* (a); and the Court granted a rule to show cause. This rule came on in the Trinity Term following, and, after argument, was

Discharged.

(a) On a *copias* returnable in the *Common Pleas*, the sheriff made his mandate to the high bailiff of Pomfret, to take the defendant, so that he might have his body *before his said Majesty at Westminster*, in five weeks of Easter; and a bail-bond was taken with condition for the defendant's appearance, *before his said Majesty at Westminster, in five weeks of Easter*. It was decided that this bond was void, because it described an appearance in the Court of King's Bench. 6 Taunt. 551.

BEFORE MR. JUSTICE BURROUGH.

O'BRIEN v. CURRIE. Feb. 18.

A commission of bankrupt cannot be supported against a person under age.

TRESPASS by a bankrupt against the petitioning creditor under his commission. It appeared that the bankrupt was a minor.

BURROUGH, J. It is quite clear, that a commission of bankrupt against a person not of age is not good in law. *Bankruptcy formerly was considered as a crime, and a commission issued against an infant certainly cannot be supported, but is absolutely void.

Verdict for the plaintiff.

Wilde, Serjt., and *Steer*, for the plaintiff.
Andrews, and *E. Lawes*, Serjts., for the defendant.

[Attornies—*Ivimey*, and *Baddeleys*.]

BEFORE MR. JUSTICE GASELEE.

HUNT v. ALEWYN and another. Feb. 19.

In an action by the indorsee of a bill of exchange, accepted in a foreign country, against a party in London who undertook to negotiate it, for not paying over the proceeds, which is tried after the bill has become due, parol evidence may be given of the particulars of the bill.

Seemle, that if the declaration in such case allege that the proceeds were received, some evidence of the receipt must be given by the plaintiff at the trial; and a letter written by the defendant, a month before action brought, saying that the money would be received in a few days, is not sufficient.

ASSUMPSIT.—The *first* count in the declaration stated, that the plaintiff was lawfully possessed of a certain bill of exchange, for 6,240 florins, foreign money, and of the value of 600*l.*, drawn by one F. Bayertz, upon certain persons trading at Amsterdam under the firm of Horstman & Co., payable on the 24th of December, 1827; and being so possessed thereof, he, on the 1st of October, 1827, delivered the same to the defendants, to be by them negotiated, and caused to be discounted for his use and benefit, for certain commission or reward; and in consideration of the premises, and of such commission, they undertook and promised him to negotiate the said bill, and cause and procure it to be discounted for his use and benefit, and to pay him the proceeds, after deducting commission and expenses, whenever they, after the discounting, should be thereunto requested. It then averred, that, after the delivery of the bill, to wit, on the 2d of October, 1827, the defendants procured it to be discounted, and received the proceeds, amounting, after the deductions, to 512*l.* 7*s.*; *yet that they did not nor would pay the plaintiff the proceeds, but kept and retained them, [*285 contrary to their promise and undertaking.

The *second* count was more general, on a promise to get the bill discounted, and pay over the proceeds, on request, with an averment of the actual discount, and receipt of the proceeds, and a refusal to pay over the amount to the plaintiff. There were the money counts; and the plea was *non assumpsit*.

It appeared that Bayertz, who was living in London, was indebted to the plaintiff for money lent, &c. The plaintiff issued a writ against him, and Bayertz proposed to give him an order on Messrs. Horstman & Co., at Amsterdam, for whom he (Bayertz) was shipping iron. The plaintiff not knowing anything of the respectability of Horstman & Co., Bayertz took him to the defendants, Messrs. Alewyn & May, who were consuls to the king of the Netherlands. They said that the house of Horstman & Co. was a house of credit, and they would negotiate any bill which was accepted by them. This was on the 18th of September. The plaintiff and Bayertz then went together to Amsterdam, and obtained the acceptance of Horstman & Co. to a foreign bill, which they brought to the defendants, who undertook to negotiate it on the behalf of the plaintiff. On the 2d of October, the defendants wrote to the plaintiff, saying that they had negotiated the bill, and that the money would be paid by the purchaser in the course of a day or two. They also inclosed a letter from a Mr. Hutchinson, who made a claim upon the bill as a creditor of Bayertz, observing, that they hoped the plaintiff would be able to arrange with that gentleman. There was, at the foot of the defendant's letter, a note of the amount of the bill, with the drawer's and acceptor's names, and the deductions for commission, &c.

On the next day, the plaintiff wrote an answer, saying, that Mr. Hutchinson's claim could not affect him as a *bonâ fide* holder, and requiring the proceeds to be paid. Bayertz afterwards became bankrupt. [*286

A brother of the plaintiff, who had seen the bill while it was in his possession, was called on his behalf to prove the particulars of it.

Taddy, Serjt., for the defendants, objected. The plaintiff cannot give parol evidence of this. He must produce the bill, or an attested copy.

GASKLEE, J. I shall not turn the plaintiff round upon this objection. I will allow the questions to be asked.

The witness then proved the bill, as set out in the declaration. He stated that his brother's indorsement was not upon it.

Taddy, Serjt., submitted, that the plaintiff ought to be nonsuited. There is no proof of the plaintiff's title to the bill. His indorsement is not upon it. There is nothing but a letter of the defendants stating that they had negotiated it.

GASELEE, J. There is no mention in the letter of the receipt of the proceeds.

Wilde, Serjt., for the plaintiff. If an agent writes a letter, saying that proceeds will be received in a few days, and the action is not brought for a reasonable time afterwards, it is to be presumed, that, at such time, the proceeds had come to his hand. This action calls upon the defendants, either to pay or show that they have not received. The plaintiff has waited more than a month, and that is quite sufficient. It was the duty of the defendants to receive the proceeds, they having negotiated the bill. It is in their power to show, whether they have received them or not; the plaintiff cannot know any thing about it.

*287] GASELEE, J. In both counts, you allege that they negotiated the bill, and received the proceeds; must not you give some proof of the receipt (a)? you declare against them for not paying you the money. But I will not turn the party round upon it.

Wilde, Serjt., then, for the purpose of showing such receipt, put in a letter of the defendants, of the 4th of October, in which they stated that an attachment, at the instance of Messrs. Glazebrook & Co., against the proceeds in their hands, as the property of Bayertz, had been lodged with them from the Lord Mayor's Court.

Taddy, Serjt., then submitted, that this was in answer to the action, as it negatived the assertion of title in the plaintiff, by showing that it was in somebody else.

Wilde, Serjt. There is no colour for the objection. In the first place, the attachment is no answer, unless it is carried on to a judgment: there was a case to that effect in this Court. And in the second place, their telling us, that a third person asserts that the proceeds are the property of Bayertz, is no evidence of their being so in fact.

Taddy, Serjt. I allow that it has been decided, that when an attachment is set up by the defendant, and proved as his case, then it must be shown that it has proceeded to a judgment. But that is not the case here. The attachment *288] appears on the plaintiff's own showing; and as *he does not go on to show what has been done in it, it must be taken to be a regular attachment.

GASELEE, J. The attachments in the case alluded to by my brother *Wilde*, were attachments which had not been regularly proceeded in. There had been time to go on with them, but the parties did not proceed regularly. I will however reserve the point. I think it is better that the case should go to the Jury.

Bayertz was then called as a witness, and stated, that he gave the bill to the plaintiff for a *bonâ fide* consideration, and that he had not any interest in it at the time when it was negotiated by the defendant's.

GASELEE, J., left to the Jury the question of the employment of the defendants, and they found a

Verdict for the plaintiff.

Wilde, Serjt., and *Hutchinson*, for the plaintiff.

Taddy, Serjt., for the defendants.

[Attornies—*Mayhew* and *Gates*.]

In the ensuing Easter Term, *Taddy*, Serjt., moved to set aside the verdict, pursuant to the leave given at the trial; but the Court were of opinion against him, upon both his objections, and therefore the rule was

Refused.

(a) In the case of *Garrett v. Handley*, which was an action on a guarantee, the undertaking was to "make provision for the repayment" of a sum of money, "under" an "arrangement" then "going on, for settling" the borrower's "affairs." *Abbott*, C. J., held, that some evidence must be given by the plaintiff, to show that no provision had been made by the defendant. Vol. 1, of these Reports, pp. 217, and 484.

*BEFORE MR. JUSTICE PARK.

The Trustees of the British Museum v. WHITE. Feb. 20.

Held at *Nisi Prius*, that in a special jury cause the plaintiff's counsel cannot have a tales without the consent of the counsel for the defendant.

Issued from the Court of Chancery.—This was a special jury cause; and ten special jurors only appeared.

Wilde, Serjt., for the plaintiffs, prayed a tales.

PARK, J. Do the other side consent? Because I do not think that a plaintiff has any right to have a tales without consent on the part of the defendant. I know that other Judges have a different opinion upon this subject; but I must act upon my own impressions.

Bosanquet, Serjt., for the defendant, gave his consent; and the cause proceeded.

Wilde, Serjt., *Cote*, and *Patteson*, for the plaintiffs.

Bosanquet, and *Adams*, Serjts., for the defendant.

[Attornies—*Bray & W.*, and *Rogers & Son.*]

LEES v. WHITCOMB. Feb. 22.

An agreement by which A. B. agrees "to remain with" C. D. for two years from the date of it, "for the purpose of learning" a particular business, will not support a declaration stating the consideration to be, that C. D. would "receive" A. B. "into his service." *Scmble*, also, that such an agreement is not available, on the grounds of there being no mutuality, and no consideration appearing on the face of it.

ASSUMPSIT.—The first count of the declaration stated, that, at the time, &c., Martha, the wife of the plaintiff, was, and from thence, &c., a dress-maker and milliner, &c., and thereupon, on the 5th day of June, 1826, in consideration that the said plaintiff, at the special instance and request of the said defendant, would receive the said *defendant into his house, and find and supply her with ^[290] board and lodging, and cause her to be taught the trade and business of a dress-maker and milliner, by the said wife of the said plaintiff, she the said defendant agreed and undertook, and faithfully promised the said plaintiff to remain and continue with the said wife of the said plaintiff for two years from the day and year aforesaid, for the purpose of learning the business of a dress-maker and milliner. It then averred that the plaintiff, confiding in the said promise of the said defendant, received her into his house, and that she remained in his house for a long time, to wit, from the day and year aforesaid, until the 14th day of April, 1827; and that during the time she so remained, he supplied her with board and lodging, and other necessities, and caused her to be taught by his wife the trade and business of a dress-maker. Then came an averment that the plaintiff was ready and willing to have suffered the defendant to have continued for the remainder of the two years, and would have supplied her, &c.,

and taught her, &c.; but that the defendant did not, nor would, although often requested so to do, remain and continue with the said wife of the said plaintiff, or in his house, but wholly neglected and refused so to do; and on the contrary, before the expiration of the said two years, to wit, on the said 14th day of April, without the license and consent of the said plaintiff and his said wife, or either of them, and against their will, &c., left the house of the plaintiff and the service of him and his wife, and continued absent, whereby he had lost the profits which he would have derived from her service and assistance.

The *second* count was similar in substance to the first, except that it omitted the words "*other necessities*" in the statement of the consideration, after the words "*board and lodging*," and stated, that the plaintiff undertook to receive the defendant *into his service*.

*291] The *third* count only mentioned the business of a *dress-maker, omitting the word "*milliner*;" but in other respects it was similar to the first count.

The *fourth* count contained the words "*dress-maker and milliner*," but omitted the words "*board, lodging, and other necessities*."

The *fifth* count omitted both the word "*milliner*," and the words "*board, lodging, and other necessities*," but stated the consideration to be as in the second count, that the plaintiff would receive the defendant into his service.

The *sixth* count was for work and labour in teaching and instructing, and for meat, drink, washing, lodging, &c.

There were the usual money counts. Plea—*Non assumpsit*.

The agreement given in evidence on the part of the plaintiff, was as follows:

"I hereby agree to remain with Mrs. Lees, of 302, Regent Street, Portland Place, for two years from the date hereof, for the purpose of learning the business of a dress-maker, &c. As witness my hand, this 5th day of June, 1826.

AMELIA WHITCOMB."

Wilde, Serjt., for the defendant, submitted, that the plaintiff was not entitled to recover. There is no contract at all on the part of the plaintiff. The defendant contracts to remain two years to learn something, and nobody, by the agreement put in, is bound to give her instruction; nor are there any words in the agreement importing beneficial service to the plaintiff. It cannot be intended that a person learning will benefit the person teaching. The consideration must appear on the face of the agreement; but there no person at all is bound. It is quite clear that the husband is not bound, because the wife, to bind the husband, must make the contract for him. The first count states a contract with respect to dress-making and *millinery*; and the agreement neither contains that nor any stipulation about necessities.

*292] *PARK, J. As to the first count, I perfectly go along with you.

Wilde, Serjt. The second, third, and fourth counts are also incorrect. The fifth count states the consideration to be an agreement on the part of the plaintiff, to receive the defendant into his service, and to cause her to be taught. The plaintiff must show that he had entered into a binding contract. It cannot here be left to implication, because there is a written agreement to which you cannot add. No action could have been brought by the defendant against Lees. The contract also does not import beneficial service. Learning, unexplained on the face of the agreement, does not import any such thing.

PARK, J. The last case on this subject was of *Jenkins v. Reynolds* (a), in this Court.

Taddy, Serjt., for the plaintiff. All that is necessary is, that the agreement

(a) 6 J. B. Moore, 86. In that case the defendant was sued on a memorandum, written and signed by him, and addressed to the plaintiff, in the following words: "To the amount of 100*l.*, consider me as security on J. C.'s account." It was held that this was not binding under the statute of frauds, as it did not express the consideration for the undertaking.

should be signed by the party to be charged. If the Court can imply the consideration for the promise of such party, by inference from the nature of his obligation, that is sufficient. The case of *Egerton v. Matthews* (a) is decisive on this point, in favour of the plaintiff.

PARK, J. I should doubt whether that case can now *be supported, [*293 consistently with *Wain v. Warlters* (b), which the King's Bench confirmed in the case of *Saunders v. Wakefield*, and we, on full consideration, confirmed it in this Court also.

Taddy, Serjt. The case of *Wain v. Warlters* is no doubt established; but *Egerton v. Matthews* is consistent with it, because the obligation to buy imports an obligation to sell; and, in the present case, an obligation to teach is to be inferred, because, without a teacher, a party cannot learn. As to the beneficial service, the staying two years is a beneficial service. As to the matter of form in the declaration, the words, "&c.," in the agreement, mean, the business, whatever it was, that Mrs. Lees was then carrying on; but the count is quite sufficient without. With respect to the receiving into the house, the expression is, that the defendant shall remain. The case of *Wain v. Warlters* is a case of great nicety, it is *inter apices juris*; but that case does not say that the obligation on one part may not be implied from the other part of the agreement. I submit that the first count is quite supported.

Hutchinson, on the same side. *Wain v. Warlters*, and *Saunders v. Wakefield*, are cases of contracts to pay the debt of another (c). In the Duke of Norfolk v. *Worthy* (d), the *Duke's name did not appear till after the [*294 breach of the contract.

Wilde, Serjt., in reply. My objection is, first, that there is no mutuality; and secondly, that there is no consideration on the face of the agreement.

PARK, J. I am of opinion with you upon both these points. There is no mutuality. The defendant could not have brought any action against Mrs. Lees. I am also of opinion that there is no consideration upon the face of the agreement.

Taddy, Serjt. Will your Lordship reserve the point?

PARK, J. I never nonsuit unless I am clearly of opinion with the defendant. I do not think it right to give you leave to move in this case.

Nonsuit.

Taddy, Serjt., and Hutchinson, for the plaintiff.

Wilde, Serjt., and Morgan, for the defendant.

[Attornies—Mayhew, and Goodeve.]

In the ensuing Easter Term, Taddy, Serjt., obtained a rule nisi for a new trial, which came on to be argued in the Trinity Term following.

June 14. Wilde, Serjt., showed cause. The agreement scarcely supports any part of the declaration. If the defendant was received under the agree-

(a) 6 East, 307. That case decides that a memorandum, signed by a defendant, whereby he agrees to give a certain sum for goods, takes the case out of the 17th section of the statute of frauds, though not signed by the seller, nor expressing any consideration for the promise of the defendant, other than by inference from his own obligation.

(b) The cases of *Wain v. Warlters*, and *Egerton v. Matthews*, were decided on different sections of the statute of frauds; the former on the 4th, and the latter on the 17th section. In the 4th section the word *agreement* is used; and the Court, in *Egerton v. Matthews*, are said to have decided on the ground that the object and wording of the two sections were different. The present case being the case of an agreement not to be performed within a year, would of course come within the provisions of the 4th section, and be subject to the construction which was put upon that section, in the case of *Wain v. Warlters*, which case decides that the writing must contain the consideration for the promise as well as the promise itself.

(c) See note (b), *supra*.

(d) 1 Camp. 337.

ment, she was received as a pupil to learn merely, and not as a servant, and service is the consideration alleged in the declaration. My first objection therefore is, that there was no contract of service. The question is not whether service was incidentally received, but was service the object of the agreement?

*295] While scholars are learning to write, a schoolmaster may apply their writing to some beneficial purpose, yet his so doing will not make the boys his servants. The agreement not being to be performed within a year, must be in writing, and the *whole* of it must be contained in the writing. The plaintiff complains of loss of service, and he must show that the defendant was under an obligation to serve. Here the Court called upon—

Taddy, Serjt., to support his rule. I rely on the fourth and fifth counts. The consideration there assumes what was proved at the trial, and was the result of the agreement, viz. that the continuing for two years was a beneficial service. The defendant was unacquainted with the business when she came, and as soon as she had learned it she went away. The word service here means continuance with a master who is to give instruction. The meaning of the word *remain* in the agreement is, that the learner will continue with the teacher for the sake of beneficial service. The case of *Egerton v. Matthews* seems strongly in our favour.

PARK, J. The services *were* beneficial, but they *might* have been otherwise.

Taddy, Serjt. That only affects the amount of compensation. We must take the chance of that.

BEST, C. J., was of opinion that neither of the counts was proved.

BURROUGH, J. Since *Wain v. Walters*, and the other case, it is clear that the consideration must appear upon the face of the agreement; and that is the short answer to this case.

*296] GASELER, J. I have a doubt upon the subject, but not sufficiently strong to induce me to disagree with the opinions expressed by the rest of the Court.

Rule discharged.

The act of the 9 Geo. 4, c. 14, s. 7, which comes into operation on the 1st of January, 1829, after referring to the 17th section of the English statute of frauds, 29 Car. 2, c. 3, and a similar provision in the Irish act, 7 W. 3, c. 12, enacts, "That the said enactments shall extend to all contracts for the sale of goods, of the value of 10*l.* sterling, and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not, at the time of such contract, be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

BEFORE MR. JUSTICE BURROUGH.

ROBARTS v. ROBARTS. Feb. 24.

A party borrowing money, gave the lender a paper in the following form: "I owe you one hundred pounds, Charles Roberts, 30th July, 1821." Underneath was written, "August 17th received fifty pounds, Charles Roberts:" Held, in an action by the lender, to which the statute of limitations was pleaded, that the latter memorandum, which was within the six years, did not constitute such an acknowledgment of the existence of the debt mentioned in the former, as to take it out of the operation of the statute.

ASSUMPSIT for money lent, &c. Pleas—the general issue, and the statute of limitations (a). It was admitted that several of the sums sought to be re-

(a) The plea of the statute was, that the cause of action did not accrue "within six years next before the suing out of the *original writ*;" and it was contended, that the production of

covered, were clearly within the statute, and the claim for them was therefore abandoned; but there were two sums, one of 50*l.* and the other of 100*l.*, which the plaintiff contended he was entitled to, under the following memorandum, which was in the defendant's hand-writing:—

“I owe you one hundred pounds.

CHAS. ROBARTS.

30th July, 1821.

“August 17th, received fifty pounds (*a*).

CHAS. ROBARTS.”

*The latter part of this paper was written within the six years, but the former was not; but it was submitted, on the part of the plaintiff, that, [*297 as, within the six years, the defendant had received 50*l.*, and had acknowledged such receipt upon the same paper which contained the acknowledgment of his owing a previous debt, his act was a confession that the first sum still remained due.

Wilde, Serjt., for the defendant, argued, that the law required a clear, unequivocal, and unconditional admission; and that no such admission was contained in the paper relied on.

Mereuether, Serjt., for the plaintiff. It is for the jury to say, whether the defendant, when he signed the second memorandum, did not re-affirm the first.

BURROUGH, J. It is now decided, that there must be a positive promise. I held out against it as long as I could; but it having been so decided, I cannot now put the question to the jury. I shall tell them that there is no evidence of a promise (*b*).

Verdict for the plaintiff for 50*l.*, with leave to move to increase it by adding the 100*l.*

**Mereuether*, Serjt., and *Carter*, for the plaintiff.

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Wilde, Serjt., for the defendant.

[Attornies—*Roche & R.*, and *Pullen*.]

the *capias* was not proof in support of that allegation, but *Burrough*, J., was of opinion that it was quite sufficient.

(*a*) It was objected, that this paper could not be given in evidence without a receipt stamp; but *Burrough*, J., overruled the objection, and referred to *Brooks v. Davies*, *ante*, Vol. 2, p. 186, which decides, that a paper not put in as a receipt, although in the form of one, does not require a stamp; reference was also made to *Tomkins v. Ashby*, 6 B. & C. 541, in which Lord *Tenterden* intimates, that the only receipts requiring a stamp are such as import that something which was formerly due had been discharged. See also the case of *Mallet v. Hutchison*, *ante*, p. 92.

(*b*) In the case of *A'Court v. Cross*, 3 Bing. 329, it appeared that the defendant, being arrested on a debt more than six years old, said, “I know that I owe the money, but the bill I gave is on a three-penny receipt stamp, and I will never pay it.” This was held not to be such an acknowledgment as would revive the debt against a plea of the statute of limitations. And in the judgment in that case, *Best*, C. J., is reported to have said: “The Courts, however, have not stopped here; they have said, *acknowledgment* of a debt is sufficient, *without any promise to pay it*, to take a case out of the statute. I cannot reconcile this doctrine either with the words of the statute or the language of the pleadings.” The case also of *Scates v. Jacobs*, 3 Bing. 638, decides, that where, to a plea of the statute of limitations, the plaintiff replies a promise within six years, and proves a promise to pay *when of ability*, made three years after the original cause of action accrued, and within six years of the commencement of the action, he must at the trial prove the defendant's ability. Mr. Justice *Burrough* (who with Mr. Justice *Park* dissented from this decision) is reported to have said, “as to the supposed necessity for a promise, instead of, or as well as, a mere acknowledgment, it should seem not to be necessary in this case, from the circumstance that an action of debt would have lain to recover the price of the goods sold and delivered, and that a bare acknowledgment of the contract would have been sufficient to support such an action.” His Lordship also said,—“There seems to be a solid and recognized distinction between an acknowledgment made before the expiration of the six years, and an acknowledgment after.”

IN the ensuing Easter Term, *Mercether*, Serjt., moved, pursuant to the leave given. He contended, that the memorandum could not be construed otherwise than as a promise, and if not a promise, it was nothing.

The Court said, that the two items were distinct matters, and, therefore, could not have the effect suggested. If the sums had been cast up, it might perhaps have been otherwise.

Rule refused (a).

(a) The law as to what is sufficient to take a case out of the statute, has received very considerable alteration and amendment from an act introduced in the House of Peers by the Right Honourable Lord *Tenterden*, Chief Justice of the Court of King's Bench. That act, which received the royal assent on the 9th of May, *1828, and comes into operation on the 1st of January, 1829, after referring to the enactments of the English statute, 21 Jac. 1. c. 16, and the Irish statute, 10 Car. 1, Sess. 2, c. 6, enacts *inter alia*, "That in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint-contractors, or executors, or administrators of any contractor, no such joint-contractor, executor, or administrator shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: Provided always that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever: Provided also, that, in actions to be commenced against two or more such joint-contractors, or executors or administrators, if it shall appear, at the trial, or otherwise, that the plaintiff, though barred by either of the said recited acts or this act, as to one or more of such joint-contractors, or executors or administrators, shall, nevertheless, be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff, as to such defendant or defendants, against whom he shall recover, and for the other defendant or defendants against the plaintiff."

Section 2 enacts, "That if any defendant or defendants, in any action on any simple contract, shall plead any matter in abatement to the effect, that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial, that the action could not, by reason of the said recited acts or this act, or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same."

Section 3 enacts, "That no indorsement or memorandum of any payment written or made, after the time appointed for this act to take effect, upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes."

Section 4 enacts, "That the said recited acts and this act shall be deemed and taken to apply to the case of any debt or simple contract, alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise."

*300] Section 8 enacts, "That no memorandum or other writing made necessary by this act, shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps."

The act is the 9th Geo. 4, c. 14, and it is entitled "An act for rendering a written memorandum necessary to the validity of certain promises and engagements."

FURTHER ADJOURNED SITTINGS IN LONDON, AFTER HILARY TERM, 1828.

BEFORE LORD CHIEF JUSTICE BEST.

LOW et al. v. COPESTAKE. April 15.

If several persons, not partners in business, separately indorse, for the accommodation of the drawer, a bill of exchange, which has been previously indorsed by another person, and on the bill being dishonoured, pay the party who has discounted it in equal proportions, they may strike out their own indorsements, and bring a joint action against such previous indorser, to recover the amount of the bill.

ASSUMPSIT.—The declaration stated, that a certain person, using the name, &c., of Frances Elizabeth Biden, on the 6th day of May, 1826, according to the usage and custom of merchants, made her certain bill of exchange, directed to one Frances Biden, and thereby required her, twelve months after date, to pay to the order of her the said Frances Elizabeth Biden, the sum of 100*l.*, for value received. It then averred that the said Frances Elizabeth Biden indorsed the bill, to the order of the defendant, and that “the said defendant then and there indorsed and delivered the same bill of exchange to the said plaintiffs,” &c. Plea—The general issue.

It appeared that the defendant, a lace merchant, in London, indorsed the bill, for the accommodation of the drawer, who kept a school at Ramsgate, and that the three plaintiffs, Messrs. Low, Austen, and Rhodes, who were tradesmen at Ramsgate, but not partners in business, each separately indorsed also for the drawer's accommodation, immediately under the indorsement of the defendant. After these indorsements, the bill was discounted by another Ramsgate tradesman, and when it became due, it was not paid by either the drawer, or acceptor, and the holder applied to the plaintiffs, [301 and received from them the amount, all at the same time, each of them advancing one third of the money.

Wilde, Serjt., for the defendant, submitted, that the three plaintiffs, under the circumstances, could not be said to take the whole jointly under the defendant's indorsement; and that their each paying a part of the money, did not give them that joint interest, which would enable them to maintain the action. He cited the case of *Machell* and others v. *Kinnear* (a).

For the plaintiffs, the cases of *Ord* and others v. *Portal* (b), and *Atwood* and others v. *Rattenbury* (c), were relied on.

*BEST, C. J. It appears to me that the plaintiffs did not possess themselves of this bill by any joint payment, but by separate payments. But, allowing [302

(a) 1 Stark. 499. That case decides, that, where a bill of exchange is, by the direction of the payee, indorsed in blank, and delivered to A., B., & Co., who are bankers, on the account of the estate of an insolvent, which is vested in trustees for the benefit of his creditors.—A. and B., two of the members of the firm, and also trustees, cannot, conjointly with a third trustee, who is not a member of the firm, maintain an action against the indorser, without some evidence of the transfer of the bill to them, as trustees, by the firm, by delivery or otherwise.

(b) 3 Camp. 239. This was an action by three plaintiffs as indorsees, against the acceptor of a bill indorsed in blank; there was no evidence of their being in partnership. It was objected that they could not recover, because there was no proof to support the allegation, that the bill was indorsed to the three together. But Lord *Ellenborough* said, “There is no occasion for any such evidence. The indorsement in blank conveys a joint right of action to as many as agree in suing on the bill.”

(c) 6 J. B. Moore, 579. In this case, the plaintiffs, as indorsees of a bill of exchange, sued the drawer in their own right, and it appeared, that the bill had been indorsed to them in blank, before the death of one of the firm, who was a partner with them as bankers, and it was held that the action was well brought, without their describing themselves as surviving partners in the declaration, as they were not bound to prove the partnership, or that the bill was indorsed or delivered to them jointly with their deceased partner.

it to be so, why may they not strike out their indorsements, and proceed as the possessors of the bill? I do not know of any law to prevent their doing this; and I am therefore of opinion, that they are entitled to a verdict (a).

Verdict for the plaintiffs, 104*l*.

Taddy, Serjt., and *Tomlinson*, for the plaintiffs.

Wilde, Serjt., and *Perring*, for the defendant.

[Attornies—*Fairbank*, and *Freeman & Co.*]

(a) In the case of *Nackell v. Kinnear*, cited on the part of the defendant, Lord *Ellenborough* said, that if it had not been for the evidence of the *particular transfer*, an indorsement in blank might have entitled the parties who brought the action to recover.

GWYNNE, Esq., v. MAINSTONE. April 15.

An instrument by which A. agrees to let, and B. to take, certain premises, on the terms that A. shall pay certain specified rents, varying in amount, at the end of every three years, up to a specified date, and which provides, that, from and after that date, "*he shall pay the clear annual rent of 9*l*. till the end of the lease.*" but does not mention any time at which the lease is to terminate, is good only for the time previous to the date at which the 9*l*. is to commence.

ASSUMPSIT, to recover 31*l*., as half a year's rent, from Midsummer to Christmas, 1827, upon the following instrument, dated the 6th of July, 1827, and signed on that day by the plaintiff and defendant.

"Dr. Lawrence Gwynne hereby agrees to let to Mr. Charles Mainstone, a house and premises situate in Gwynne's place, Hackney Road, now in the possession of the said Charles Mainstone, upon the terms and conditions hereinafter stated; that is to say, that the said Charles Mainstone shall pay to the said Lawrence Gwynne, by quarterly payments, the annual rent of 62*l*., clear of *303] land-tax, *sewers-rate, and all other rates and taxes whatsoever, from Midsummer-day last past, till Midsummer-day, 1830; and from and after Midsummer-day, 1830, he shall pay the clear annual rent, as aforesaid, of 57*l*. till Midsummer-day, 1833; and from and after Midsummer-day, 1833, till Midsummer-day 1836, he shall pay the clear annual rent, as aforesaid, of 52*l*.; and from and after Midsummer-day 1836, till Midsummer-day, 1839, he shall pay the clear annual rent of 51*l*.; and from and after the year 1839, *he shall pay the clear annual rent of 9*l*., till the end of the lease.* And the said Charles Mainstone agrees to keep the said house and premises in thorough repair, and to insure the same from fire in the sum of 500*l*., in one of the public offices, in the joint names of himself and the said Lawrence Gwynne, and to pay 9*l*. to the said Lawrence Gwynne for the lease. And the said Charles Mainstone hereby agrees to take the said house and premises, upon the terms and conditions hereinbefore stated."

This instrument was stamped with a 30*s*. lease stamp.

Wilde, Serjt., for the plaintiff. This action is said to be defended on the ground that the instrument is void for uncertainty. But there is certainty for a particular time, and that is sufficient. The action is brought to recover half a year's rent, from Midsummer to Christmas, 1827, and there is a clear agreement to pay a certain rent, from Midsummer, 1827, to Midsummer, 1830. After the completion of the time specifically mentioned in the agreement, it will then operate as a lease at will.

Best, C. J. There is no time mentioned at which the tenancy is to be determined.

Wilde, Serjt. No, my Lord; but it is sufficient for the time specified. *Plowden's Com.* 271 (a).

* *Taddy*, Serjt., for the defendant, contended, that the plaintiff was not entitled to recover, as the agreement was evidently imperfect, and not intended to be acted upon as the foundation of a suit. [*304]

BEST, C. J. *Plowden's Commentary* says, "Brown said, if one make a lease for three years, and so from three years to three years, during the life of J. S., this shall be a good lease for no more than six years; for, during six years, there is certainty, for it was certain for the first three years: and when he says, and so from three years to three years, this is as much as if he had said, from this first three years during other three years, which contains certainty; but when he goes further, and says, during the life of J. S., this does not contain any certainty, for it is uncertain how many more years J. S. may live. So that at the commencement of the lease, the end of the number of years intended is not known, which is contrary to the nature of a lease for years, and therefore it shall only be good for six years in all. *Quod Dyer concessit.*" Upon the authority of this passage, I think that the instrument in question is good for the time certain, *viz.* up to Midsummer, 1839.

Tuddy, Serjt., also contended, that the instrument was not itself a lease, but merely an agreement for a lease.

But upon this point, at the suggestion of the Lord Chief Justice, an arrangement was entered into between the parties, by which the plaintiff undertook to execute a lease up to the year 1839, and was allowed to have his verdict entered for the half year's rent which was due.

* *Wilde*, Serjt., and *Hutchinson*, for the plaintiff.

Tuddy, Serjt., for the defendant.

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[Attornies—*Norton*, and *Ashton*.]

(a) *Say v. Fuller* and another. The case decides, that a lease for ten years by indenture, wherein the lessor grants, that, if the lessee pay, at the end and term of every ten years, ten thousand tiles, then he shall have a perpetual demise of the land, from ten years to ten years continually following, and out of the memory of men, is a good lease for no more than ten years; for, beyond that, no other term has any certain commencement, continuance, or end. This case is also reported in 4 Bac. Abr. 176.

In 6 Coke, 36, it is said, if a man make a lease for years, without saying how many, this shall be a good lease for two years certain, because for more there is no certainty, and for less there can be no sense in the words; and in 4 Bacon's Abridgment, p. 179, it is said, "If a person make a lease for a year, and so from year to year, as long as he shall continue person, or as long as he shall live, this is a lease for two years at least, if he lives and continues person so long; and after the two years, or at most after three years, but an estate at will for the uncertainty, unless livery be made." See the cases of *Phillips v. Hartley*, ante, p. 121, and *Wright v. Trevesant*, post, as to what is a lease, and what an agreement merely.

HAWKINS v. FINLAYSON. April 16.

In an action against the captain and owner of a steam vessel, for an injury resulting from the improper management of the vessel, if it appear, that a pilot had the control, such pilot is not a witness for the defendant, without a release, although the defendant himself was on board at the time.

ACTION by a bargeman, to recover damages for the loss of clothes, &c., occasioned by the sinking of a barge, in consequence of its being run foul of by a steamboat, of which the defendant was the captain and owner.

The injury took place in the river Avon, and the defendant was in the vessel,

but he had a pilot on board, who was steering at the time of the accident. This pilot was tendered as a witness on his behalf.

Bompas, Serjt., for the plaintiff, submitted, that he must be released.

Wilde, Serjt. They have shown that the captain and owner was on board.

Best, C. J. It has been held in insurance cases, in the Court of Common Pleas, that the pilot is answerable.

*306] *The pilot, being asked, said, "the captain does not interfere with my steering, I go where I please."

Wilde, Serjt. The cases in which pilots have been held to be answerable, are the cases of Trinity House pilots, which, by the act of Parliament, captains are *compellable to take*.

Best, C. J. I think he is not a witness without a release.

The objection was afterwards withdrawn.

Verdict for the plaintiff.

Bompas, Serjt., and *Fish*, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attornies—*Hicks & B.*, and *Clarke, R. & M.*]

COURT OF KING'S BENCH.

SITTINGS AT WESTMINSTER, AFTER HILARY TERM, 1828.

BEFORE LORD TENTERDEN, C. J.

BURTON v. GREEN. Feb. 18.

To prove an act of bankruptcy, in a trader who is a member of Parliament, by his not paying or securing to a creditor a debt of 100*l.* after the suing out of a writ of summons, &c. it is not absolutely necessary to call the creditor.

If a writ of *f. fu.* be sued out against one of several partners, for a debt due from him alone, there is great doubt as to what interest in the partnership property can be sold by the sheriff.

CASE against the defendant, as sheriff of the county of Lancaster, for a false return of *nulla bona* to a writ of *feri facias*, sued out by the plaintiff against Thomas Claughton, Esq. *Second* count for neglecting to levy.

*307] *The writ of *feri facias* was tested on the first day of Hilary Term, 1825; and it was proved that Mr. Claughton had a one-third share in the Ashton Green colliery, which was in the county of Lancaster, and where there were goods and fixtures belonging jointly to him and his two partners, to more than three times the amount to be levied under this execution; and it was contended on the part of the plaintiff, that the sheriff should have levied on this joint property to the extent of one-third.

The defence was, that partnership property could not be seized under a writ of *feri facias*, sued out against one partner only; and that, even if it could, a commission of bankrupt had been sued out against Mr. Claughton, in the month of March, 1824; and, therefore, the property in these goods had passed to the assignees, as the writ was issued in January after an act of bankruptcy, and within two months of the suing out of the commission. The act of bankruptcy relied on was under the stat. 4 Geo. 3, c. 33. To substantiate this, it was proved

that Mr. Claughton was a member of Parliament, and that, on the 9th of December, an affidavit of Thomas Legh, Esq., stating that Mr. Claughton was indebted to him in the sum of 25,000*l.*, for money lent, was filed with the clerk of the declarations, and a summons sued out on the same day. It was also proved, that the summons was duly served on Mr. Claughton. And the witness, who filed the affidavit and sued out the summons, stated, that Mr. Claughton had not given any security under the act, or satisfied Mr. Legh's debt, in any way that he knew of; but that Mr. Claughton's bail having been rejected, no appearance was ever entered for him. To show Mr. Legh a creditor to the amount of 100*l.*, one of the witnesses for the plaintiff stated in his cross-examination, that he knew Mr. Legh was a large creditor of Mr. Claughton's, and that, at one of the meetings under Mr. Claughton's bankruptcy, Mr. Claughton's counsel said that if all his objections to the debt were allowed, it would still exceed 60,000*l.* The *trading and petitioning creditor's debt were proved (Mr. Legh not [*309 being the petitioning creditor under the commission).

Tindal, S. G. Is it sufficiently shown, that Mr. Legh was a creditor, without his being called as a witness?

Lord TENTERDEN, C. J. I think it is. His Lordship added: It is not material to this case, but I am not quite satisfied as to the interest which the sheriff might have sold under the execution. There is great difficulty in making the sheriff a tenant in common with the partners.

Tindal, S. G., elected to be

Nonsuited.

Tindal, S. G., Reader, and Goulburn, for the plaintiff.

Sir J. Scarlett, and Tbmllinson, for the defendant.

[Attornies—Long & Co., and Redsdale.]

This, as to the act of bankruptcy, was a case under the stat. 4 Geo. 3, c. 33 (now repealed), for which sect. 10. of the late bankrupt act, 6 Geo. 4, c. 16, is substituted.

By the stat. 6 Geo. 4, c. 16, s. 10, it is enacted, "That if any creditor or creditors of any such trader, having privilege of Parliament to such amount as is hereinafter declared requisite to support a commission, shall file an affidavit or affidavits in any court of record at Westminster, that such debt or debts is or are justly due to him or them respectively; and that such debtor, as he or they verily believe, is such trader as aforesaid, and shall sue out of the same court a summons, or an original bill and summons against such trader, and serve him with a copy of such summons, if such trader shall not, within one calendar month after personal service of such summons, pay, secure, or compound for such debt or debts, to the satisfaction of such creditor or creditors, or enter into a bond in such sum, and with two sufficient sureties, as any of the judges of the court out of which such summons shall issue shall approve of, to pay such sum as shall be recovered in such action or actions, together with such costs as shall be given in the same, and within one calendar month *next after personal service of such summons, [*309 cause an appearance or appearances to be entered to such action or actions, in the proper court or courts in which the same shall have been brought, every such trader shall be deemed to have committed an act of bankruptcy from the time of the service of such summons, and any creditor or creditors of such trader to such amount as aforesaid may sue out a commission against him, and proceed thereon in like manner as against other bankrupts." See Arch. B. L. 270.

In the case of *Ex parte Harcourt*, 2 Rose, 211, Lord Eldon, C., speaking of the act of bankruptcy under the stat. 4 Geo. 3, c. 33, says, "It has indeed been argued, that the act of bankruptcy introduced by this statute must of necessity be proved by a creditor, because it is constituted of circumstances which rest, and can rest only on his particular testimony. The creditor can alone prove that the debt has not been paid, secured, or compounded for, to his satisfaction. I certainly concede, that with reference to the negative circumstances which the statute requires, the evidence of a creditor must, in this particular act of bankruptcy, be admitted to that extent; but the necessity which enacts this admission, enacts the extent of it; and although you must admit him to prove what he alone can prove, yet he is not to be admitted to prove what can be established by the evidence of others."

With respect to taking partnership property under an execution sued out against one partner for his separate debt, Lord Mansfield says, in the case of *Fox v. Hanbury*, Cowp. 449: "If a creditor takes out execution against one partner, as in Salk. 392, the vendee would be tenant in common;" and his Lordship cites the opinion of Lord Hardwick, in the case of *Skipp v. Harwood*, in the following terms: "If a creditor of one partner takes out execution against the partnership effects, he can only have the undivided share of his debtor, and must take it in the same manner the debtor himself had it, and subject to the rights of the other partner." In *Heydon v. Heydon*, Salk. 392, Lord Holt lays down, that the sheriff must seize the whole, and sell a moiety thereof undivided, and the vendee will be tenant in common with the other partner.

In *Taylor v. Fields*, 4 Ves. 396, it was held by the Court of Exchequer, that the separate creditor of a partner has no right against the joint property, further than the separate interest of that partner, viz. his share upon a division of the surplus, subject to the accounts of the partnership; and the Court held, that the joint property of an insolvent partnership, taken in execution for a separate debt, could not be held against the joint creditors.

In *Ex parte Hamper*, 17 Ves. 407, Lord Eldon says, that an individual creditor getting execution, might undoubtedly have laid hold of the joint effects at law, subject to an account, ascertaining the specific interest in such joint effects; and in *Waters v. Taylor*, 2 Ves. & B. *310] 300, his Lordship inquiring how a sheriff executes a writ *under a judgment against one partner? Mr. Cooke (*amicus curiæ*) stated, that the way in which the sheriff executes the writ in practice, is by making a bill of sale of the actual interest. And in that case, Lord Eldon said, "If the Courts of law have followed Courts of equity in giving execution against partnership effects, I desire to have it understood, that they do not appear to me to adhere to the principle, when they suppose that the interest can be sold before it has been ascertained what is the subject of sale and purchase. According to the old law, I mean before Lord Mansfield's time, the sheriff, under an execution against partnership effects, took the undivided share of the debtor, without reference to the partnership account; but a Court of equity would have set that right, by taking the account and ascertaining what the sheriff ought to have sold. The Courts of law have now, however, repeatedly laid down, that they will sell the actual interest of the partner professing to execute the equities between the parties, but forgetting that a Court of equity ascertains previously what was to be sold. How could a Court of law ascertain what was the interest to be sold, and what the equities depending upon an account of all the concerns of the partners for years?" In the case of *Parker v. Pistor*, 3 B. & P. 288, where a *f. fa.* issued against one partner, the Court would not, at the request of the partnership creditors, give the sheriff time to return the writ, until an account could be taken of the claims upon the partnership; and the Court said, that the safest line of conduct for the sheriff to pursue, was to put some person in the possession of defendant's share as vendee, leaving him and the parties interested to contest the matter in equity, where a bill might be filed, stating that he had taken possession of the property, and praying that it might not be disposed of till all the claims were arranged.

BURROWS, Gent., v. UNWIN. Feb. 18.

Practice.—After the Jury have had the case summed up to them, and have retired, the Court will not permit them to see a treatise on the law of the subject, even with consent of parties, as they should state their difficulty to the Judge, and receive his direction as to the law.

CASE, for negligence of the defendant's servant.

LORD TENTERDEN, C. J., had summed up the evidence, and the Jury had retired, when they sent a message to his Lordship, desiring to have Selwyn's Law of Nisi Prius sent them from the library of the Court.

*311] LORD TENTERDEN, C. J., asked the counsel on both *sides if they objected to its being sent, and they answered that they had no objection. However, his Lordship observed, "The regular way is, for the Jury to come into Court and state their question, and receive the law from the Court: and for the sake of precedent that course should be adopted now."

The books were not sent.

Verdict for the plaintiff.—Damages, 1s.

Sir J. Scarlett, F. Pollock, and Gunning, for the plaintiff.

Brougham, for the defendant.

[Attornies—Robinson & B., and Brooksbank & F.]

MACLEOD, M. D. v. WAKLEY. Feb. 19.

Whatever is fairly written of a work, and can be reasonably said of it, or of its author, as connected with it, is not actionable, unless it appear that the party, under the pretext of criticizing the work, takes an opportunity of attacking the character of its author. In cases of libel, a subsequent publication, brought out even after issue joined, may be evidence to show the motives of the party.

An admission signed by the defendant's attorney, consenting to admit the defendant to be editor of a periodical work called "The Lancet," is no evidence that the defendant was editor on a day subsequent to the date of such admission.

LIBEL.—The plaintiff was a physician, and the editor of a periodical work called "The London Medical and Physical Journal;" and the libel complained of was published in "The Lancet," also a periodical work, published by the defendant.

The number of the Lancet which was the subject of the present action, was published on the 19th of May, 1827, and tended to cast ridicule on the plaintiff, as the editor of the London Medical and Physical Journal.

In opening the case, Sir J. Scarlett was proceeding to read the following paragraph from a later number of the Lancet, published two days only before the trial. "*Macleod v. Wakley.*—The yellow Goth will be scarified by Mr. Brougham on Monday next, at the Court of King's Bench, at Westminster."

**Brougham*, for the defendant. I submit that this cannot be evidence. [*312] This was published after issue joined, and it can have nothing to do with any injury the plaintiff had sustained at the time of the bringing of this action.

Lord TENTERDEN, C. J. I am by no means satisfied that what is published at any time before the trial, may not be evidence to show the motive of the party; however late any thing takes place, it may be evidence of a previous intention as to a previous fact.

To prove that the defendant was the editor of the Lancet, the following admission was put in:—

"In the King's Bench.

Between Roderick Macleod, plaintiff,

and

Thomas Wakley, defendant.

"We hereby admit the above-named defendant to be the editor of a certain periodical publication, called the Lancet, mentioned in the declaration in this cause, and consent that the above-named plaintiff shall not be required to give evidence thereof on the trial of this cause. Dated this 13th day of February, 1828.

(Signed) FAIRTHORN & LOFTY,
King Street, City."

The libel was read, and the plaintiff's counsel wished to read the paragraph already stated, beginning "The yellow Goth."

**Brougham*, for the defendant. There is no evidence that the defendant, Mr. Wakley, was the author of that. We have only admitted him to be editor up to the 13th of February, and this was published afterwards.

Sir J. Scarlett, *contrâ*. It is admitted, that Mr. *Wakley was the editor, and it lies on him to show that he is no longer so, especially as [*313] we can show that the publication continues in the same form, and at the same shop.

Lord TENTERDEN, C. J. I do not think that I can hold that this admission can be extended to a publication after its date. I consider that the admission goes down to its date, but no further.

The evidence was rejected.

**Brougham*, for the defendant, contended, that the alleged libel only attacked

the plaintiff as the editor of a periodical work, and was in fact only fair criticism; and he relied on the case of *Carr v. Hood*, 1 Camp. 355, n., and also on the case of *Hall v. Longman*, decided in the Exchequer very recently, and in which the doctrine laid down in the case of *Carr v. Hood*, was confirmed.

LORD TENTERDEN, C. J. (in summing up.) It has been stated on the part of the defendant, that the matter contained in this publication relates to the plaintiff only as an author; but still there is no doubt that a man who is an author, has a right to have his character protected, just the same as if he acted in any other capacity. However, notwithstanding that, whatever is fair, and can be reasonably said of the works of authors or of themselves, as connected with their works, is not actionable, unless it appear that, under the pretext of criticizing the works, the defendant takes an opportunity of attacking the character of the author; and then it will be a libel. That there is in this publication a great deal of ridicule, must be admitted by every one; and I think that there appears also to be some rancour: still, if you think that what is said here was fairly called for by what the plaintiff had done as the editor of another publication, *314] the defendant is entitled to a verdict; but if you should think the remarks were not fairly called for, you will find for the plaintiff.

Verdict for the plaintiff.—Damages 5*l*.

J. Scarlett, F. Pollock, and Patteson, for the plaintiff.
Brougham, and Kelly, for the defendant.

[Attornies—*Poole & Co.*, and *Fairthorn & L.*]

ADJOURNED SITTINGS IN LONDON, AFTER HILARY TERM, 1828.

BEFORE LORD TENTERDEN, C. J.

SAUNDERSON *v.* HANSON, Gent., &c. Feb. 29.

Scille, that if a tenant pays taxes which he alleges ought to have been paid by his landlord, and afterwards pays rent for two years subsequently, without making any deduction, he cannot recover the amount in an action against the landlord. *Scille*, also, that a broker, who, when receiving rent under a distress, deducts a sum purporting to be for land-tax, is not to be considered as *allowing* the land-tax, so as to affect the landlord's right, but as merely, from not knowing how to act, consenting to receive the money without the sum deducted.

ASSUMPSIT for money paid to the use of the defendant.—The plaintiff had been tenant to the defendant, and the action was brought to recover a sum of 6*l*. 15*s*. for land-tax and sewers-rates, which had been paid by the plaintiff during the tenancy, but omitted to be deducted out of the rent. A distress had been put in for one quarter's rent, and the broker who received the money under it, had deducted a sum of 18*s*. 4*d*., which it appeared was one of the usual amounts of the land-tax. This, it was contended for the plaintiff, showed that the land-tax was only paid on behalf of the defendant.

LORD TENTERDEN, C. J. On the face of the receipt I should say, that the broker does not *allow* the land-tax. He does not know what to do on the subject, and he consents to receive the money without it.

*315] His Lordship then inquired, at what time the payments sought to be recovered were made? and was told, in 1825; and that the plaintiff had continued to hold and pay rent for two years afterwards.

Campbell, for the defendant said, that he should prove an agreement by the plaintiff to pay the land-tax and sewers-rate.

Lord TENTERDEN, C. J. How can the plaintiff, after continuing to pay rent for so long a time subsequently to the payment of the taxes, be in a situation to maintain this action?

Thesiger, for the plaintiff, referred to *Stubbs v. Parsons (a)*.

Lord TENTERDEN, C. J. If a man goes on after paying taxes, and pays rent for a long time without deducting them, what can be presumed, but that he had no right to make the deduction? What man is safe if this is to be allowed? But it is said there was an agreement. Let that be proved.

The agreement was then proved as opened by Mr. *Campbell*, and the plaintiff was

Nonsuited.

Thesiger, for the plaintiff.

Campbell, for the defendant.

[Attornies—*G. W. Armstrong*, and *in Person*.]

(a) 3 Barn. & Ald. 516.

*JACKS v. BELL et. al. Feb. 29.

[*316]

A person who has preferred an indictment for an assault, from which he did not suffer any personal injury, and has succeeded in it, and received from the Treasury a portion of the fine imposed upon the defendant, is not entitled, in an action against the same defendant, to recover more than nominal damages. And it is the duty of an attorney when applied to to bring such an action, to dissuade the party from persevering in his intention.

ASSAULT.—It appeared that the defendants had been indicted for the same assault on the prosecution of the plaintiff, and were found guilty and fined; and that the plaintiff had received from the Treasury the sum of 100*l.*, part of the fines imposed. It did not appear that the plaintiff had suffered any personal injury.

Lord TENTERDEN, C. J., to the plaintiff's counsel. Is a man to bring an action after he has succeeded in an indictment, and received a part of the fines imposed on the defendants?

Platt, for the plaintiff. I am prepared to contend in support of his right.

Lord TENTERDEN, C. J. I know that by law he may maintain the action; but what damages is he to recover? A Judge's certificate is necessary to enable the party to receive such fine; and I am sure that not one of the Judges upon the bench would have given the certificate in this case, if he had known that an action was afterwards to be brought.

The plaintiff's attorney was then called as a witness, and stated, that his bill for the prosecution amounted to the whole sum which the plaintiff had received from the Treasury, and added, in answer to a question from the Court, that when the plaintiff applied to him to bring the action, he neither persuaded him to go on, nor dissuaded him from it.

Sir *J. Scarlett*, for the defendants. This mode of proceeding is quite unexampled in my experience. His *Lordship, I am sure, will say, that the Courts never grant certificates for the receipt of any part of a fine, if [*317 any action is brought for the same cause. In this case, as there is no proof of any personal injury, one farthing damages will be quite sufficient, as a plaintiff

should not be encouraged to bring such an action, or an attorney to assist him in so doing.

Lord TENTERDEN, C. J. In this case there must be a verdict for the plaintiff; but the question will be, as to the amount of damages. The parties have been indicted, and now an action is brought against them. Here is a twofold proceeding—a double harass and a double vexation for one and the same offence. In actions for assaults, Juries do not in general confine themselves to damages for the personal injury sustained. I do not remember any instance in which a party has brought an action after having preferred an indictment, and received a portion of the fine. It does not appear in this case, that any personal injury has been sustained. You will therefore say, under these circumstances, what damages you think ought to be given to the plaintiff.

The Jury found for the plaintiff.—Damages one farthing.

Lord TENTERDEN, C. J. I am really sorry that this action has been brought, because it will operate to prevent the Judges from granting certificates, to enable prosecutors to receive part of the fines imposed upon defendants.

His Lordship then observed to the plaintiff's attorney: You say in your evidence, that you neither persuaded nor dissuaded the plaintiff, when he applied *318] to you on the subject of this action. In that respect you did not do *your duty. It was your duty to tell him, that he ought not to bring the action.

Platt, for the plaintiff.

Sir *J. Scarlett*, *Denman*, C. S., and *Goulburn*, for the defendants.

BRADLEY v. WATERHOUSE and BRIGGS. *March 4.*

A parcel containing two hundred sovereigns inclosed in six pounds of tea, was sent by coach, and paid for as of ordinary value, both the party sending and the owner of the parcel being aware of a notice by the coach proprietors, limiting their responsibility to 5*l.*; the parcel was stolen by one of the porters of the coach, while it was standing in the street at a manufacturing town in the course of its journey: In an action to recover the value from the coach proprietors the defendants had a verdict, on the ground, that the loss was occasioned by the improper mode in which the parcel had been committed to their care.

CASE to recover damages for the loss of a parcel, containing six pounds of tea and two hundred sovereigns.—The plaintiff was a banker, residing at Ashbourne in Derbyshire, and the defendants were the proprietors of the Manchester Defiance coach, which passes through Ashbourne. The tea and the sovereigns were sent by the plaintiff's sons, who were grocers and tea dealers in London. The sovereigns were inclosed in paper, and put with the tea into a bag, and the whole was covered with a wrapper. Twopence was paid for the booking, and two shillings for the carriage, being the sum payable for an ordinary parcel of the same size and weight, without any reference to the value. The plaintiff's sons had been in the habit, for several years previously, of sending him money in similar parcels, to the amount in the course of a year of 15,000*l.* or 20,000*l.* The parcel was stolen by one of the porters attending the coach at Leicester, and he was tried for the offence and transported. It appeared to have been the practice to change the guard at Leicester, at which place the coach arrived at six in the morning; and the coach was left in the street there for the space of about half an hour. If any thing was paid for according to the value, it was particularly noticed in the way-bill, and the new guard was told to take particular care of it. After the loss, the defendants changed their plan, and the same guard went all the way through to Manchester. Parcels *319] containing money to be sent to London, were frequently *brought by the plaintiff's servants to the booking-office at Ashbourne; but

the book-keeper refused to take them as ordinary parcels, and the servants waited and delivered them themselves to the coachman. Both the party sending the goods, and the plaintiff, were aware of the notice by which the defendants restricted their liability to parcels of 5*l.* value. The defendant Briggs, in a conversation with a friend of the plaintiff's, after the trial for the robbery, said, that he would wait on him in London and settle the action, and urged him to persuade the plaintiff to remit a portion of the amount, as he did not pay any insurance, adding, that he would make the guard pay a part for his negligence, as he had no business to leave the coach to the porters. On one occasion, when the plaintiff's servant took a parcel with money to the office at Ashbourne, the book-keeper told him that they would not be liable for such a parcel, if it was lost, unless it was paid for according to its value. The servant told this to the plaintiff, and he said, in reply, "O never mind; they will talk, but I must run the risk."

Tindal, S. G., for the plaintiff. The 5*l.* notice does not extend to protect the coach proprietor against misfeasance, either of himself or his servants, or against gross negligence. There are several cases to this effect. There was one lately decided in the Court of Common Pleas; and in this Court, there is the case of *Garnet v. Willan* (a). There the change of the nature of the conveyance was considered, as taking the case out of the effect of the notice; and in the still later case of *Sleat v. Fagg* (b), the same doctrine was laid down. It may be said, that there was concealment with respect to the two hundred sovereigns; but the defendants are wrong-doers, and cannot avail themselves of the misconduct of the other party. It was so said in the case of *Sleat v. Fagg*, and there was no more concealment in this case than in any other. If there was not *the exercise of ordinary care and diligence, the state of the parcel will [*320 make no difference with regard to the rights of the parties.

Sir *J. Scarlett*, for the defendants. There is no consideration for the promise which has been spoken to as made by the defendant Briggs. A master has great reason to complain of those who constantly expose his servants to a temptation under which they may eventually fall. The case of *Sleat v. Fagg* had nothing to do with the notice, it was founded on a special contract to send by the mail, and the defendant sent by another coach, which he had no right to do, because a person may choose to trust the mail, when he would not trust to any other conveyance. I admit that a case of very gross negligence may not be protected by the notice. The plaintiff in this case has imposed on the carrier. I remember a case of a Jew who sent dollars and gold packed up with a quantity of apples, from Stamford to London, and the Jury gave a verdict for the defendant, on the ground that the plaintiff had himself exposed the property to that risk which was the cause of the disaster. A carrier has a right to say, if you send money, you do it at your own risk; the responsibility is too great for me, and I will not undertake it. This is a perfectly reasonable protestation, and a carrier is bound to make it. A man may choose notwithstanding to send money by coach. The words of the notice are "on any account whatsoever." If a man wishing to send money in a parcel thrusts it on the carrier in defiance of the notice, he cannot claim damages if a loss should happen. No extraordinary negligence has been proved, but on the contrary, it appears from the evidence that the business was conducted in the ordinary way. It is not the practice to call over the parcels when the guard is changed. I submit that the case, as proved, goes to discharge the defendants altogether. The promise made by the defendant Briggs, is not binding, as it did not proceed upon a *knowledge of all the circumstances. If the plaintiffs had not concealed [*321 the nature of its contents, special attention would have been paid to the parcel. The defendants have also been at the expense of prosecuting.

Tindal, S. G., in reply. Bradley's saying that he must run the risk, means,

that he was aware of the notice, and must run such risk as the law would throw upon him; but he could not mean that he would run the risk of extraordinary negligence on the part of the defendants. The coach was left for half an hour without protection, in a populous manufacturing town. This ought not to have been the case, and the defendants themselves have discovered the impropriety of it, for, ever since the loss, they have made the guard go the whole of the journey.

LORD TENTERDEN, C. J. I own it seems to me that the case may be considered as if the notice was not an absolute bar, as the defendants must be supposed to have known that the plaintiff was in the habit, from the way in which the parcels were made up, of sending other things besides goods. And then that may introduce the question, whether there has been gross negligence on the part of the defendants; but you will also consider, whether it does not introduce another and preliminary question; viz. Has the plaintiff brought this loss upon himself, by his own manner of conducting his business. The way in which the loss occurred, does not appear to have been discovered for a great length of time. The particular negligence imputed to the defendants, is the leaving the coach in the street for half an hour. Now, if during that time a stranger had robbed the coach, it might have been said to the defendants, you ought to take care that thieves in the street do not steal the parcels which are committed to your custody; but no man can be sure that he shall protect himself against the dishonesty of his own servants. It is fit to consider, in such a *322] case, whether the party *complaining, or seeking to charge the carrier, has or has not been the cause of the servant's dishonesty. In the present case, the mode in which the goods were packed, might have that effect. The weight would be notice of the nature of the contents, and afford a temptation to the servants to purloin. It is said that the defendants were conscious, from the statement of Briggs, that they were bound to make good the loss. But Briggs only says that he will "*settle it*," he does not say that he will pay the amount. And this he says, that he individually will do, and not he and Waterhouse the other defendant. This looks as if he thought, that he, from living at Leicester, was the party who would be liable; and if so, on the effect of his admission he alone would be responsible. If, however, he acted under a misapprehension of the responsibility which the law would cast upon him, his admission is not such as can be used with effect against him. It appears, too, that he talks of it as a matter of compromise. The question comes to this: has this been a case of gross negligence on the part of the defendants, or has the loss been brought on by the plaintiff's own conduct in sending valuable articles under such a slight disguise? If you are of opinion that the latter was the case, then you will find your verdict for the defendants.

Verdict for the defendants.

Tindal, S. G., *Marryatt*, and *Hill*, for the plaintiff.

Sir *J. Scarlett*, and *F. Pollock*, for the defendants.

[Attornies—*Young & V.*, and *T. Leigh*.]

See the cases of *Langley v. Brown*, 1 Moore & Payne, 583; and *Mayhew v. Eames*, ante, Vol. 1, p. 550.

*FENWICK v. ROBINSON. *April 17.*

If a new ship is insured, "on a voyage from Bristol to New York, during her stay there, and back to her port of discharge," and on her passage back from New York to England, sustains an injury, which requires her to be repaired, the underwriter is not entitled to deduct one-third new for old, as the whole is to be considered only one voyage.

ACTION against the defendant, as secretary of the Patriotic Insurance Company, on a policy of insurance on the ship *Bolivar*, valued at 4000*l.*, on a voyage from Bristol to New York, during her stay there, and back to her port of discharge. The vessel sailed from Bristol to New York, and discharged her cargo there, and on her return to England met with a disaster, and was obliged to be repaired. The question in the cause was, whether the rule of Lloyd's, of deducting one-third new for old, where a ship is injured after she has been one voyage, applied to the case of the *Bolivar*, or, in other words, whether the passage from New York to England was to be considered as a second voyage, or only as a part of the first. Several witnesses were called on the part of the plaintiff, who said, that the passage from England to New York, and the passage from New York to England, constituted together only one voyage; and some of them added, that they had settled averages in cases of a similar description, and had not allowed the deduction.

The witnesses who were called on the part of the defendant, stated, that it is a voyage when a vessel has earned freight, or been in a situation to earn it; and some of them stated, that they had known instances in which ships sent in ballast to Bourdeaux for wine, and to Sunderland for coals, were considered, when coming back, as on a second voyage.

F. Pollock, for the plaintiff, contended, that as the words of the policy were "on a voyage from Bristol to New York," "and back to her port of discharge," the underwriters were bound by that description to pay the whole without deduction. He submitted that the question was, whether there was such an invariable rule on the subject, that the plaintiff must be taken to have contracted *on the faith of it; and that this could not be the case, when it was [*324] proved that averages had been settled in opposition to it.

LORD TENTERDEN, C. J. (to the Jury.) The only question is, whether or no the defendant is to pay the whole expense of the repairs, or is to be permitted to deduct one-third. On the face of the policy, nothing appears about this deduction, and therefore the defendant, who seeks to make it, is bound to show that he has a right to do so. He founds his claim on a supposed custom. That there is a custom to deduct one-third is clear and indisputable; and it is founded upon the supposition, that there is a difference between new and old materials; and to avoid discussion in each particular case, it is agreed that the deduction shall be of one-third. I am as great a friend to general rules as any one. But it is impossible to lay down any general rule, which may not, in some cases, be productive of hardship. It is admitted that this rule is not absolutely universal, for if the loss happens on a first voyage, the underwriter is not entitled to the deduction. And that introduces the question, whether, in this case, it was her first voyage in which the ship became injured. All the witnesses for the plaintiff agree in considering the whole as one voyage; some of them say, that they have actually settled averages in cases similar to the present, without allowing the deduction. Many questions were put to them, in cross-examination, as to the rule in long voyages; and they appeared by no means prepared to give very accurate evidence on the subject. Some thought the policy would regulate it, some the charter-party, and some considered that it was a question of time. Perhaps it may not be unfit or unreasonable to consider whether the voyage out and home was not *all one adventure*. The policy is all one, and the contract is all one, and it seems to me to be all one adventure. The defendant's witnesses say, that it is a voyage when a vessel has earned freight, or is *in [*325]

a situation to earn it; and some of them, that where a vessel is sent in ballast to a particular place, for a cargo, and is injured in coming back, the third is to be deducted as on a second voyage, and they also add, that they have settled averages on that principle. There is therefore contradictory evidence on the part of the plaintiff and defendant. The witnesses for the plaintiff are more in number than those of the defendant. But it is a question on which you may have some personal knowledge. I think the observation correct, which was made on the part of the plaintiff, that, inasmuch as the policy does not in its terms make any provision on the subject, the defendant must make out the practice clearly to your satisfaction; and that, if he has not so done, he cannot be considered as having brought himself within the rule.

The Jury found for the plaintiff, saying that they considered it as all one voyage.

F. Pollock, and *Alderson*, for the plaintiff.

Sir J. Scarlett, and *Campbell*, for the defendant.

[Attornies—*Thompson, B. & S.*, and *Oliverson & Co.*]

SLATER et al. v. WEST. April 19.

A trader in London took a bill of exchange in part payment for goods, of a person representing himself to be a tradesman from the country, and to have been recommended by a customer, and sent the goods, in consequence of an order from the buyer, to a public-house, which was not a booking-office, without making any inquiries except as to the respectability of the acceptor. The bill turned out to have been stolen, and, in an action by the trader against the acceptor, the defendant had a verdict, on the ground that the plaintiff had taken the bill out of the ordinary course of trade, and under circumstances which ought to have excited his suspicion.

ASSUMPSIT, on a bill of exchange, for 45*l.*, dated the 10th of July, 1827, drawn by one Darby, on and accepted by the defendant, payable at two months after date. Plea, the general issue.

*326] On the morning of the 5th of September, 1827, a *stranger of respectable appearance came to the warehouse of the plaintiffs, who were in the Scotch and Manchester trade, and stated that his name was Symes, that he was a tailor at Taunton, and that he was recommended to them by a Mr. Combes, of that place (who, it appeared, had extensive dealings with the plaintiffs). He selected a quantity of woollen cloths and velveteens. While he was making the selection, he asked the managing clerk if they would have any objection to take a bill in part payment. The clerk replied, that they should not, provided the parties were respectable, and requested that he would leave it with them for a time, that they might make the necessary inquiries. Symes went away for about an hour, and inquiries, during his absence, were made by one of the plaintiffs, as to the goodness of the bill; and on Symes's return, he was told that he might have the goods. They amounted to 56*l.* 2*s.* Symes, in addition to the bill, paid 11*l.* 2*s.* in cash, and directed the goods to be sent to the Rose and French Horn, in Wood Street, about five minutes' walk from the plaintiffs' premises. They were sent in the course of the same day. The Rose and French Horn was not a booking-office, but an ordinary public-house. When the porter arrived there, he deposited the goods in the passage (a), and Symes,

(a) It appeared that the direction, "Mr. Thomas Symes, Taunton," was covered with brown paper fastened down by skewers; and some observations were made on this circumstance, as suspicious; but it was proved to be the practice of the trade so to cover the directions of the

who was not known there, came out of the parlour with another person, and gave the porter something to drink. Symes himself signed the porter's book. The porter suspected that all was not quite right, but had not an opportunity of communicating his suspicions to the plaintiffs till the following morning, when, in consequence of what he told them, they sent him to the *public-house [†327 to make inquiries. Symes, soon after the departure of the porter, took away the goods in a truck. The bill in question was lost, soon after it was drawn, from the custody of the brother of the drawer, who was going to get it discounted. On the 10th of August (four or five days after the loss), an advertisement was inserted in the Morning Advertiser newspaper, stating the loss of the bill, and the names of the parties to it, and requesting that it might be brought to Arabella Row, Pimlico. It was not proved that the plaintiffs were in the habit of reading the Morning Advertiser. They did not make any inquiries as to the truth of Symes's representation, nor did they ask him for a reference to any person in London.

Gurney, for the defendant, contended, that the plaintiffs were not entitled to recover. The inquiry as to the respectability of the parties to the bill, is immaterial to the consideration of this case. The important inquiry is, whether there was such a person as Mr. Thomas Symes, of Taunton. In the case of *Gill v. Cubitt* (a), the Judge, the Jury, and the Court of King's Bench afterwards, held that a person who takes a bill of exchange, should make inquiries as to the person who brings it, or show that he is acquainted with him. Any swindler may pick up the name of a customer. A person who loses a bill, is entitled to require that the party to whom it is offered should make due inquiry, before he takes it. Symes did not bring any letter from Mr. Combes, of Taunton. It is not the mode of doing business, that a perfect stranger is to come into a warehouse, and his word to be taken, as to who and what he is, without any inquiry being made into the truth of his statements. The question is, who is to be at the loss of the amount of this bill; the drawer, who has been guilty of no negligence, or the plaintiffs, who, as I *submit, have been guilty [†328 of great negligence, and have conducted their business in a very incautious way.

Brougham, for the plaintiffs. The case of *Gill v. Cubitt*, it is true, decides, that you must ask questions of the bearer, if you are not acquainted with him; but I deny that you are bound to make inquiries of other people about him. The statement made by Symes, that he knew Mr. Combes, of Taunton, was something whereby to identify the person, and rendered it highly improbable that he should be any other than the person he represented himself to be. If Symes had represented himself as living at Paddington, where the acceptor of the bill did live, the plaintiffs would have made inquiry about him; but he stated that he lived at Taunton. According to the argument on the other side, they should have stopped the transaction for three or four days, till they had written and received an answer. This might be very well in a extraordinary transaction; but the circulation of paper could not go on, if it were considered to be requisite in those of an ordinary description. As to the advertisement of the loss, the Morning Advertiser is not the paper in which a notice, as regards the plaintiffs, who are respectable Manchester warehousemen, ought to have been inserted. It is, with reference to their situation, the most obscure that could have been selected. The porter might have his suspicions, but he did not communicate them to his employers at the time. It appears that Symes was a person of respectable appearance. I submit, under all the circumstances, that nothing was done by the plaintiffs, which was not in the ordinary and regular course of business: and therefore that they are entitled to recover on the bill.

Lord TENTERDEN, C. J. (in summing up, said,) There is no proof that the

packages sent out, in order that thieves may not see, while the goods are being carried through the streets, to what place they are going.

(a) *Ante*, Vol. 1, pp. 163, 487.

newspaper ever came under the view of the plaintiffs. The plaintiffs have given value for the bill, but it is contended, that they are not entitled to *329] *recover upon it, because it is said, that if any person takes a bill of exchange out of the ordinary course of trade and business, and under circumstances which ought to excite suspicion in the mind of a reasonable man, knowing how the affairs of the world are conducted, he cannot afterwards sue upon that instrument. This doctrine is of modern origin. I believe that I was the first Judge who decided this point at *Nisi Prius*. The Court to which I belong, confirmed my decision, and the other Courts have, I believe, acted on the same principle. But in every case of this description, the question is one which ought to be guardedly and carefully considered. We are to take care, on the one hand, that we do not prevent the circulation of paper, which circulation is so essential to the commerce of the country; and, on the other hand, that we do not allow persons to take it under the circumstances I have mentioned, because, by so doing, we shall give encouragement to thieving, which has been carried on lately to a very considerable extent. It is our duty, bearing both these things in mind, to give our attention to the evidence in the case. I think our judgment must be confined to the evidence of that which passed in the first instance, at the plaintiffs' warehouse, because, although the porter, after he had delivered the goods, might have his suspicions excited, yet he did not the same day communicate his suspicions to the plaintiffs. As to the brown paper being placed to cover the direction, it struck me, at first, as extraordinary, but it turns out not to be so, as connected with the evidence of the practice of the plaintiffs and another house. It seems that it was done in the ordinary course of business. It appears that the Rose and French Horn was not a booking-office, and was situate very near the warehouse of the plaintiffs; and it is perhaps a little extraordinary that the plaintiffs should not have known that it was not a booking-office. But the porter says, that those offices are so frequently altered, that it was not easy to know.

*330] If the manner in which the bill was offered by *a perfect stranger, making verbal representations, and desiring the goods to be sent to such a place, but betraying no consciousness of suspicion, and buying to a larger amount than the amount of the bill, leads you to conclude, that the plaintiffs ought to have had their suspicions excited, then I am of opinion that you should find your verdict for the defendant. This case differs from those which have been already decided on the subject. There seems to be a difference between the cases of a purchase of goods and the discounting of a bill, by a bill-broker. There was a case tried here (a), in which a person presented a check to a tradesman, in payment for a small parcel of goods, and received the remainder in money. That, also, was very different from the present; and, with respect to the cases against the bankers, they were cases of notes of a large amount (b). If you think that the plaintiffs took this bill out of the ordinary course of business, and under circumstances which should have excited their suspicion, that the person giving it was not entitled to it, then you will find your verdict for the defendant. But unless you can come to that conclusion, then, as the plaintiffs have given full value for the bill, you will find your verdict for them.

Verdict for the defendant.

Brougham, and *Platt*, for the plaintiffs.

Gurney, and *Chitty*, for the defendant.

[Attornies—*James & W.*, and *Towers*.]

(a) *Downe v. Halling* and others, *ante*, Vol. 2, p. 11.

(b) *Snow v. Peacock*, *ante*, Vol. 2, p. 215; and *Snow v. Leatham*, *Id.* p. 314.

ON the first day of the ensuing Easter Term, *Brougham* moved for a new trial.

LORD TENTERDEN, C. J., said, The case was one which *was peculiarly proper for the consideration of the Jury. I do not say, that, if they had found their verdict the other way, I should have been dissatisfied. [*331]

BAYLEY, J. The circumstance of the man's directing the parcel to be sent at a given hour, was one to excite suspicion. The plaintiffs might also have looked into the Directory, to see if the public-house was a booking-office. I think that this verdict, so far from being a check to the circulation of bills, will tend to prevent a person meditating fraud from carrying it into execution.

LITLEDALE, J. I should have been satisfied if the verdict had been the other way, but it was peculiarly a matter for the consideration of the Jury.

Rule refused.

ADJOURNED SITTINGS IN LONDON, AFTER EASTER TERM, 1828.

BEFORE LORD TENTERDEN, C. J.

MUDIE v. BELL et al. May 29.

A declaration which alleges, that A. B. broke and entered the *dwelling-house* of the plaintiff, and made a disturbance *therein*, and broke open *part of the leads and roof of said dwelling-house*, is not supported by proof of breaking an external rail fence, and trespassing on leads forming the roof of a counting-house, occupied by A. B., but used as an easement to the house of the plaintiff.

TRESPASS.—The declaration stated, that the defendants broke and entered a certain *dwelling-house* of the plaintiff's and made a great noise and disturbance *therein*, and stayed, &c., and forced and broke open *part of the leads and roof of the said dwelling-house*, and broke to pieces, &c., divers doors, windows, &c., by means of which *premises the plaintiff and his family were greatly disturbed, &c., in the peaceable possession of the said *dwelling-house*, &c. [*332]
Plea—Not Guilty.

It appeared that a counting-house, occupied by one of the defendants, extended behind the plaintiff's house, so that the roof of it, consisting of leads with a skylight, came just under the windows of the plaintiff's kitchen. During the occupation of the plaintiff's house by the person under whom he held it, the leads of the roof of the counting-house were used as an easement to that house, and a meat-safe was erected on them; but they had been repaired by those under whom the defendants claimed. The injury complained of was, the breaking of an external rail fence, and trespassing on the leads.

LORD TENTERDEN, C. J., was of opinion, that, upon this evidence, there was no proof of a breaking of the plaintiff's *dwelling-house*, and therefore directed a Nonsuit.

Brougham, and *Parke*, for the plaintiff.

Campbell, *F. Pollock*, *J. Williams*, *Crompton*, and *Steer*, for the respective defendants.

[Attornies—*Acton*, and *Woodward & S.*]

IN the ensuing Trinity Term, a motion was made for setting aside the non-suit; but the Court were of opinion that the decision at *Nisi Prius* was correct, and refused to grant a rule.

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*PHENEY v. JONES, Esq. May 29.

In an action against the Marshal for an escape, the allegation in the record in the original action is *prima facie* evidence that the party was committed to his custody.

ACTION against the Marshal of the King's Bench. The bill (of the 4th of December, 1827) stated that the plaintiff, in Michaelmas Term, 8 Geo. 4, recovered against one George Price, Esq., 229*l.* for damages, for the non-performance of certain promises, whereof the said George Price was convicted; and thereupon on Wednesday next after fifteen days of Saint Martin, in Michaelmas Term, 8 Geo. 4, the said George Price then being personally present in the said Court, &c., was then and there in and by the said Court, &c., at the prayer of the said plaintiff, *committed to the custody of the said defendant, then being Marshal, &c., in execution, for the damages, &c. as by the record of the commitment remaining in the said Court, &c., more fully appeared*; by virtue of which said commitment the said defendant, so being such Marshal as aforesaid, kept and detained the said George Price in his custody, in execution for the damages aforesaid, at the suit of the said plaintiff, until the said defendant, so being, &c., not regarding the duty of his said office as Marshal, &c., on the 1st day of December, &c., freely and voluntarily suffered the said George Price to escape and go at large, &c. Plea, the general issue.

The order for the commitment of Price was produced, and the record in the original action was read, which contained an allegation of his commitment, as averred in the bill: but no witness was called who had seen him in the Marshal's custody. It was proved, that, on the 4th of December, he was residing in a house at Walworth.

Sir J. Scarlett, for the defendant. There is no evidence that Price ever was in the custody of the Marshal, there is only evidence of the order for his commitment.

*334] *Campbell*, on the same side. I have never known this *evidence omitted. The fact is generally proved by the clerk of the papers. There is nothing to show that Price was in custody at the time of the escape.

Lord TENTERDEN, C. J. By the record it appears that on Wednesday after fifteen days of Saint Martin, in Michaelmas Term, the party was committed to the custody of the Marshal. That is *prima facie* evidence, and unless you can alter it, the plaintiff will be entitled to a verdict.

Sir J. Scarlett. It is only a fiction of law.

Lord TENTERDEN, C. J. I think it is *prima facie* evidence. But I will give you leave to move the Court upon the subject.

Verdict for the plaintiff.

Brougham and *Busby*, for the plaintiff.

Sir J. Scarlett and *Campbell*, for the defendant.

[Attornies—*Smithson & Co.*, and *Rogers & Son.*]

IN the ensuing Trinity Term, Sir James Scarlett moved in pursuance of the leave given, but the Court refused to grant a rule.

*BOOTH v. GROVER. May 29.

If the declaration in an action against the maker of a promissory note, state, that the defendant made it "*his own proper hand being thereon subscribed*," and it appear that the note was drawn by his son in his name and by his authority, the variance will not prevent the reading of the note, but the allegation may be rejected as surplusage.

ASSUMPSIT, on several promissory notes. The declaration stated, that the defendant made them "*his own proper hand being thereon subscribed*."

It appeared that the defendant's son drew them in his father's name and by his authority, because the defendant himself could not write well enough.

R. V. Richards objected, that the notes could not be read, because they were stated to have been drawn by the defendant in *his own proper hand*, and it appeared from the evidence, that they were not drawn by him, but by his son.

Lord TENTERDEN, C. J., was of opinion, that the words might be considered as surplusage.

The case went on, and, eventually, a Juror was withdrawn.

Steer, for the plaintiff.

R. V. Richards, for the defendant.

[Attornies—*Lott*, and *J. B. Lawrence*.]

In the case of *Levy v. Wilson*, 5 Esp. 180, the declaration stated, that the party indorsed the bill, '*his own proper hand being thereunto subscribed*,' and it appeared, that it was indorsed *per procurator*, this was held a fatal variance; but in the case of *Helmsley v. Loader*, 2 Camp. 450, where, on a similar declaration, it appeared that the indorser's wife wrote his name by his authority, it was held that this was no objection after a promise to pay; and Lord *Ellenborough* said, that he thought it would be too narrow a construction of the words, *own hand*, to require that the name should be written by the party himself.

*ADJOURNED SITTINGS AT WESTMINSTER, AFTER
EASTER TERM, 1828. [*336]

BEFORE LORD TENTERDEN, C. J.

PATON v. DUNCAN. June 3.

If one undertake to furnish a new history of a country, this is not performed by his furnishing a book, which is a translation of an entire previously existing history, with his own continuations and some additions.

THIS action was brought to recover the sum of 2*l.* 4*s.*, being the price of a book sold by the plaintiff to the defendant. It appeared in evidence, that the defendant had subscribed his name in the plaintiff's subscription book, for one copy of "A new History of Scotland, by James Hakewell, Esq.," which was the book in question. It also appeared, that the defendant had paid part of the price of the book (2*s.* 6*d.*) as earnest, and that the book consisted partly of a translation of Buchanan's History of Scotland, and partly of an original continuation by Hakewell. The proportion of the continuation to the translation did not appear, but it was proved that the defendant had insisted on the plaintiff's taking back the book, which he refused to do.

Campbell, for the defendant. I submit that the plaintiff must be called. By the agreement, he is to furnish the defendant with a new History of Scotland, and the book which he actually sends is a translation, in great part, of a well known history already existing. Perhaps the defendant would not have subscribed for the work, had he known that it was to consist mainly of a translation of Buchanan's book; and it appears that he offered to return the book, as he was at liberty to do on discovering of what it consisted.

Brougham, contrâ. A history must necessarily be a compilation of matters already in existence somewhere; *and the province of the historian is, *337] merely to collect together all the facts and authorities which bear upon the matter on which he writes. It frequently happens, that it is indispensable that a historian should translate into the language in which he is writing, a history written in a language less known; and the incorporation of this with his own composition will certainly not make his book the less original as a history, or disqualify it for being styled a new history. Such was the case with Buchanan's work, and such is, and must necessarily be, the case with the best histories.

Lord TENTERDEN, C. J. I think, when a person undertakes to furnish a new history of a country, the undertaking is not performed by his furnishing a book which commences with the translation of an entire history, already existing and extensively known, as Buchanan's book certainly is, and then giving his own additions and continuation. It may be a new edition of the original work, with additions, but it is not a new history. The plaintiff must be called.

Nonsuit.

Brougham, and ———, for the plaintiff.

Campbell, for the defendant.

[Attornies—*J. Young*, and *Hurd & J.*]

*339] *SECOND SITTINGS IN LONDON, IN TRINITY TERM, 1828.

MARGETSON v. AITKEN. *June 18.*

If a defendant has entered into a deed of composition with his creditors, containing the usual clause of release, and the plaintiff has executed the deed as a creditor for a certain sum, that is a good defence to an action by the plaintiff as indorsee of a bill to a larger amount, of which the defendant was indorser, and which then lay dishonoured, in the plaintiff's hands. But it is no defence as to two similar bills, also of larger amount, which the plaintiff had paid away, and which were then in the hands of third parties.

If, after a bill is dishonoured, the indorser offer to pay the holder so much in the pound, on the amount: *Señble*, that this dispenses with proof of the notice of dishonour.

Assumpsit by the plaintiff as the indorsee, against the defendant as the indorser, of three bills of exchange, amounting together to 41*l.* 13*s.* 6*d.* There was no proof of any notice of dishonour, but a witness proved, that after the bills had become due, the defendant offered to pay the plaintiff a composition of eight shillings in the pound, on the amount of them.

The defence was, that after these bills had been given, but before two of them became due, the defendant had compounded with his creditors, and that the plaintiff had executed the deed of composition; the plaintiff's debt being there

stated to be 27*l*. However, it also appeared, that the two bills that had not become due at the time of the executing of the deed of composition, had been indorsed over by the plaintiff, and were not then in her hands; but that the other bill, which was for 10*l*., was then in her hands, as a dishonoured bill.

Gurney, for the defendant. This deed of composition is an answer to this action, for it is not competent to a party to execute a deed of composition as a creditor to a certain amount, and then afterwards claim a larger debt. In this case the plaintiff has represented herself as a creditor for 27*l*.; and having done so, if she is allowed to recover more, it is a fraud on all the other creditors. As to the notice of dishonour, the most that is in evidence is an offer of a composition, which is not enough.

Lord TENTERDEN, C. J. The utmost effect that can *be given to Mr. *Gurney's* argument, and to the deed, is, that the plaintiff releases [339 whatever debt is then due to her; but I am of opinion, that that deed cannot be taken as a release by the plaintiff as to bills then outstanding undishonoured in other hands. It does not, I think, apply to two of the bills. As to the remaining bill, I think that the plaintiff cannot recover on it, as that was dishonoured at the time of the executing of the deed. With respect to the offer of the composition dispensing with proof of the notice of dishonour, Mr. *Gurney* may move to enter a nonsuit, if he should, upon consideration, think fit to do so, my opinion, as at present advised, is against him. I am inclined to think enough.

Verdict for the plaintiff.—Damages 31*l*.

C. F. Williams, and *Curwood*, for the plaintiff.

Gurney, for the defendant.

[Attornies—*S. Sharp*, and *Drew*.]

ADJOURNED SITTINGS IN LONDON, AFTER TRINITY TERM, 1828

SHERWOOD v. ROBINS. July 9.

On a sale of a reversionary interest, with the usual condition that no error of description, &c. should vitiate the sale, but a compensation be allowed; the reversion was described as absolute, on the death of a person aged sixty-six. In fact, the person was only sixty-four, and the reversion was not absolute, as the property would be divided if he left more children than one: Held, that this sale was void, and that the offer of a compensation would not support it; but if it had been a mere difference of the age, *semble*, that it would have been otherwise.

MONEY had and received. Plea, the general issue. The plaintiff had purchased a reversionary interest, which *was described at the time of the [340 sale, as follows: "The absolute reversion to 2000*l*. principal money, receivable on the demise of a gentleman upwards of sixty-six years old. It is secured on large freehold estates near York. The reversion is not subject to any contingency." After the plaintiff had made this purchase, it was discovered, that the vendor's father was sixty-four, instead of sixty-six years of age, and that the sum of money was to be divided at the death of the vendor's father, among such of his children as might be then living, so that if, at the time of his decease, the vendor's father should leave any other child besides the vendor such child would be entitled to a share of the money. As soon as this was

pointed out to the defendant, he relied on the sixth condition of the sale, by which it was provided that, "if any mistake or omission shall be discovered in the description of the property, or any other error whatever shall appear in this particular, such mistake, omission, or error shall not vitiate the sale, but a compensation or equivalent shall be given or taken, as the case may require." Under this condition, the defendant offered to make a reasonable compensation.

For the plaintiff it was contended, that although this might not be a misdescription wilfully made by the defendant, who was merely the auctioneer; yet, that if his employer instructed him to make such a representation, knowing it to be untrue, that would vitiate the sale.

For the defendant it was contended, that this was a mere accidental error.

Lord TENTERDEN, C. J., left it to the Jury, to say, whether the misdescription was wilful, or merely an error.

The Jury found that it was a wilful misdescription, and returned a verdict for the plaintiff.

Lord TENTERDEN, C. J. I left this question to the Jury, because both sides *341] rested their case upon that point; *but I think that it is immaterial. If it had been a mere difference of age, a compensation might be correctly calculated; but that can never be where there is the additional contingency as to the number of children the party may have at his death. No one can estimate that.

Sir J. Scarlett, Campbell, and Comyn, for the plaintiff.

C. F. Williams, and Ryland, for the defendant.

[Attornies—T. E. Sherwood, and Andrews.]

THWAITES, Gent., One, &c., v. MACKERSON and another. July 10.

If an attorney undertake to conduct a cause for the costs out of pocket, it being represented to him by his client, that such client took a certain interest under a deed: The attorney cannot charge more than the costs out of pocket, though it should turn out that the cause was lost, because his client did not take the interest under the deed which he stated that he took, it being the duty of the attorney to see the deed before he brought the action.

If an attorney does business for a client of a nature to make his bill taxable, and other business clearly not so, he is bound to put the whole into one bill, which bill is taxable; and he cannot bring an action in the first instance, and recover for the non-taxable business, but must deliver his whole bill a month, &c. under the statute.

ASSUMPSIT for an attorney's bill, in bringing an action at the suit of the defendants against the Sheriff of Surry. There was also another bill for a further demand for other business. Plea—General issue.

It was proved that the business was done, and that the bill for the business respecting the action had been duly delivered under the statute; but the second bill for the other business had not been so delivered.

With respect to the first bill, it appeared, on the part of the defendants, that after their sister had married a person named Powell, an execution against Powell came into the defendants' house, under which certain goods were taken; and it also appeared, that the plaintiff undertook to bring an action against the Sheriff for such taking, at his own risk, and charge the defendants no more than the money out of pocket: which had been paid him.

For the plaintiff it was shown, that the defendants had represented to him that the goods in question had been secured by a settlement, at the time of the *342] marriage of the *defendant's sister, but on the trial of the action against the Sheriff, that settlement turned out not to be good; and it was con-

tended, that the plaintiff was by this released from his engagement. It was however proved, on the cross-examination, that the plaintiff was told where the deed of settlement was. As to the second bill, it was contended, that the defence did not at all apply to that.

Lord TENTERDEN, C. J. I am of opinion, that as the plaintiff knew where this deed was, it was his duty to see it before he brought an action, and not to trust to his client's representation as to the legal effect of a deed. As to the second bill, it is true, that it contains no taxable item; but if an attorney has a demand which is taxable, and another which is not, he must put both of them into one bill, and the whole of such bill may then be taxed. He cannot divide his demand into parts: that has been decided over and over again.

Verdict for the defendants.

Gurney, and Busby, for the plaintiff.

J. Williams, and Patteson, for the defendants.

[Attornies—*Thwaites, and Poole & G.*]

LEATHERDALE v. SWEEPSTONE. July 12.

If a party say to his creditor, that he will pay him so much, and put his hand in his pocket to take out the money, but before he can get his money out, the creditor leaves the room, and the money is in consequence not produced till he is gone, this is no tender. A plea of tender is, in practice, very seldom successful; and the Lord Chief Justice observed, that he was, on that account, always sorry to see such a plea on the record.

Work and labour. Pleas—General issue and a tender as to part of the plaintiff's demand. Replication denying the tender.

*To prove the tender, a witness was called, who stated that he heard [343] the defendant offer to pay the plaintiff the amount of his demand, deducting 14s. 0½d., which balance was the sum stated in the plea. That the defendant then put his hand into his pocket, but before he could take out the money, the plaintiff left the room, and the money was therefore not produced till the plaintiff had gone.

Lord TENTERDEN, C. J. This is no tender, the plaintiff got away before any tender could be made. I am always sorry to see a plea of tender on the record, because I know, from experience, that it is so very seldom made out.

Verdict for the plaintiff.

Sir J. Scarlett, and Thesiger, for the plaintiff.

Gurney, and C. Cresswell, for the defendant.

[Attornies—*D. Willoughby, and A. Michell.*]

*FURTHER ADJOURNED SITTINGS IN LONDON, AFTER
TRINITY TERM, 1828.

BEFORE LORD TENTERDEN, C. J.

WHITEHOUSE, Assignee of HOLLAND, a Bankrupt, v. ATKIN-
SON, Esq. Oct. 16.

In trover by the assignees of a bankrupt, for goods taken by the Sheriff under an execution, it appeared that the goods were taken at about the time of year at which the sheriffs are changed, and it was proved, that a witness, after the present cause was set down for trial, saw a form of return indorsed on the writ, which had never been returned. This form of return was signed by the defendant as Sheriff: Held, to be sufficient evidence that he was the Sheriff who executed the writ; and that if the writ, when produced at the trial, has his name erased, and the name of the previous Sheriff substituted, it will be a question for the Jury, whether that substitution was made to correct a mistake, or to defeat the plaintiff.

The price at which goods are sold at a Sheriff's sale is not necessarily the measure of damages in trover, if the sale be wrongful; but when the plaintiff is an assignee, as he must have sold the goods if they had come to him, Juries are often induced to find a verdict for no more than the sum at which the Sheriff actually sold.

In an action against the Sheriff, the officer who had given him security is not a competent witness for the defence, even though the officer is indemnified by the execution-creditor, and does not employ the attorney.

TROVER.—The goods in question consisted of the stock and furniture of the bankrupt, who kept a public-house in Staffordshire, and these goods were claimed by the plaintiff, as assignee under the bankruptcy. The defendant was the Sheriff of Staffordshire, and the goods had been seized under an execution, at the suit of a judgment-creditor named Williams.

The bankruptcy was clearly made out, and there was no doubt that the assignees were entitled to the goods; and the main question was, whether the action should have been brought against Mr. Atkinson, the present Sheriff, or against Mr. Meynell, the late Sheriff. To connect Mr. Atkinson with the taking of the goods, the writ, which had not been returned, was produced; and a witness proved, that when he saw it in the month of July, 1828, in the hands of the agent of the attorney for the execution-creditor (this cause being then set down for trial), there was indorsed on it a memorandum of the time when it was delivered at the Sheriff's office, and a form of a return, importing that 467*l.* 8*s.* 8*d.* had been levied; to the latter of which the name of Mr. Atkinson

*345] was put as Sheriff; but to the *former there was the name of Mr. Meynell. However, on the writ being produced at the trial, it appeared that the name of Mr. Atkinson had been erased from the back of it, and the name of Mr. Meynell substituted, but by whom this had been done, or when, did not appear. It was distinctly shown, that the writ went into the Sheriff's office, on the 1st of February, which is the time about which the Sheriffs are changed; and it was also shown, that the goods were sold on the 28th and 29th of February; and that on the 1st March, 1828, the same person acted as under-sheriff both to Mr. Meynell and Mr. Atkinson. There was no evidence of the exact time at which Mr. Atkinson came into office.

On these facts, it was contended, that the name of Mr. Atkinson had been put on the writ by the mistake of a clerk, and that that mistake was corrected by the insertion of the name of Mr. Meynell instead of that of Mr. Atkinson, as it properly might be, the Sheriff not having been ruled to return the writ. The defendant's counsel also contended, that as the goods were fairly sold, the plaintiff, if entitled to a verdict, ought not to recover more than the goods fetched at the Sheriff's sale, which, after the proper deductions, was 389*l.*; more

especially as no notice of the bankruptcy was served till after the sale had commenced.

To prove the fairness of the sale, the Sheriff's officer who made the levy was called: he said, on the *voir dire*, that he gave security to the Sheriff; but he stated, that he was indemnified by the execution-creditor, and was not to pay the attorney in this action.

Lord TENTERDEN, C. J. I think he is not a competent witness; if the result of this action is against the Sheriff, he is liable at a certainty, and he never may get repaid on his indemnity; therefore it is his interest to defeat the action.

The plaintiff's counsel, in reply, relied much on the *absence of proof as to the exact time of Mr. Atkinson's coming into office, and contended, [*346 that the prices received for goods at the Sheriff's sale were not to be taken as the fair measure of damages in an action of trover.

Lord TENTERDEN, C. J. (in summing up.) The first question to be considered in this case is, whether this action is properly brought against Mr. Atkinson, the present Sheriff, and if you think that he is the Sheriff who sold these goods, the plaintiff has a right to recover, because the bankruptcy is clearly proved, in such a way as to show that these goods became the property of the plaintiff, as assignee. From the evidence it appears, that the writ of *fieri facias* was delivered at the Sheriff's office, on the 1st of February, 1828. This is about the time of year at which the Sheriffs are changed; but we have not had Mr. Atkinson's patent produced, nor indeed any evidence of the exact time at which Mr. Atkinson actually came into office. However, in the month of July, the writ is seen by one of the witnesses, with a form of return on the back of it, to which Mr. Atkinson's name appears as Sheriff. Now, at that time this cause was set down for trial, and if it had been tried then, and this writ produced with Mr. Atkinson's name to this form of return on the back, that would have been decisive against him; however, since that time, the name of Atkinson has been erased, and that of Meynell inserted. Now, if you think that the name of Atkinson put to this return was written there by mistake, and that some clerk in the Sheriff's office wrote the name of Mr. Atkinson, when he should have written the name of Mr. Meynell, and that, in fact, Mr. Atkinson had nothing to do with this execution, the defendant is entitled to your verdict; but if you should be of opinion that the insertion of the name of Meynell was an afterthought, to turn the plaintiff round, then the plaintiff is entitled to recover. With respect to the damages, a plaintiff is not bound by the sum at which goods have been *sold at an auction; but where the plaintiff is an assignee, [*347 who must have sold the goods if they had come to his hands before any sale by the Sheriff, it often happens, that a Jury considers the sum at which the goods were actually sold at auction, as a fair measure of damages. As to the notice, it should be observed, that it was not given early enough to be of any use in putting the parties on their guard, as the auctioneer did not receive it till after the sale had actually commenced.

Verdict for the plaintiff.—Damages 389*l.*, being the amount at which the goods were actually sold by the Sheriff.

Sir J. Scarlett, and Comyn, for the plaintiff.
Campbell, and Patteson, for the defendant.

[Attornies—Whitehouse & J., and Alexander & Son.]

KING, Gent., One, &c., v. MASTERS. Oct. 17.

If an action be brought on a note, and for business done as an attorney, the note not tallying in its amount with the business done at the date of it, and no evidence being given as to the consideration for it: It will be left to the Jury to say whether the note was given in satisfaction of the bill for business done up to the time of its date, or whether it was an entirely distinct transaction.

ASSUMPSIT on a promissory note, for 87*l.* 4*s.*, made by the defendant, and payable to the plaintiff; there was also a count for business done by the plaintiff as an attorney, and the money counts. Plea—General issue.

This cause was undefended. The plaintiff's bill for business done, amounted to upwards of 300*l.*, but there was no evidence as to what was the consideration for this note; however, by a reference to the bill for the business done, it appeared that, at the time of the date of the note, the amount for business done was only about 17*l.*

*Lord TENTERDEN, C. J. There is great difficulty here. How can *345] I say that this note was not given in satisfaction of the bill, up to the date of it?

Sir J. Scarlett. I submit that it is a question for the Jury. The sum for which the note is given does not at all correspond with the amount of the business done up to that time.

Lord TENTERDEN, C. J. The question for the Jury is this, whether this note is to be considered as a discharge of the bill of fees up to that time? I own, that I think that the note is an independent transaction, because, that is for 87*l.* 4*s.*, and the bill up to that time amounts to a much smaller sum. Again, it is very unusual for people to pay their bills to attorneys till they are regularly made out; and besides, as this plaintiff has delivered his bill a month before action brought, as he was bound to do, it was in the power of the defendant to have had it taxed; and if it had appeared to the master that this note had been given for the fees, he would have deducted that amount from the bill. It is for the Jury to consider whether the note is for any part of the same demand, or whether it is a distinct transaction.

Verdict for the plaintiff.—Damages 391*l.*, being the amount of the note, and the full amount of the bill of fees.

Sir J. Scarlett, and Hutchinson, for the plaintiff.

[Attornies—W. H. King, and Downes.]

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*OWEN v. ORD. Oct. 18.

Though it is not absolutely necessary, yet in correct practice, an attorney ought, before he commences an action, to take a written direction from his client for so doing.

ASSUMPSIT on an attorney's bill. It was proved that the business was done, but no very distinct evidence was given of any retainer; and two witnesses were called for the defendant, who stated, that, before the business was done, the defendant said that the plaintiff should be at no expense.

Verdict for the defendant.

Lord TENTERDEN, C. J. I think it right to state, that every respectable attorney ought, before he brings an action, to take a written direction from his client for commencing it; and he ought to do this both for his own sake and for the sake of his client. It is much better for him, because it gets rid of all

difficulty about proving his retainer; and it would also be better for a great many clients, as it would put them on their guard, and prevent them from being drawn into law-suits without their own express direction.

Gurney, and *Follett*, for the plaintiff.

Platt, for the defendant.

[Attornies—*Bennett*, and *In Person*.]

ARCHARD v. HORNOR. Oct. 20.

If the contract between master and servant be the usual one for a year, determinable at a month, the servant, if turned away improperly, cannot recover on a count stating the contract to be for an entire year; and he cannot, on the common count for wages, recover for any further period than that during which he had served.

ASSUMPSIT.—The first count of the declaration stated, that, in consideration that the plaintiff had agreed that he and his wife would become the servants of the defendant *at certain wages, the defendant undertook, &c., to continue them in such service until the expiration of *one year*. Breach, [*350] that he discharged them without warning, before the year had expired. There was also a count for wages, and the money-counts. Pleas, *non assumpsit* to the special counts, and *non assumpsit* to the other counts, as to all but the sum of 11*l.*, and a tender of that sum. Replication, admitting the tender.

The plaintiff claimed wages for the time that he had served, and for a quarter more. It appeared, that the plaintiff and his wife entered the service of the defendant in the month of December, 1827, and were dismissed on the 6th of Feb. 1828; but the only evidence of the contract was, a conversation between the plaintiff and the defendant, at the time of the dismissal. In this conversation, the defendant told him, he must leave his house, and he offered him 16*l.* 4*s.* 10*d.*, which was the amount of wages up to the time, and a month's wages more. This the plaintiff refused, and said he would not take less than a quarter's wages more; upon which the defendant said, he would not give it, as it was quite an unusual thing.

LORD TENTERDEN, C. J. There is no evidence of the contract here declared upon. The most that can be made of this conversation is, that there was a contract for a year determinable at a month's notice. The declaration is on a contract for a year absolutely.

Gurney, for the plaintiff. They have not even paid the month's wages into Court, the sum of 11*l.* is only for the time of the actual service.

LORD TENTERDEN, C. J. You have no count upon a contract determinable at a month.

Curwood. Does not your Lordship think we can recover it on the count for wages?

*LORD TENTERDEN, C. J. No. On that count you cannot recover [*351] for any more than the time you have actually served (*a*). The plaintiff must be called. The ordinary contract with servants is for a year, determin-

(*a*) In the case of *Hull v. Heightman*, 2 East, 145, where a seaman had contracted to go a voyage from Altona to London, and back, and had stipulated that he should not be entitled to wages, till the end of the voyage, it was held that he could not maintain a general *indebitatus assumpsit* for his wages, *pro rata*, as far as London, though he was there wrongfully dismissed by his captain, but that his remedy was either for the breach of the special contract, or for such tortious act of the captain, whereby he was prevented from earning his wages.

able at a month; but to entitle you to recover, you must declare properly upon that contract (a), and not declare as if your contract was for a year absolute (b).
Nonsuit (c).

Gurney, and Curwood, for the plaintiff.
Brougham, and Fish, for the defendant.

[Attornies—*S. Sharp, and Clift & F.*]

(a) A form of declaring on that contract will be found in 3 Ch. Pl. 154.

(b) It should be observed, that the recent stat. 9 Geo. 4, c. 15, which empowers the Judge at the trial to cause the record to be amended in cases where there is a variance, only extends to variances between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record, and not to cases where the proof is by parol.

(c) See the cases of *Hutman v. Boulnois*, ante, Vol. 2, p. 510; and *Beeeton v. Collyer*, Id. 607, and the cases there cited.

*352] *CAPEL and another v. THORNTON. Oct. 20.

An agent authorized to sell goods has (in the absence of advice to the contrary) an implied authority to receive the proceeds of such sale.

Goods sold. Plea—General issue. On the part of the plaintiffs, who were coal merchants, it appeared, that coals were delivered by their servant at the house of the defendant in Regent's Park, with a vendor's ticket in the name of the plaintiffs. No evidence was given of any order, but the vendor's ticket was proved to have been delivered to the defendant's footman; however, there was no proof that it ever reached the defendant.

On the part of the defendant it was proved, that the defendant's son had, for several years, bought coals of a person named Ellsworth, who professed to sell on his own account, but who, unknown to the defendant and her son, really sold on commission. It further appeared, that the defendant's son always received bills of parcels in the name of Ellsworth, and paid him for coals, Ellsworth giving receipts in his own name; and that being asked by her son to deal with Ellsworth, the defendant ordered these coals of him, and received a bill of parcels in his name; and in about a week after the coals were delivered, she paid him for them; however, more than a month after this payment, the plaintiffs sent the defendant a notice "to pay the amount to them or their clerk, and not to Mr. Ellsworth."

Lord TENTERDEN, C. J. The plaintiffs must be called. There is no evidence that the defendant ever gave any order to the plaintiffs; indeed it is proved, that the defendant only dealt with Ellsworth, who is admitted by the notice to be the agent of the plaintiffs; and if he, as their agent, had authority to sell goods, so had he (in the absence of advice to the contrary) an implied authority to receive the proceeds of such sale. The plaintiffs cannot avow the acts of their agent as to one part of the transaction, and repudiate them as to *353] another part. With *respect to the notice, as the money was paid before the notice came to the defendant's hand, that cannot operate in the plaintiff's favour.

Nonsuit.

Gurney, and Chitty, for the plaintiffs.
Sir J. Scarlett, and Comyn, for the defendant.

[Attornies—*Meymott & Son, and Grimaldi & Stables.*]

See the cases of *Gillman v. Robinson*, ante, Vol. 1, p. 642, and *Pratt v. Willey*, ante, Vol. 2 p. 350.

VON LINDENAU v. DESBOROUGH. Oct. 21.

If A., being indebted to B., die, and C. agree to pay the debt by instalments, in five years, A. has an insurable interest in the life of C. for those five years.

If the assured, at the time of effecting the policy, conceals any thing which is material for the insurer to know, the policy is void; and it makes no difference whether the assured considered it material or not: and what amounts to a misrepresentation, or to a material concealment, is a question for the Jury.

The fact, that, on a life policy, an unusually high premium was paid, is quite immaterial, and is therefore not to be taken as proof that the office considered the party to be a bad life.

ASSUMPSIT on a policy of insurance dated June 16th, 1824, renewable for five years, on the life of Duke Frederick the Fourth of Saxe Gotha. There was also a count for money had and received. Plea—General issue.

The defendant was the secretary of the Atlas Insurance Company, and the plaintiff had effected this insurance, which was for 3,200*l.*, as the director of the government country bank of the duchy of Altenburgh.

To show an interest, it was proved, that Augustus Duke of Saxe Gotha, who was the immediate predecessor of Duke Frederick the Fourth, was, at his decease, indebted in his private capacity to various persons, to the amount of about 80,000*l.*, this bank being creditors to a large amount; and that Duke Frederick the Fourth, soon after his accession, entered into a treaty with the private creditors of Duke Augustus, by which he agreed to pay them their debts, by half-yearly instalments, so that the *whole would be discharged in five years. [*354] This treaty was signed by the plaintiff on behalf of the bank.

Sir J. Scarlett objected, that the plaintiff had no interest to enable him to effect this insurance.

Lord TENTERDEN, C. J. It appears that this bank were creditors of the former Duke Augustus, to a large amount, and that Duke Frederick having undertaken to pay the debts by instalments, in five years, the plaintiff, as the director of the bank, effects an insurance on Duke Frederick's life for those five years. Such being the facts, I think that the plaintiff has an insurable interest.

With regard to the Duke's state of health, it appeared, that the representation made before the policy was effected, stated, that his highness had never had gout, asthma, apoplexy, epilepsy, &c., and was not afflicted with any disorder tending to shorten life.

The certificates of his two physicians, which were given in before the execution of the policy, stated, that, since the year 1809, his highness had had a cataract in the left eye, and since the year 1819, had been "*hindered*" in his speech, from having had an inflammation of the chest, of which he had been perfectly cured; and they further stated, that he was free from disease and symptoms of disease; and it also appeared, that before the policy was effected, a letter from a person named Bernardi, an agent of the Union Insurance Office, at which a policy had also been effected, had been shown to the defendant. This letter contained a passage to this effect: "agreeable to our information, the Duke has led a dissolute life, to the loss, according to some information, of his mental faculties; but this is contradicted by the physicians." However, by the evidence of the witnesses at the trial, it appeared, that the Duke was afflicted with almost a total loss of speech, from the year 1822, to the time of his death, which one of the medical witnesses attributed to local paralysis; that he had *periodical catarrhal affections, accompanied by fever, and also that [*355] his mind was diseased to a degree almost amounting to imbecility. It also appeared, that the immediate cause of his highness's death was an extravasation of water on the brain, produced by inflammation; but on the head being opened after death, a tumour more than six inches in length, two in breadth, and one in depth, was found inside the skull, and this had not only pressed upon the brain, but had also depressed the skull at the base; from which it was inferred by the medical witnesses, that this tumour had formed either before birth, or in very early infancy.

Sir *J. Scarlett*, for the defendant. I submit that the plaintiff must be nonsuited. Here was a concealment of material facts. At the time of the effecting of the policy, there is not the slightest allusion to the state of the Duke's mind, nor to the periodical catarrhal affection. These were matters most material to be communicated to the Insurance Office.

Lord TENTERDEN, C. J. It strikes me that these points are what I cannot decide. I shall tell the Jury, that if any material fact was either concealed or misrepresented, the policy is void; and it will be for them to say, whether these omissions are material concealments.

Sir *J. Scarlett*. I admit they are matters of fact.

Lord TENTERDEN, C. J. There is also a warranty that the Duke was not afflicted with any disease tending to shorten life; but that is rather a question of fact for the Jury.

A witness stated, that the premium paid on this insurance, was about two-thirds higher than the ordinary premium on a life of the same age. This *356] evidence was given, *with a view of showing that the Duke was not considered by the office as a good life.

Lord TENTERDEN, C. J. The amount of the premium is quite immaterial. That has been held in cases of ship policies as long as I have known Guildhall.

Mr. Green, an eminent surgeon, was called, to state his opinion that the symptoms of the Duke were not attributable to organic injury; but, in his cross-examination, he stated, that if he had been referred to before the policy was effected, he should have felt it his duty to have mentioned the Duke's state of mind, and the periodical catarrhal affection.

Lord TENTERDEN, C. J. I shall tell the Jury, that, if any fact, in their opinion material for the information of the office respecting the state of the Duke's health, and which was known to the party certifying, was concealed, then, in my opinion, the policy is void.

Brougham, for the plaintiff, elected to be nonsuited.

Nonsuit.

Brougham, F. Pollock, and Brodrick, for the plaintiff.

Sir *J. Scarlett, Campbell, and Coleridge*, for the defendant.

[Attornies—*Blacker & G.*, and *Bovill*.]

In the ensuing Term, *Brougham* moved to set aside the nonsuit, and for a new trial, on the ground, that the question to be left to the Jury was not, as his Lordship had put it at the trial, whether any material fact was concealed; but *357] whether there was a concealment of any fact *which was really material, and which the assured himself considered to be material. And he also contended that, even admitting that there had been a concealment by the assured, still the letter of Bernardi was sufficient to put the office upon making inquiries, if they had thought their information not sufficient: and he argued, that life policies could not be effected, if the assured must run the risk of being bound to state every thing, that, upon the opinions of physicians, might be afterwards considered to be material.

Lord TENTERDEN, C. J. The letter of Bernardi was not a communication from the assured, but a letter from the agent of another office; however, if that had expressly disclosed the facts material to be known, it might have been a question whether it was material to tell the office that which they in effect knew before; but this letter contains no direct information, it is all rumour and report. Among the questions put by the office to the physicians, I find this, "Are there any other circumstances within your knowledge which the directors ought to be acquainted with?" Now this question calls for a statement of every thing that

any one could think material. Some of the witnesses, using a soft expression, said, that the Duke's intellect was "controlled;" but the effect of the evidence is, that his mind was very much impaired; and one of the witnesses, who had been with him for years, never heard him utter a syllable. Ought not these circumstances to have been known? Upon the whole of the facts, I am of opinion, that I was not wrong in the way in which I proposed to leave this case to the Jury.

BAYLEY, J. Whether a policy be effected on a life, or a ship, or against fire, the underwriter has a right to expect that every thing material should be communicated to him. And if a circumstance be not communicated, the question is, whether it was *in fact* material; and not, whether *the assured *believed* [*358 that it was material: and the communication of all such facts is an onus lying on the assured. My Lord *Tenterden*, at the trial, offered to leave the materiality to the Jury; and the mode in which his Lordship proposed to put the question appears to me to be right in every respect.

LITTLERDALE, J. It does not signify whether the assured thought a certain fact material to be communicated to the underwriter. The question is, whether, in point of fact, it was material; and that is a question for the Jury.

Rule refused (a).

(a) In the course of the discussion, the following cases were cited: *Mayne v. Walter*, Park. Ins. 531; *Ross v. Bradshaw*, Id. 649; *Carter v. Boehm*, 3 Burr. 1905; *Haywood v. Rodgers*, 4 East, 590; *Huguenin v. Kayley*, 6 Taunt. 186; *Bufe v. Turner*, Id. 338; *Morrison v. Muspratt*, 4 Bing. 60. See also Park. Ins. 294-306; Id. 317-319; Id. 649-651; and *Maynard v. Rhode*, ante, Vol. 1, p. 360.

The East India Company v. LEWIS. Oct. 22.

In an action for money had and received, the defendant, as an answer to the action, put in one part of a deed of covenant, executed by the plaintiffs, whereby the defendant covenanted to pay over all monies received by him on account of the plaintiffs; notice having been given to the plaintiffs to produce the counterpart of this deed: Held, that the defendant's having possession of the plaintiffs' part of the deed, was presumptive evidence that he had executed the counterpart, and that this was equally a ground of nonsuit whether the counterpart had been lost or not.

MONEY had and received (a). Plea—General issue. It appeared that, previous to the year 1818, the defendant had been the sub-treasurer of Bencoolen; and that, as such, he had had the charge of the East India Company's treasure at that place; and that before he left that *situation, which was on the [*359 27th of March, 1818, he was directed to deliver an account of the treasure, which ought to be kept closely guarded in certain rooms in a fort there, the defendant having the custody of the keys of those rooms. It further appeared that the defendant did deliver such account in the month of April; and that, on the treasure being counted in the month of July, 1818, a deficit was discovered; and it was ascertained that the sum of 146,700 dollars (between 35,000*l.* and 36,000*l.*) was wanting of the sum that should have been found there, according to the account delivered by the defendant. And it was stated by the defendant's successor in the office of sub-treasurer, that he had never taken money from the fort, as he had paid the current expenses of his office from monies paid into his office, which had not been carried into the fort; and he also stated, that he believed that no one could have taken away any money between the months of April and July, 1818.

Gurney, for the defendant, proposed to show, that the defendant was under

(a) There were several special counts in the declaration, but as the Solicitor-General opened this as a case of money had and received, it is unnecessary to state them.

a covenant to perform his duty properly, in his office of sub-treasurer, and that therefore the present action of *assumpsit* would not lie. For this purpose, he put in a deed of covenant, purporting to be between the Company on the one part, and the defendant on the other. This deed, which was dated in February, 1816, recited, that the defendant had been appointed sub-treasurer, and by it the defendant covenanted to account faithfully for all monies, and pay over, &c. This deed was under the common seal of the Company, and notice had been given to the Company's attorney to produce the counterpart executed by the defendant.

In answer to this, *Tindal*, S. G., for the plaintiffs, proposed to show that the defendant had obtained possession *of this part of the deed, which was
*360] executed by the Company, without his having himself executed the counterpart. And with a view of showing this, it was proved, by a witness named Owen, that it was his duty to keep the counterparts of deeds of covenant executed by the East India Company's covenanted servants, and that he could not find any counterpart of this deed executed by the defendant. This witness also stated, that the practice, when the party was abroad, was, for the Company to execute their part, and to send that, together with the unexecuted counterpart, to the governor of the place where the party was; and for the governor, on getting the counterpart executed, to deliver over the Company's deed to such party; and that upon this it was the duty of the governor to return the counterpart to the East India House. And the further to raise an inference that the defendant had obtained possession of the Company's part of the deed without executing the counterpart, it was proved that the defendant acted for a short time as secretary to the government at Bencoolen; however, it was admitted that the secretary would not have to open letters sent by the Court of Directors to the governor.

Lord TENTERDEN, C. J. I am of opinion, that the plaintiffs have not shown enough to rebut the presumption that the defendant has executed the counterpart of this deed. It was clearly the duty of some person to keep possession of this deed till the counterpart was executed; and this deed being in the possession of the defendant, is presumptive evidence that he has executed the counterpart. If he has executed it, and it is lost, it is still his deed, and the plaintiffs must sue upon it, and cannot maintain an action against him for money had and received. I think the plaintiff must be called.

Sir J. Scarlett. I fear that this evidence would hardly be sufficient proof of the loss of the counterpart.

*361] *Lord TENTERDEN, C. J. On this evidence, I must take it, that the counterpart was executed by the defendant; and if it was, the question, whether it is lost or not, is quite immaterial in this action.

Nonsuit (a).

Tindal, S. G., *Bosanquet*, Serjt., Sir J. Scarlett, *Spankie*, Serjt., and *Dodd*, for the plaintiffs.

Gurney, *Brougham*, and *Chitty*, for the defendant.

[Attornies—*E. & J. Lawford*, and *M. Heath*.]

(a) *Assumpsit* only lies on agreements not under seal, an action of debt or covenant being the proper remedy for the non-performance of agreements by specialty. In the case of *Schack v. Anthony*, 1 M. & S. 573, where a charter-party under seal contained a covenant to pay freight to the master, it was held that the master must sue in debt or covenant, and that the owners could not maintain *assumpsit*; and Lord *Ellenborough* observed, "that if a bond were given to a trustee, it could hardly be contended, that an action of *assumpsit* could be maintained by the *cestui que trust* for the recovery of the money secured by the bond. However, in the case of *Sutherland v. Lishman*, 3 Esp. 42, it was held, that if the deed is only executed by the plaintiff, and not by the defendant, *assumpsit* is the proper form of action. So, in the case of *Foster v. Allanson*, 2 T. R. 479, where a partnership by articles under seal had been dissolved, and a balance struck, and there had been a promise to pay that balance, it was held that an action of *assumpsit* would lie. And in *Moravia v. Levy*, Id. 483, *Buller*, J., held, that it would lie on an express promise to pay a balance struck, though articles under seal, containing a covenant to account, were still subsisting.

*RALPHO et al. Assignees of RUTLEGE, a Bankrupt, v. DAWES and another. Oct. 23.

If assignees of a bankrupt, suing for a debt due before the bankruptcy, receive notice of disputing the trading, &c., the Judge will only grant them a certificate for the costs of producing the depositions, and not for the costs of the attorney's attendance, or of witnesses to prove the bankruptcy.

ASSUMPSIT on a bill of exchange, drawn by the bankrupt on the defendants, and accepted by them. Notice of disputing the trading, petitioning creditor's debt, and act of bankruptcy, had been given; but, as this bill became due before the bankruptcy, the depositions taken before the commissioners were read, to prove the trading, petitioning creditor's debt, and act of bankruptcy (a).

The defendants proved that the bankrupt had received a greater sum on their account than the amount of this bill: and the plaintiffs were

Nonsuited.

Gurney, for the plaintiffs, applied for a certificate to enable them to deduct the costs of proving the bankruptcy from the defendants' costs (b); and he asked to be allowed the expenses of three witnesses, who had been subpoenaed to establish the bankruptcy, and also the expense of the attorney's attendance.

LORD TENTERDEN, C. J. If there had been no notice, the commission and adjudication would have been sufficient proof of the bankruptcy; but as there was a notice, and the bankrupt could have brought the action, you were obliged to produce the depositions, which are made conclusive evidence. All I can give you is your costs of producing the depositions, which amount to nothing.

No certificate was granted.

*Gurney and Hutchinson for the plaintiffs.

Sir J. Scarlett, F. Pollock, and Kelly, for the defendants.

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[Attornies—Tate, and Fisher,—Green & A.]

(a) As to those points these depositions are, by sect. 92 of the bankrupt act, 6 Geo. 4, c. 16, made "conclusive evidence of the matters therein respectively contained, in all actions at law and suits in equity brought by the assignees, for any debt or demand for which the bankrupt might have sustained any action or suit."

(b) Under sect. 90 of the bankrupt act, 6 Geo. 4, c. 16. See Arch. B. L. lv.

PEYTON v. The Governors of St. Thomas's Hospital. Oct. 23.

In an action against a body corporate, for negligently pulling down a house which belonged to them, whereby the plaintiff's house was injured; a letter written to the plaintiff, respecting the pulling down of the house by the defendant's surveyor, who had the management of all their buildings, is to be presumed to have been written by him in that capacity, and is therefore evidence against them.

CASE.—The declaration stated that the defendants, being possessed of a house, pulled it down in so negligent a manner as to injure the house of the plaintiff. Plea—General issue.

The house in question belonged to St. Thomas's Hospital; and it was proved that Mr. Robinson was the surveyor to that hospital, and that he had the management of all their buildings; and it was proposed to read a letter written by him to the plaintiff respecting the pulling down of this house.

Sir J. Scarlett. I submit that this letter is not evidence. Mr. Robinson

might be surveyor for many other parties besides the Governors of St. Thomas's Hospital.

Lord TENTERDEN, C. J. As it appears that he was their surveyor, and had the management of their buildings, and also that this house belonged to the Governors, I must presume that this letter was written by him as their surveyor. This is a corporation, and they cannot do these acts for themselves.

The letter was read. The plaintiff was ultimately

Nonsuited.

Tindal, S. G., Gurney, Brodrick, and Dodd, for the plaintiff.

Sir J. Scarlett, Campbell, and C. Cresswell, for the defendants.

[Attornies—*Smith & B.*, and *Wainwright & Co.*]

*364] *In the ensuing Term, *Tindal, S. G.*, obtained a rule nisi for setting aside the nonsuit, on grounds quite distinct from the point above determined.

WHITMORE and another v. WILKS the Elder. Oct. 24.

If trustees under a paving act sign checks drawn by the clerk of the person who is clerk to the trust, those checks being drawn so as to be alterable from small sums to larger, the trustees cannot charge the clerk to the trust for negligence if these are altered, as it was their duty not to sign checks drawn in such a form; nor can they charge him for misconduct of his clerk, which would have been prevented if the trustees had done their own duty in the way in which the clerk to the trust had fair reason to expect they would.

A count charging a clerk with negligence in suffering his employers to be defrauded of sums of money, without specifying any in particular, is bad.

If, by a private act of Parliament, forty-eight trustees are appointed (not being a corporation), of whom sixteen are to go out annually by rotation; and, by the same act, the trustees are to sue and be sued in the names of their treasurers for the time being; an action for money had and received may be maintained in the names of the present treasurers, although both they and the present trustees came into office since the time when the money was received by the defendant to the use of the trust.

ASSUMPSIT by the plaintiffs, as treasurers to the trustees for lighting, watching, and paving the parish of St. Luke, Middlesex. The first count of the declaration stated, that, in consideration that the trustees would appoint the defendant to be clerk to the said trustees, he undertook to perform his duty as clerk; that they did appoint him, and that it was his duty to prepare checks to be signed by the trustees, or any three of them, on one Thomas Cobb; that fifty checks were drawn by the defendant "in a careless, improper, and unbusiness-like manner;" and that the said checks were altered (after they had been signed) to larger sums, without the consent of the trustees; that they were presented to Messrs. Masterman, who, by reason of the careless, improper, and negligent manner in which the same were drawn, and not being able to detect the alterations, paid them. *Second* count, the like on an executed consideration. *Third*, that the defendant had been appointed clerk, and promised to perform his duty as such; and that checks were drawn and paid, and returned by the bankers; and that it was his duty to deliver them over to the

*365] trustees within a reasonable time; but that he did not do so. *Fourth* for neglecting to give notice of the defaults of a collector (a). **Fifth*,

(a) No evidence was offered on this count.

that it was his duty to make out perfect accounts of payments made on behalf of the trustees; but that he did not. *Sixth*, that it was his duty to investigate the accounts, and to take care that no improper ones were allowed; but that he suffered improper payments to be made. *Seventh*, that he undertook to use reasonable diligence as clerk, and that he "permitted the trustees to be cheated and defrauded of divers sums of money." *Eighth*, money had and received. *Ninth*, account stated. Plea—General issue.

The case on the part of the plaintiffs was as follows:—By a private act of Parliament, 50 Geo. 3, c. *cxlix*, it was enacted, that there should be forty-eight trustees for the paving, lighting, and watching the parish of St. Luke, of whom sixteen should annually go out by rotation; and also two treasurers, with separate rates for the paving and the lighting of this parish; and also a clerk, to which latter office the defendant was appointed in the year 1810, he being also the vestry-clerk. The plaintiffs were appointed treasurers in 1827. In the year 1821 the defendant employed a confidential clerk, named Milne, to do the whole of the business necessary to be done by the clerk to the trustees. Milne absconded in the year 1826, having embezzled large sums of money belonging to the trustees, with which sums it was now sought to charge the defendant, under the following circumstances:—

It appeared, that the course of business was for all demands on the trustees to be audited by an audit committee, and if allowed by them, such allowance was reported to the next general meeting of trustees; and if, at that meeting, the demands were ordered to be paid, it became the duty of the clerk to make out a list of them, called the pay-list, and to draw checks for the amounts, which checks were to be signed by three or more trustees, at what was called a pay-committee. It appeared, that Milne had introduced into the pay-lists several small sums as due to *fictitious persons, which had never been allowed by the audit committee, and that he obtained checks for these sums; *e. g.* [366 in May, 1824, Milne, before the sitting of a pay-committee, had inserted the name of Sabbathon in the pay-list, for a sum of 1*l.* 16*s.* 10*d.*; no such money was really due, and no such account had ever been audited. A check for this sum was, however, drawn by Milne, and signed by the trustees; but, when paid at the banker's, the sum had been altered to 9*l.* 16*s.* 10*d.* (a) The amount of checks so altered was 116*l.* 3*s.* 4*d.*

Another sum, with which it was sought to charge the defendant, was a sum of 350*l.* Under the act of Parliament, the trustees have a power of letting the privilege of carrying away dust and ashes. This, in the year 1825, was let to a person named Sinnott, at the sum of 350*l.* per quarter. The first quarter was paid in advance to the defendant himself, at Midsummer, 1825; and, on the 8th of November, 1825, Mr. Sinnott, in consequence of a letter he received, came to the board-room of St. Luke's parish, and paid 350*l.* for the next quarter, to Milne, who gave a receipt, signed "For the trustees of St. Luke, Middlesex, Joseph Milne." After the third quarter became due, the defendant wrote to Mr. Sinnott for payment, saying nothing respecting the payment for the second quarter: and when the payment for the third quarter was made to the defendant himself, he did not object that the second quarter had not been paid.

Another sum with which it was sought to charge the defendant was a sum of 375*l.* By the act of Parliament, the two treasurers are to keep separate accounts; and one of them kept a banking account with Messrs. Masterman, the other with Messrs. Williams; and it *appeared that Milne called on [367 three of the trustees, separately, at their houses, and told them that a sum of 350*l.* had been paid in at Messrs. Masterman's, which was the wrong banking-house; and he, therefore, wished them to give him a check for the amount, with a view that he should take it away from Messrs. Masterman's and

(a) This had been done by making the words *one pound* the first words of a line, so that the word *ninety* could be inserted before them, and the letter *s* put in after the word *pound*.

pay it in at Messrs. Williams's. They gave the check (which, by the act, ought to have been signed at a meeting), and Milne received the money at Messrs. Masterman's, but never paid it in at Messrs. Williams's.

It was also imputed to the defendant as negligence, that he did not cause the ledger and cash-book to be duly posted; and that he did not attend at any but the general meetings of the trustees.

Lord TENTERDEN, C. J. It strikes me, that there are two objections to charging Mr. Wilks with these checks: He has a right to say that the trustees shall transact their business properly. Now, the trustees here draw checks for persons named in the pay-list, whose accounts were not in the audit-book; and it appears to me that the trustees should see that the sum put down in the pay-list is warranted by the audit-book. The other objection is, that the checks are altered from small sums to large. The exact mode is not proved, but I can easily suppose it; and if a check for a small sum was written in such a way as to be easily alterable to a larger sum, it was the duty of the trustees not to sign it; and Mr. Wilks had a right to expect that the trustees would do their duty before they could charge him.

Campbell, for the plaintiffs. I submit that the defendant was guilty of negligence before any default in the trustees. It was his duty, as clerk, to make out a true pay-list; and if he did not do so, it clearly was a gross breach of duty. *368] It is true, that he did not himself put items into the pay-list which were not in the audit-book, but still he employs another who does it, and for the acts of that other he must be answerable.

Lord TENTERDEN, C. J. It is, no doubt, the duty of a clerk to make out a correct pay-list; and you do not impute it to the defendant that he himself has done otherwise. You seek to charge him with the wrongful act of another. Now that could not have happened at all, if the trustees had done their duty in that way, in which Mr. Wilks had fair reason to expect that they would.

To prove the payment of the 350*l.* by Mr. Sinnott to Milne, at the board-room, Mr. Sinnott was called.

Sir J. *Scarlett*. He is not a competent witness; he is the person who had to pay the money. He is to say that he paid it to Milne; and if that payment was not made under such circumstances as will clear him, he will have to pay the money over again. He has, therefore, a direct interest to make it a good payment, if he can.

Lord TENTERDEN, C. J. As at present advised, I think him competent to prove the fact of a payment to Milne.

He was examined.

Evidence was given, that the books had not been posted.

Lord TENTERDEN, C. J. The seventh count in this declaration charges generally, that he suffered the trustees to be defrauded without stating how. I think I am bound as a Judge not to receive evidence upon such a count as that; it does not give the party the least idea what it is that he has to defend himself against.

Sir J. *Scarlett* objected, that the plaintiffs must be nonsuited, as they did not *369] become treasurers till 1827, and all the defaults were before that time; and he relied on sect. 158 of the act (a), which empowers the trustees to sue by their treasurers; and he further contended, that as some of the trustees

(a) By the private act of Parliament, 50 Geo. 3, chap. csliz, it is enacted, "That the trustees to be appointed under this act shall sue and be sued in the name or names of the treasurer or treasurers, clerk or clerks, for the time being, to be appointed under this act; and that no action or suit, which may be brought by or against the said trustees, or any of them, shall abate or be discontinued by the death or removal of such treasurer or treasurers, clerk or clerks, or by the act of him or them without the consent of the said trustees, as the case may be; but the treasurer or treasurers, clerk or clerks for the time being, shall always be deemed plaintiff or plaintiffs, defendant or defendants, in every action or suit, as the case may be."

had gone out by rotation, this was not money had and received to the use of the present trustees, they not being a body corporate.

LORD TENTERDEN, C. J. This is a point of the greatest importance. If I should hold, that money had and received must be maintained by those who are trustees at the time, a great many just claims of trustees would be lost. I cannot decide so important a point here.

Sir J. Scarlett addressed the Jury for the defendant, and contended, that the trustees could not charge the defendant with negligence, as they had been guilty of much greater negligence than he had.

LORD TENTERDEN, C. J. (in summing up.) This action has its origin in the very great malversation of a clerk of Mr. Wilks; however, there is not the slightest reason to suppose that Mr. Wilks himself ever knew any thing about it. This case is divided into several parts, and the first of them has relation to the preparing of the checks, which, from the way in which they were drawn, could be altered from small sums to larger. Now, I am of opinion, that, in point of law, the trustees cannot charge Mr. Wilks with the *amount of [*370 these alterations, because he had fair reason to suppose that the pay-committee would draw their checks in such a way as to prevent their being altered. Another part of the charge in the declaration is, a general neglect of duty. Now, I think that no man ought to be brought to answer a general charge of neglect of duty, without its being specified what the alleged negligence is; but it appears to me, that there is no negligence on the part of Mr. Wilks, that is not met by greater negligence on the part of the trustees. It is said, that he was guilty of negligence in not posting the ledger and cash-book. However, it is clear that the trustees suffered that, for if they had ever thought it worth their while to look at the books, they would have seen that they were not properly posted. Again, it is said, that he did not attend all the meetings; but, to that the direct answer is, that the trustees did not require him to do so. The case, therefore, seems to be confined to the two sums which are sought to be recovered on the count for money had and received. First, as to the sum of 375*l.*, it appears that Milne went to three trustees, and told them that this sum had been paid into a wrong banking-house; upon which they separately signed a check, which allowed him to get possession of it. This they ought never to have done, for, by the act of Parliament, all checks are to be signed at a meeting; and besides, even if the money was at a wrong banking-house, no use could be made of it in any way but by the trustees, or under their authority. I will not say that I am surprised that they allowed themselves to be so deluded, because we see things of this kind every day; but then, how does this affect Mr. Wilks? It is true, that the money is received by his clerk, but still he is only answerable for the acts of his clerk within the scope of his duty; and I own, it strikes me, that the giving of this check was a misplaced confidence by the trustees, and no fault of Mr. Wilks.

His Lordship then, with respect to the sum of 350*l.*, received by Milne from Mr. Sinnott, left it to the Jury to say, *whether the defendant had [*371 reason to suppose that money would be paid to Milne at the board-room, directing them, if they thought he had, to find a verdict for the plaintiffs for that sum.

Verdict for the plaintiffs.—Damages 350*l.*

Campbell, F. Pollock, and Parke, for the plaintiffs.

Sir J. Scarlett, Gurney, Brougham, and Chitty, for the defendant.

[Attornies—*Simson*, and *Wilks*, Senr.]

IN the ensuing Term, Sir J. Scarlett moved for leave to enter a nonsuit on the point reserved; and contended, that the action for money had and received

was founded on a contract ; and that neither the present trustees, nor the present treasurers for them, could maintain an action founded on a contract made with their predecessors ; and he cited the cases of *Smith*, assignee of *Blake*, v. *Godard* (a) ; *Jeffery* v. *Muc Tuggart* (b).

BAYLEY, J. In whose names do you say that the action should have been brought ?

Sir J. Scarlett. In the names of the persons who were either the treasurers or the trustees at the time when the money was received.

Lord TENTERDEN, C. J. The objection that the treasurers cannot sue for money due before their time, and before the time when the present trustees came into office, involves a question of very grave and extensive importance, as the trustees acting under a great number of acts of Parliament would be materially affected by a decision against the present plaintiffs on that ground. However, I *372] think that the effect of this statute, which authorizes the *treasurers for the time being to sue, is to give them power to sue in all cases for by-gone sums received to the use of the trustees, though before their time ; and if we were to hold otherwise, many sums due to these trusts could never be recovered at all. These trustees are trustees for the parish, and the treasurers, though appointed by the trustees, are really the representatives of the parish.

BAYLEY and LITLEDALE, Js., concurred.

Sir J. Scarlett then applied for a new trial, on the ground, that Sinnott was not a competent witness ; and that the sum of 350*l.* was not paid by Sinnott to Milne under such circumstances as to make the defendant liable.

The Court, on these grounds, granted a rule *nisi* for a new trial.

(a) 3 B. & P. 465.

(b) 6 M. & S. 126.

PASCALL v. HORSLEY and another. Oct. 25.

If one of two defendants plead a plea of bankruptcy *pais darrein continuance*, the plaintiff cannot, at *Nisi Prius*, confess this plea to be true, and go on with the case as to the other defendant.

As soon as this case was called on, *Wightman*, for the defendants, put in a special plea of the bankruptcy of one of the defendants, *pais darrein continuance*.

Campbell, for the plaintiff. I wish to confess the plea, and to try the case as to the other defendant.

Lord TENTERDEN, C. J. That cannot be done at *Nisi Prius*. I cannot deal with a plea *pais darrein continuance*. I must receive the plea, and cause it to be annexed to the record ; but I cannot receive a replication, or even a confession of it. You must reply in the Court above.

Campbell, for the plaintiff.

Wightman, for the defendant.

[Attornies—*Osbaldston & M.*, and *Davis & Co.*, *Borradaile & Co.*]

See the case of *Myers* v. *Taylor*, *ante*, Vol. 2, p. 306, and 1 Arch. Pr. 199.

*ADJOURNED SITTINGS AT WESTMINSTER, AFTER
TRINITY TERM, 1828.

BEFORE LORD TENTERDEN, C. J.

REX v. HUGHES et al. Oct. 27.

Bail to the Sheriff have no right to take their principal into custody, nor have bail in the Palace Court. With respect to bail above, it is otherwise.

INDICTMENT for a riot, and for assaulting a person named Lewis.

The defence set up was, that two of the defendants were the bail of Lewis, in an action in the Palace Court, and that fearing that he would run away, they wished to take him into custody and secure him.

Lord TENTERDEN, C. J. I am clearly of opinion, that bail to the Sheriff cannot take their principal as bail above may; and I consider the bail in the Palace Court to be in the same situation as bail to the Sheriff.

Verdict—Guilty.

Bradrick, for the prosecution.

Denman, C. S., and *Busby*, for the defendants.

[Attornies—*Horncastle*, and *Willis*.]

The cases on the subject of bail rendering their principal, and also respecting their taking him into custody for that purpose, will be found collected and referred to in 1 Arch. Pr. 311-315.

MORTIN v. SHOPPE. Oct. 27.

Riding after a person and obliging him to run away into a garden to avoid being beaten, is an assault.

ASSAULT.—Plea—General issue. The plaintiff was walking along a foot-path by the road side at Hillingdon, and the defendant, who was on horse-back, rode after him at a quick pace. The plaintiff ran away, and *got [*374 into his own garden; when the defendant rode up to the garden-gate (the plaintiff then being in the garden about three yards from him), and shaking his whip, said, "Come out, and I will lick you before your own servants."

Denman, C. S., objected, that this did not amount to an assault.

Lord TENTERDEN, C. J. If the defendant rode after the plaintiff, so as to compel him to run into his garden for shelter, to avoid being beaten, that is in law an assault.

Verdict for the plaintiff.—Damages 40s.

Brougham, and *Comyn*, for the plaintiff.

Denman, C. S., and *Law*, for the defendant.

[Attornies—*Poole & Co.*, and *Carter & Co.*]

SHERRINGTON *v.* JERMYN. Oct. 28.

One having made and signed a promissory note, handed it to a third person, the payee being present; but before it was given to the payee it was altered, by the consent of all parties: Held, that this giving it to the third person was not an issuing of it, and that it did not require a new stamp.

ASSUMPSIT against the defendant as the maker of a promissory note, payable to the plaintiff, or order, one month after date. It appeared, from the evidence of Mr. Freeman, that he was present, with the plaintiff and the defendant, when the note was made. That the body of the note was written by the plaintiff, and signed by the defendant, and that, after signing it, the defendant handed it to the witness to attest, and to give it to the plaintiff; and that when it was so handed to Freeman, the note ran thus:

"I promise to pay to Mr. S. Sherrington, or order, on demand, the sum of Two Hundred Pounds, with interest."

But after it was so put into the hands of Freeman, and before it was given to the plaintiff, it was, with the consent of all parties, altered to its present form, which was this:

* "One month after date, I promise to pay to Mr. S. Sherrington, or *375] order, Two Hundred Pounds."

The words "on demand" being struck out with a pen, and "one month after date" substituted, and the words "with interest" being altogether erased.

F. Pollock, for the defendant, submitted, that the note having been handed over to Freeman in the manner stated, after it had been signed and perfected by the defendant, it was to be considered as issued from that time, and that consequently it was void under the stamp laws.

Lord TENTERDEN, C. J. I am of opinion, that, as it was all one transaction, it could not be considered as issued at the time of the alteration.

Verdict for the plaintiff.

Campbell and *Gunning*, for the plaintiff.

F. Pollock and *Ashmore*, for the defendants.

[Attornies—*Beart*, and *Baker*.]

See the cases of *Bishop v. Chambre*, ante, p. 55; *Sentance v. Poole*, ante, p. 1, and the authorities there cited.

In the case of *Walton v. Hastings*, 4 Camp. 223, it was held, that if a bill of exchange is delivered by the drawer to the payee, and the date is altered by an agreement between the payee and drawee before acceptance, the bill is made void. However, in the case of *Downes v. Richardson*, 5 B. & A. 674, it was held, that an accommodation bill having been altered, with the consent of the acceptor, before it came into the hands of a *bonâ fide* holder for value, was good as against the acceptor, though altered without the consent of the drawer and the first indorser, because an accommodation bill is not issued till it is in the hands of some person who is entitled to treat it as a security available in law.

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*KENNEDY *v.* GAD. Oct. 29.

The Lord Chief Justice will not try an action for money had and received, to recover back a deposit paid to abide the event of a wrestling match, which did not take place.

MONEY had and received. Plea—General issue.

This case was undefended.

Hutchinson, for the plaintiff, opened, that a wrestling match was to have
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taken place at Brighton; and that the plaintiff deposited 24*l.* in the hands of the defendant, to abide the event of the match. The match did not take place; and the defendant being called upon to return the money, he paid back 16*l.*, but refused to pay the remaining 8*l.*; to recover which this action was brought.

Lord TENTERDEN, C. J. This is an action for a sum of money deposited as a bet on a wrestling match, which is an action I ought not to try; and I shall discharge the Jury from giving any verdict.

Jury discharged.

Hutchinson, for the plaintiff.

[Attornies—*Innis*, and *Humphreys*.]

See the case of *Egerton v. Furze*, ante, Vol. 1, p. 613.

BANN v. DALZELL, Esq. Oct. 29.

In an action on an Irish judgment, the question, whether any and what interest is recoverable, is a question for the Jury, under all the circumstances of the case. And in deciding this question they will have to consider whether the plaintiff has taken proper steps to find his debtor and follow up his judgment by an execution, or whether he has been guilty of *laches*.

DEBT on an Irish judgment, obtained by the plaintiff, and one Bond, his partner (whom the plaintiff survived), for the sum of 81*l.* The defendant paid 81*l.* into Court; *and the only question was, whether or not the plaintiff was entitled to interest on the judgment debt, it being admitted that the original debt, for which the judgment was obtained, would not have carried interest. The judgment was recovered in the Court of Exchequer in Ireland in 1817. [*377]

F. Pollock, for the plaintiff, contended, that if he could show that the plaintiff had used due diligence, after obtaining the judgment, in order to find the defendant, and render his judgment available, he was entitled to such interest as the Jury should deem reasonable, leaving it to them to say what amount of interest they would award him. It was very hard, in a case where every means had been taken to make this judgment available, that the plaintiff should be told, ten years after it was obtained, that he was to receive only the amount of the sum recovered by his judgment.

Evidence was then given, with a view of showing that the plaintiff had used due diligence to put his judgment in execution, he having, shortly after judgment was signed, issued a writ into Yorkshire upon it, after he had made inquiries for the defendant in town.

R. V. Richards, for the defendant, submitted, that no interest could by law be recovered on an Irish judgment; and that at all events it could not where the original demand was not of a nature to carry interest; and he cited the case of *Atkinson v. Lord Braybrooke* (a).

Lord TENTERDEN, C. J. I think that the question should be left to the Jury under all the circumstances of the case.

*Witnesses were then called, to show that the defendant had been generally resident in Baker Street, London, since the year 1817; that he was often seen, and went openly abroad, passing the very shop of the plaintiff; and that his name was to be found in the Court Guide, as resident in Baker Street. [*378]

Lord TENTERDEN, C. J. (in summing up.) Actions of debt on judgments are

by no means favoured by the Courts; and it is the duty of a person who recovers a judgment in a Court of law, to issue execution in the manner the law has provided, and not to bring an action upon it. The question for your consideration is, not whether the defendant ought to have paid the money (for it is the duty of all men to pay their just debts), but whether the plaintiff had taken due means to discover the defendant, in order to enforce payment by means of an execution founded on his judgment? It is the duty of the creditor to use proper diligence to discover his debtor. On the one hand, the plaintiff has called witnesses, with a view of showing that he has used all due and reasonable means in endeavouring to find the defendant; and on the other, the defendant has adduced proof to convince you that he might have been found, had inquiries been directed to the proper quarter. You will therefore say, after hearing this conflicting testimony, whether the plaintiff has taken proper steps to find the defendant. If you think that he has, you will give him a verdict, with such interest on the judgment as you think reasonable; but if you think he has not, and that he has lost the benefit of his judgment by his own *laches*, then you will find for the defendant, as the amount of the judgment has been paid into Court.

Verdict for the plaintiff.—Damages 32*l.* being 5*l.* per cent. for eight years.

*379] **F. Pollock, and Platt, for the plaintiff.*
R. V. Richards, for the defendant.

[Attornies—*G. S. Ford, and Vizard & B.*]

In the case of *Entwistle v. Shepherd*, 2 T. R. 78, which was an action on a judgment of the Court of Common Pleas, which had been affirmed on writ of error; *Buller, J.* says: "It is a question for a Jury to say, whether or not they will give interest on the judgment in the name of damages, for interest may be recovered in an action on the judgment, if it be not the practice of the Court to allow interest in the costs." However, in the case of *Atkinson v. Lord Braybrooke*, 4 Camp. 380, *Lord Ellenborough* held, that no interest could be allowed in an action on a judgment of the Supreme Court of Jamaica. See the case of *Arnott v. Redfern*, *ante*, Vol. 2, p. 88.

BIRCH v. JERVIS. Oct. 29.

A bill given to a creditor to induce him to sign a bankrupt's certificate is void, in whosever hands it may be, and whatever the consideration given by the holder; but a bill given to a creditor to keep him from taking steps to oppose the certificate, would be good in the hands of a holder for value without notice.

ASSUMPSIT by the plaintiff as indorsee of a bill of exchange, for 35*l.*, drawn by John Jervis on the defendant, Thomas Jervis, and indorsed by the former.

On the cross-examination of the plaintiff's witness, it appeared that this bill was originally drawn for the purpose of being paid to a creditor of the defendant named Ross, to induce him not to oppose the allowance of the certificate of the defendant, who had sometime before become bankrupt; however, it was stated by Ross, that he gave this bill to the plaintiff in payment of a debt due from him to the plaintiff.

The defence was, that this bill was paid to Ross, to induce him to sign Jervis's certificate, and evidence was given of that fact; and it was also contended, that the plaintiff had given no consideration for the bill when he received it from Ross.

*380] Lord TENTERDEN, C. J. A bill given to a creditor to induce him to sign the certificate of a bankrupt, is void, in whosever hands it may

be, and whatever the consideration given by the holder; but if this bill was given to Ross not to induce him to sign the certificate, but merely to keep him from taking any steps to oppose the defendant's getting his certificate, then it would be good in the hands of the plaintiff, if he is a holder for value without notice.

Verdict for the defendant.

Denman, C. S., and *Moody*, for the plaintiff.

Gurney, for the defendant.

[Attornies—*John Hill*, and *J. M. Dodds*.]

By the statute 6 Geo. 4, c. 16, s. 125, it is enacted, That any contract or security made or given by any bankrupt or other person unto or in trust for any creditor, or for securing the payment of any money due by such bankrupt at his bankruptcy, as a consideration or with intent to persuade such creditor to consent to or sign such certificate, shall be void, and the money thereby secured or agreed to be paid shall not be recoverable, and the party sued on such contract or security may plead the general issue, and give this act and the special matter in evidence. [See Arch. B. L. 201.]

ROBERTS v. Lady GRESLEY. Oct. 30.

If the attorney of a creditor write to A. asking payment of a debt due from B., and A. answer the letter and pay 200*l.* of the debt; and afterwards the attorney again write to A., asking payment of the residue of the debt, and A. send a letter promising payment, this last letter is evidence in an action against B.

Goods sold. Plea—General issue. The plaintiff relied on a promise of payment by Mr. King, and the whole question was, whether there was sufficient proof that Mr. King was the agent of the defendant at the time of this promise. It appeared that two letters were sent to the defendant, asking payment, to which no answers were *returned; and that afterwards the plaintiff's attorney wrote to Mr. King for payment, who answered the letter, and paid 200*l.*, part of the demand; and it further appeared, that the plaintiff's attorney some time after this wrote again to Mr. King, to ask for payment of 163*l.*, the residue of the debt, to which Mr. King replied by the letter promising payment.

J. Williams, and *Hutchinson*, for the defendant, objected, that there was not sufficient proof that Mr. King was the defendant's agent at the time of the promise to pay.

Lord TENTERDEN, C. J. It is clearly shown that he was her agent at one time; and I think there is evidence to go to the Jury that he continued so.

Verdict for the plaintiff.

Sir *J. Scarlett*, and *Comyn*, for the plaintiff.

J. Williams, and *Hutchinson*, for the defendant.

[Attornies—*Rye*, and *King*.]

EARRATT v. BURGHART. Oct. 30.

If a lad goes on liking with a view to his being bound an apprentice, his intended master cannot charge for his board and lodging for the first month, nor perhaps for so long time as he conducts himself properly. But if he stays for many months, behaving ill after complaints to his father of his misconduct, it will be for the Jury to say whether there was any contract, either express or implied, that his father should pay for his board and lodging.

ASSUMPT for board and lodging furnished to the defendant's son. The plaintiff was a saddler and belt-maker, and sought to recover the sum of 22*l.* 10*s.* for the board and lodging of the defendant's son, at the rate of 10*s.* *per* week. In the month of December, 1826, the son of the defendant went to the house of the plaintiff, on liking, with a view to his being bound as an apprentice. He behaved well for between three and four months, and after that time he became negligent, and the plaintiff complained to his father. His conduct became worse, and at the end of upwards of nine months, the plaintiff, in *382] consequence of some act of misconduct, was obliged to dismiss him from his house. After this, a person called on the defendant twice, to ask payment for the board and lodging; when the defendant said that he would call on the plaintiff.

Brodrick, for the defendant, contended, that as the lad went on liking, with a view to his being taken as an apprentice, the plaintiff was not entitled to recover for his board and lodging; and he relied on the case of *Wells v. Wilkins* (a).

Lord TENTERDEN, C. J. (in summing up.) If a boy goes to a tradesman's house upon liking, with a view to his being bound as an apprentice, I should have thought, that if he had stayed for a month, or any other short time, the intended master could not recover for his board and lodging; but here, it is proved that the defendant's son stayed for more than nine months; that after three months he became so negligent, that his master complained of him; and that, on his becoming worse, he was forced to dismiss him from his house. A demand is made for payment for his board and lodging; and, in answer to this, the defendant says, he will call on the plaintiff. I do not think that his saying that he will call on the plaintiff is to be taken as a distinct acknowledgment of a liability to pay; however, it is still not a denial that any thing is due. The present case materially differs from the case cited. There the master sent the lad away without any reason, and the father desired him to take the lad back, and even offered him for that purpose; here, on the contrary, the defendant's son was dismissed for misconduct. The question I shall leave to you is this, Whether there was any contract express or implied to pay for the board and lodging of this lad, for any and what portion of the time he was in the house of *383] the plaintiff. The first month I think you must take off, because that is the ordinary time for lads to go on liking; and perhaps you may take off for the three months that he behaved well; and if you think that you can reasonably say that there was no contract, either express or implied, to pay for any part of the board and lodging, then you will find for the defendant; however, if you are satisfied that there was any such contract, you will say how much the plaintiff is reasonably entitled to.

Verdict for the plaintiff.—Damages 8*l.*

Gurney, and *Clarkson*, for the plaintiff.

Brodrick, for the defendant.

[Attornies—*Dods*, and *A. King*.]

(a) *Ante*, Vol. 2, p. 231.

PATTISON v. JONES, Esq. Nov. 1.

If a master in giving the character of a servant in a letter state certain facts, the master, in the defence of an action brought by the servant for libel, is not bound to prove the truth of every fact he stated: it is enough, that he give such evidence as convinces the Jury that he wrote what he did with an honest belief of its truth. *Semble*—that a character of a servant, if given *bonâ fide*, is a privileged communication, although it had not been applied for.

LIBEL. Plea—General issue. The libels in question were two letters written by the defendant Mr. Jones to Mr. Mornay.

The plaintiff had been butler to Mr. Jones, and had left his service; after that, he went to serve as butler with Mr. Mornay, who took him without a character; but the defendant, on the 25th of April, 1826, wrote the following letter to Mr. Mornay:—

“Sir,—Having been informed that you had an intention of taking my butler into your service, I feel it incumbent upon me, as a neighbour, to inform you that I have just discharged him for misconduct, and that I cannot feel myself justified in recommending it to you to engage him. I have been rather surprised that you have not applied to me for his character, but I shall not think any more about it. I am, &c.,

WM. JONES.”

*(This was one of the libels complained of.) Upon receiving this [*384 letter, Mr. Mornay wrote a letter to the defendant, stating, that it was necessary that Mr. Jones should state the particulars of the plaintiff's misconduct, and asking whether he was sober and honest. The letter then continued, “I beg to set your mind perfectly at ease as to any information he might afford me relating to what passed between the sale and delivery of possession of this estate, as I am fully apprised of all the particulars.”

To this letter the defendant, on the 26th of April, wrote an answer (the second libel), in the following terms:—

“Sir,—I have no hesitation in informing you, that I discharged my butler, not only on account of drunkenness and absence from duty in my house, but on account of my having great reason to believe that he had made free with a great deal of my wines, &c., in which I found a very great deficiency upon an examination with the cellar-man who packed it up to be brought down to Putney, who took a regular account of it, which I have got. Pattison had the audacity to open all those packages, without any authority from me, and he acknowledged that fact yesterday before witnesses, when he was so conscious of his misconduct, that he said he would not take any situation in the neighbourhood of Putney. Under these circumstances, I thought it right and neighbourly to put you upon your guard against him.

“As to any information he can give about the furniture, as insinuated in your letter, I can set him and every body else at defiance. I intended to have furnished you with more information, not only about him, but about another person, but as you have not treated the information I have already given you in the way I took it for granted you would have done, I shall decline doing so, being satisfied that you will in time be convinced of the rectitude of my conduct. After what I told Pattison about the wine yesterday, I do not think that he will like to live in the *neighbourhood of Putney, but I have no objection to your taking him into your service, if you think that you can [*385 do so with propriety. I am, &c.,

WM. JONES.”

Sir J. Scarlett. There is no evidence of malice. That is a necessary proof on the part of the plaintiff in cases of servant's character.

Denman, C. S., contra. There is no case that goes to protect an unasked communication by a former master, which the first of these letters clearly is; and further, the malice may be inferred from the letters themselves.

Lord TENTERDEN, C. J. I will not stop the case on this objection.

To show the *bona fides* of the communication, evidence was given, that the plaintiff was often muddled, though not drunk; and that, on the removal of a large quantity of wine, several dozens were missing. But there was no evidence to show that they must have been taken by the plaintiff.

Lord TENTERDEN, C. J. (in summing up.) In ordinary cases of libel, malice is implied; but in cases of letters giving the character of servants, where that character is applied for, there is a burden of proof on the plaintiff to show malice; however, where, as in this case, the first letter was sent by the former master, unasked, I am not satisfied that that rule applies. The question is, whether these communications were made by the defendant honestly and fairly, according to the best of his judgment and belief, or were these letters written from malicious motives. In such a case as this, I am of opinion, that the defendant is not bound strictly to prove every fact stated in the letters; it is enough, if there
*386] be such proof as convinces the Jury that the defendant wrote what he did with an honest belief of its truth.

Verdict for the plaintiff.—Damages 80*l*.

Denman, and Platt, for the plaintiff.

Sir J. Scarlett, Gurney, and Coltman, for the defendant.

[Attornies—*W. Bowler, and Rogers & Son.*]

In the ensuing Term, *Sir J. Scarlett* moved for a new trial on the ground that these letters were privileged communications, and that there was no sufficient proof that the defendant was actuated by malice.

Lord TENTERDEN, C. J. I thought at the trial, that, as the correspondence originated with Mr. Jones, this case differed from all those that had preceded it.

Sir J. Scarlett. That applies only to the first letter. The second communication was asked for by Mr. Mornay.

BAYLEY, J. The second letter would not have been asked for, if the first had not been sent.

Lord TENTERDEN, C. J. I doubted whether I should have received evidence for the defendant, as there was no special plea; however, I left it to the Jury on the questions, whether Mr. Jones was actuated by malice, or whether he wished merely to keep another gentleman from taking a bad servant; and I confess I was a good deal struck by the observation, that if a person knew that another was going to take a bad servant, he might fairly tell that other what he knew respecting such servant.

*387] BAYLEY, J. This case has been put in the fairest way for the defendant, by considering this as a privileged communication. To make it a privileged communication, I do not say, that it is necessary for the defendant to be set in motion by an application from the person who is going to take the party into his service, for if the defendant knows that a person is going to take a servant that he ought not, he may tell him so, and put him upon asking questions. But still the Jury must consider whether he does this *bonâ fide*, or from malicious motives.

LITTLEDALE, J. If this was a privileged communication, the defendant was at liberty to go into his whole case under the general issue, and then it became a question of *bona fides*. That was purely a question for the Jury, and upon that question they have decided. I think the case is different where a man volunteers to send to the intended master, and where he is applied to for the

character; and if a person does volunteer, I think the Jury may reasonably require more evidence to convince them of the *bona fides*.

Rule refused.

See the cases of *Blackburn v. Blackburn*, *ante*, p. 146, and 1 M. & P. 33, and the cases there cited; and also the case of *Robertson v. Macdougall*, *ante*, p. 259.

TOD et al. v. Earl of WINCHELSEA and another. Nov. 3.

A witness examined on the trial of an issue out of Chancery, died; a new trial was granted, and on the new trial parol evidence was allowed to be given of what this witness had deposed on the former trial, notwithstanding there was the usual order for reading the depositions in equity of such witnesses as had died since the first trial.

Issue directed by the Master of the Rolls to try whether the will of the Duke of Roxburgh was duly executed. This was a new trial of the case reported *ante*, Vol. 2, p. 488.

Mr. Tate, who was examined as a witness at the former *trial, to show [*388 the situation of the rooms, was proved to be dead.

Sir J. Scarlett wished to go into proof of what this witness had said in his evidence on the former trial.

Tindal, S. G. This is an issue directed by the Master of the Rolls, and there is the usual order of the Master of the Rolls for the reading of the depositions in the equity suit, of such of the witnesses as have died since the former trial. I therefore submit that the other side is not at liberty to give evidence of what Mr. Tate proved on the former trial, but they must read his deposition taken in Chancery.

Sir J. Scarlett, *contra*. This cause must be tried like every other. It is the same cause of action, and between the same parties.

Lord TENTERDEN, C. J. I think I must receive the evidence.

The evidence given by Mr. Tate on the former trial was read by Mr. Oliver, the short-hand-writer, from his notes.

Lord TENTERDEN, C. J. (in summing up.) By the statute of frauds, 29 Car. 2, c. 3, a will of lands must be attested by three witnesses in the *presence* of the testator. However, by the word *presence*, it is not meant that it should be done in the actual sight of the testator; and it is sufficient that the will should be attested in such a situation that the testator *might* see the witnesses sign the attestation. Such is the result of the authorities; and indeed I am not aware that my opinion delivered at the last trial has ever been questioned.

Verdict for the plaintiff.

*Sir J. Scarlett, Gurney, Jacob, and Jardine, for the plaintiffs.

Tindal, S. G., Brougham, and Stuart, for the defendants. [*389

[Attornies—*E. S. Foss*, and *Rogers & Home*.]

If a witness, who has been examined on a former action *between the same parties*, and where the point in issue was the same as in the second action, is since dead, what he swore at the first trial may be proved by one who heard him give evidence. 1 Phill. Ev. 274. But the person called to prove what a deceased witness said, must undertake to repeat *precisely his very words*, and not merely to swear to their effect. *Ib.* For the purpose of introducing an account of what a deceased witness swore on the first trial, the *Nisi Prius* record, and the *postea* indorsed thereon, are good evidence to show that the cause was brought on for trial, or that it was actually tried. *Id.* 275. See also *Dee dem. Lloyd v. Passingham*, *ante*, Vol. 2, p. 445.

1828.

BEFORE MR. JUSTICE PARK AND MR. BARON VAUGHAN.

BERKSHIRE ASSIZES.

BEFORE MR. BARON VAUGHAN.

REX v. EDMEDS et al. *March 4.*

If game-keepers attempt to apprehend a gang of night poachers, and one of the game-keepers be shot by one of the poachers, this will be murder in all the poachers, unless it be proved that either of them separated himself from the rest, so as to show that he did not join in the act.

THE prisoners, eight in number, were charged with shooting James Mancey, with an intent to murder him.

It appeared, that at about 11 o'clock in the night of the 6th of January, the prisoners, each having a gun, were out for the purpose of shooting pheasants, in a coppice belonging to Mr. Crutchley, at Sunning-hill; and that on James Mancey, and other game-keepers and servants of Mr. Crutchley, going towards them for the purpose of taking them into custody, the prisoners formed into two lines, and pointed their guns at the game-keepers, saying, that they would shoot them; when a shot was fired, which wounded James Mancey. Some of the game-keepers' party were severely beaten over the head with the gun-barrels; but no other shot was fired, except that by which Mancey was wounded.

*391] *Carrington*, for the prisoners. I submit, that under the stat. 57 Geo. 3, c. 80 (a), game-keepers and other persons were only *permitted* to apprehend night poachers, but not *enjoined* to do so; because, if they were so enjoined, every person, no matter what his station, would be liable to an indictment if he did not go and apprehend persons that he saw poaching, just the same as a constable, who, seeing a felony committed, should neglect to apprehend the felon. Now, if game-keepers are only *permitted* to apprehend, the killing them in a resistance would only be manslaughter; because, it is laid down by Lord Hale (b), that to kill a constable who is taking a felon, is murder; because he is not only *permitted* but *enjoined* to take the felon, and is liable to indictment if he does not do so; whereas, a private person being only *permitted* to arrest on suspicion of felony, the killing him is but manslaughter. There is also another point, which is this: If the shooting of Mancey was not in pursuance of, but was beside the common unlawful intent for which these parties assembled, the only person who can be found guilty is the one who actually fired the gun. To make the whole party guilty, the act must be done strictly

(a) This statute is now repealed by the statute 9 Geo. 4, c. 69. However, this latter statute contains a clause respecting the apprehension of offenders, which is set out in Carr. Supp. p. cxli.

(b) 2 P. C. 90-92

in prosecution of the purpose for which the party was assembled. Now, their common intent was only to kill game, and it is clear that there was no common intent to shoot this man, because only one gun was fired instead of the whole number.

VAUGHAN, B. I am of opinion, that when this act of Parliament empowered certain parties to apprehend persons who were out at night armed for the destruction of game, it gave them the same protection in the execution of that power, which the law affords to constables in the execution *of their [*392 duty. These persons were in the actual commission of the offence; and [this is nothing like the case put, of a private person arresting another on suspicion of felony. With respect to the other point, that is rather a question for the Jury; but still, on this evidence, it is quite clear what the common purpose was. They all draw up in lines, and point their guns at the game-keepers, and they are all giving their countenance and assistance to the one of them who actually fires the gun. If it could be shown that either of them separated himself from the rest, and showed distinctly that he would have no hand in what they were doing, the objection would have much weight in it.

The Jury found three of the prisoners guilty, and acquitted the others.

Curwood, and Justice, for the prosecution.

Currington, for the prisoners.

[Attornies—*W. Henson, for the prosecution; Burgess,—and Compigny & D., for the respective prisoners.*]

As the two following cases relate to the same points as the above, we have thought it best to insert them here.

WORCESTER.—*Coram PARK, J.*

REX v. HAWKINS et al. March 11.

If a gang of poachers attack a game-keeper, and leave him senseless on the ground, and one of them return and steal his money, &c., that one only can be convicted of the robbery, as it was not in pursuance of any common intent.

THE indictment charged the prisoners, and a person named Williams (who was not in custody), with robbing William Tucker.

It appeared that the prisoners were out poaching in the night, in company with Williams; and that Tucker, who was the game-keeper of Mr. West, met them as he was going his rounds, when the whole party set upon him and beat him till he was senseless; and [*393 that on his recovering, he missed his pocket-book and money, and his gun. However, to connect some of the prisoners with the offence, an accomplice was called, who stated that they all beat the game-keeper, and left him lying on the ground; and that after they had gone some little distance Williams returned and robbed him (a).

PARK, J.—It appears to me that Williams is alone guilty of this robbery. It appears that

(a) To make all guilty, “the fact must appear to have been committed strictly in prosecution of the purpose for which the party was assembled; and therefore, if divers persons be engaged in an unlawful act, and one of them, with malice prepense against one of his companions, kills him, the rest are not concerned in the guilt of that act, because it hath no connection with the crime in contemplation.” So, where two men were beating a third in the street, and a stranger made an observation on the cruelty of the act, and one of them stabbed him, this was not murder in both, though both were committing an unlawful act; because only one of them intended to do injury to the person killed. 1 Curw. Hawk. p. 101.

In *Plummer's* case, a smuggler, in a scuffle with the revenue officers, shot one of his comrades (upon a grudge of his own): the question was, whether the whole gang were guilty of murder; and it was held, that as it did not appear that the gun was discharged in prosecution of the purpose for which the party had assembled, it was only murder in him who did it. Cited 1 Russell, 602; *Hodgson's* case, 1 Leach, 6. S. P. And if several are out for the purpose of committing a felony, and upon an alarm run different ways, and one of them maim a pursuer to avoid being taken, the others are not to be considered principals in such act. *Rex v. White, Russ. & Ry. C. C. R.* 99.

there was no common intent to steal the keeper's property. They went out with a common intent to kill game, and perhaps to resist the keepers; but the whole intention of stealing the property is confined to Williams alone. They must be acquitted of the robbery.

Verdict—Not Guilty (a).

Ladlow, Serjt., and Carrington, for the prosecution.
Gedson, for the prisoners.

[Attornies—*Wgatt & Tibbatts*, and *Parker*.]

(a) They were afterwards convicted on an indictment for night poaching.

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*GLOUCESTER.—*Coram* VAUGHAN, B.

REX v. WHITHORNE et al. April 10.

Where game-keepers had seized two persons who were poaching in the night, and they (having surrendered) called to a third, who came up and killed one of the game-keepers, this is murder in all, though the two struck no blow, and though the game-keepers had not announced in what capacity they had apprehended them.

MURDER.—The prisoners Whithorne, Perry, and Smith, were charged with the murder of Richard Rounce.

It appeared that the deceased and others, who were the game-keepers and servants of Mr. Waller, found the prisoners, Perry and Smith, out for the purpose of catching hares, on the night of the 26th of November. It also appeared that they collared Perry and Smith, and after some blows on both sides those prisoners stood quite still; but that soon after they called to the prisoner Whithorne, who came up, and, with a stick shod with iron, beat the game-keepers on the head, rescued the other two prisoners, and killed the deceased.

Phillipotts, for the prisoners, objected, that as the game-keepers did not announce to the prisoners who they were, the arrest was illegal; and further, that as their duty was at most to apprehend only, and it was in proof that they beat the prisoners, that would reduce the offence to manslaughter; and that at any rate the charge could not be supported as against Perry and Smith, because, after the blows, they submitted to be taken, and had nothing to do with the killing of the deceased.

VAUGHAN, B. If those two had acquiesced, and had stayed perfectly passive, that would be so; but it is proved that they called to Whithorne, who came up and killed this man. With respect to the keepers' not announcing who they were, there is no pretence for saying that the prisoners did not know that perfectly well. And they did not make any question of their authority. They did not say, "You have no right to take us—who are you?" or any thing of that sort. I am of opinion that this was a legal apprehension, and, being so, all the legal consequences must follow.

Verdict—Not Guilty.

Justice and Maclean, for the prosecution.

Phillipotts, for the prisoners.

[Attornies—*Press & Co.*, and *Tara*.]

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*WORCESTER ASSIZES.

BEFORE MR. BARON VAUGHAN.

WILLIES v. FARLEY, Esq. March 10.

A. sued out a writ of *f. fa.* against the goods of B., and the Sheriff executed a bill of sale of certain goods to A. After this, B. remained in possession of the goods, and the Sheriff again took them, under another execution against B.: Held, that in an action brought by A. against the Sheriff for taking these goods, the declarations of B. were evidence for the defendant, to show that A.'s execution was merely colourable.

TROVER.—It was proved, that on the 13th of July, 1827, the plaintiff, Edward Willies, sued out a writ of *feri facias* against the goods of John Willies;

and that the defendant, as Sheriff of Worcestershire, on the 16th of July, executed a bill of sale of those goods, which were the goods in question, to the plaintiff; and that on the 9th of September, in the same year, the defendant as Sheriff seized these same goods under another execution against John Willies at the suit of Messrs. Homfray & Co.

The defence intended to be set up was, that John Willies remained in possession, and that the plaintiff's execution was merely colourable, and therefore that the goods, up to the time of the second execution, really belonged to John Willies. To show this, the defendant's counsel wished to ask the Sheriff's officer, in cross-examination, what John Willies said when Messrs. Homfray's execution went in.

Curwood, for the plaintiff, objected, that what John Willies said as to the property of the goods, was not evidence, as he might be called.

VAUGHAN, B. What John Willies said as to whose the goods were, he being then in possession of the goods, is evidence.

This evidence was received, and the officer also proved, that the plaintiff had said to him, that he had sued out the first execution, to protect the goods from Messrs. Homfray.

Nonsuit.

**Curwood*, and *Carrington*, for the plaintiff.

Campbell, and *Corbet*, for the defendant.

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[Attornies—*R. Gude*, and *Grazebrook*.]

STAFFORD ASSIZES.

BEFORE MR. BARON VAUGHAN.

REX v. ELDERSHAW. *March 19.*

A boy under the age of fourteen, cannot be convicted of an assault with intent to commit a rape.

ASSAULT, with intent to commit a rape upon Harriet Finney; second count, for a common assault.

The prisoner was a boy under twelve years of age, and Harriet Finney a child of fourteen months old. It was proved that the prisoner said to another boy, that he "had had concern with the child three times;" and the mother of the child, a few days after, perceived that she had marks of violence on her person.

VAUGHAN, B. This boy being under fourteen, he cannot, by law, be found guilty of a rape, except as a principal in the second degree. I am, therefore, of opinion, that he cannot be convicted on the first count of this indictment. From his age, the law concludes that it is impossible for him to complete the offence, and that, in my judgment, must be held to negative the intent alleged in the first count of this indictment.

Verdict—Guilty of a common assault only.

**REX v. CURRAN. March 19.*

If the servant of the owner of property find a party actually committing an offence against the stat. 7 & 8 Geo. 4, c. 29 (the larceny act), and apprehend him under sect. 63 of that act, and, while taking the party to a magistrate, such party kill him, this will be murder; but if the servant *either* did not see him in the actual commission of the offence, *or* be taking him to any other place than before a magistrate, it will not be murder.

INDICTMENT for cutting Robert Sutton, with intent to murder him.

It appeared that the prosecutor, Robert Sutton, was the servant of a farmer named Foster, who directed him to apprehend the prisoner for stealing the turnips. The prosecutor very soon after this found the prisoner in a field adjoining to Foster's turnip field, with a quantity of turnips in his possession. The prosecutor took him into custody, and proceeded with him first to Foster's house, and thence to the house of the constable; but on their way there, the prisoner said he would go no further, and drew a knife, with which he severely wounded the prosecutor.

On the part of the prosecution, it was contended, that the prosecutor, Sutton, as the servant of Foster, had a right to apprehend the prisoner, under the 63d sect. of the stat. 7 & 8 Geo. 4, c. 29; and therefore, that if Sutton had died, the offence of the prisoner would have been murder.

VAUGHAN, B. This resolves itself into a mere question of law. By one of the sections of the stat. 7 & 8 Geo. 4, c. 29, stealing vegetable productions is made an offence, and, by the 63d section, the owner of the property, or his servants, are empowered to apprehend persons, found committing offences against that act, and to take them forthwith before a justice of the peace. Now here, this man was not found committing the offence, but was in the next field; which brings the case neither within the letter nor the spirit of this enactment. Again, by this enactment, the owner or servant who apprehends, must take the offender forthwith before a justice. Now, this man was actually taken to Foster's, and was about to be taken to the constable's, all which is clearly wrong. If this
*398] *prisoner had been found in the very act of stealing the turnips, and had been taken by a servant of the owner, to be carried forthwith before a magistrate, I should have said, that the servant had all the protection of a constable; and that if the prisoner had cut or stabbed him with an intention to kill, it would have been a capital offence.

Verdict—Not Guilty.

Whately, for the prosecution.

By the statute 7 & 8 Geo. 4, c. 29, s. 43, persons who shall steal or destroy, or damage with intent to steal, "any cultivated root or plant, used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land open or inclosed, not being a garden, orchard, or nursery ground," are punishable on a summary conviction by one justice of the peace. And by sect. 63 of the same stat. it is enacted, that "any person found committing any offence, punishable either upon indictment or upon summary conviction, by virtue of this act, except only the offence of angling in the day time, may be immediately apprehended without a warrant, by any peace officer, or by the owner of the property on or with respect to which the offence shall be committed, or by his servant or any person authorized by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law; and if any credible witness shall prove, upon oath before a justice of the peace, a reasonable cause to suspect that any person has in his possession or on his premises any property whatsoever, on or with respect to which any such offence shall have been committed, the justice may grant a warrant to search for such property, as in the case of stolen goods; and any person, to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed on or with respect to such property, is hereby authorized, and, if in his power, is required to apprehend, and forthwith to carry before a justice of the peace the party offering the same, together with such property, to be dealt with according to law."

G *

*BEFORE MR. JUSTICE PARK.

WARD v. NANNEY, Clerk. *March 17.*

At a general election, A. was, after a contest, returned to serve in Parliament; A. died before the next meeting of Parliament: Held that, immediately on his death, the representation of that place "became vacant," within the meaning of the treating act, 7 & 8 W. 3, c. 4; and that if B., who was neither a candidate nor the agent of a candidate, canvassed for C., and ordered beer for the voters, after such vacancy, this was within the act, even though it was not proved that C. either knew of the canvass or of the treating: and it was therefore held, that an innkeeper could not recover against B. for beer supplied to those voters by his order. The treating act extends to an unsuccessful candidate who did not come to the poll.

ASSUMPT for goods sold. Plea—General issue. It appeared that the plaintiff, who kept the Goat public-house, at Stafford, had supplied beer to the voters there, under the following circumstances:—

At the general election, in the summer of the year 1826, Mr. Ironmonger was returned jointly with Mr. Benison; to represent the borough of Stafford, after a contested election, at which Mr. Campbell was the unsuccessful candidate. Before the meeting of Parliament, in the beginning of the year 1827, Mr. Ironmonger died, so that he never took his seat in the house.

In the month of August, 1826, just after the death of Mr. Ironmonger, the defendant, who was a clergyman, canvassed the borough in favour of his brother Sir W. Wynn, and directed the plaintiff to supply the voters with beer. The plaintiff did so, and the defendant paid the amount of the plaintiff's bill up to the month of October, when he renewed his directions to the plaintiff, who supplied more beer to the voters, to the amount of 25*l.* 9*s.*, to recover which this action was brought.

Campbell, for the defendant. This plaintiff cannot recover. The representation of the borough of Stafford was vacant by the decease of Mr. Ironmonger, and therefore this supply of beer is within the treating act, 7 & 8 W. 3, c. 4; by which it is enacted, that no person to be elected to serve in Parliament, for any county, city, &c., shall, after the teste of the writ of summons, or after any such place becomes vacant, either directly or indirectly, by himself or others, give meat, drink, &c. to the voters.

**Jervis*, and *Curwood*, *contra*. As Mr. Ironmonger had never taken [⁴⁰⁰] his seat, there could not be said to be a vacancy by the mere fact of his death; for, had the unsuccessful candidate petitioned, and shown, before a committee of the House of Commons, that he ought to have been returned, the committee would have seated him on his petition; and so Mr. Ironmonger's death would have caused no vacancy. And besides, the treating act applies, at most, only to treating by the candidate, or by his agents; now here, though Mr. Nanney, the defendant, treated the voters, yet he was no agent to the candidate; and the candidate does not appear to have known that the defendant was trying to secure his election. Again, this statute only relates to treating by or on behalf of persons *to be elected*: which only implies to a successful candidate. Sir W. Wynn was not a successful candidate, for, in fact, he withdrew from the contest.

PARK, J. I am of opinion that the representation was vacant on the death of Mr. Ironmonger; he was the party returned, and although it is possible that the return might have been quashed, and some other gentleman seated, on a petition, yet that never was so. If you could show that another person was seated by petition, and that Mr. Ironmonger's return was quashed, I might hold that his death made no vacancy; but as the matter really stood, his death did, in fact, cause the vacancy. With respect to the act only extending to treating

by candidates and their agents, I think this case is clearly within it, for it includes all treating by the candidates themselves, "or by any other ways or means on his or their behalf." Now, it is impossible to say that this was not a treating on behalf of Sir W. Wynn. With respect to the other point raised, that the treating act applies only to successful candidates, I am decidedly of opinion that that is not so.

Nonsuit.

*401] **Jervis*, and *Curwood*, for the plaintiff.
Campbell, for the defendant.

[Attorneys—*Passman*, and *R. W. Williams*.]

By the stat. 7 & 8 W. 3. c. 4. it is enacted, "That no person or persons hereafter to be elected to serve in Parliament for any county, city, town, borough, port, or place within the kingdom of England, dominion of Wales, or town of Berwick upon Tweed, after the *teste* of the writ of summons to Parliament, or after the *teste* or the issuing out or ordering of the writ or writs of election upon the calling or summoning of any parliament hereafter, or after any such place becomes vacant hereafter in the time of this present or of any other parliament, shall or do hereafter, by himself or themselves, or by any other ways or means on his or their behalf, or at his or their charge, before his or their election to serve in Parliament for any county, city, town, borough, port, or place within the kingdom of England, dominion of Wales, or town of Berwick upon Tweed, directly or indirectly give, present, or allow to any person or persons, having voice or vote in such election, any money, meat, drink, entertainment or provision, or make any present, gift, reward or entertainment, or shall, at any time hereafter, make any promise, agreement, obligation, or engagement, to give or allow any money, meat, drink, provision, present, reward or entertainment, to or for any such person or persons in particular, or to any such county, city, town, borough, port, or place in general, or to or for the use, advantage, benefit, employment, profit or preferment of any such person or persons, place or places, in order to be elected, or for being elected, to serve in Parliament for such county, city, borough, town, port, or place." See the case of *Richardson v. Webster*, Bart. ante, p. 128, and the case there cited.

*402]

*SHREWSBURY ASSIZES.

BEFORE MR. BARON VAUGHAN.

DOE on the demise of OLDNALL and Wife v. DEAKIN and WOOLEY.
 March 24.

A will of lands executed more than thirty years ago, is admissible in evidence without calling the subscribing witness, although the testator has died within thirty years, and it be proved that one of the subscribing witnesses is still alive.

A. claimed in ejectment as heir-at-law of B. A. traced his pedigree through the youngest son of a common ancestor, who, in the year 1689, had four elder sons whose descendants (if any) would have had a better title than B. — Held, that the length of time was a sufficient ground to presume their deaths; and that the Court would take it that they all died without issue, unless there was some evidence to induce a presumption that they, or some of them, married and left issue.

EJECTMENT by the lessor of the plaintiff, Mrs. Oldnall, to recover certain estates in the county of Salop, as the devisee of Frances Wooley. The estates had never been in the actual possession of Frances Wooley, but she was alleged to have been entitled to them as the heir of Thomas Wooley, of Wood-hall, Esq., who, by his will, which bore date in the year 1798, devised these estates to his widow for life, and, after her decease, to his own right heir. Thomas Wooley of Wood-hall, Esq., died in the year 1800, and the possession went

according to the will, as his widow enjoyed the estates to the time of her death, in the year 1824.

The counsel for the lessor of the plaintiff wished to give this will in evidence; however, it appeared, that, though the will by its date was more than thirty years old, yet thirty years had not elapsed since the death of the testator; and it also appeared that one of the subscribing witnesses was alive, but not in Court.

Campbell, for the defendant. This will cannot be read without calling the subscribing witness. A deed operates *in presenti*; and though to a deed no witness is required by law, yet, if there be one, that witness must be called, if it be within thirty years of the date of the deed. Now, to a will of lands, three witnesses are required by law, and a will does not operate till the death of the party. I therefore submit, that if either of the witnesses is in being, that witness must be called, more especially if the will has not been in operation for thirty years.

*VAUGHAN, B. I shall admit this will in evidence without the subscribing witness being called. The rule of thirty years is founded on [*403 the presumption that the witnesses are dead; and, therefore, as this will was executed more than thirty years ago, I shall admit it.

The will was read (a).

To show the title of Frances Wooley, as the heir-at-law of Thomas Wooley of Wood-hall (the person last seised in fee), it was opened that Thomas Wooley of Wood-hall was the grandson of William, the eldest son of Thomas Wooley Senr.; and that Frances Wooley, under whom the lessors of the plaintiff claimed, was the granddaughter of Edward, the youngest son of the same Thomas Wooley Senr. To prove that Edward was the sixth son of Thomas Wooley, the marriage settlement of William Wooley, the eldest son of Thomas, was put in. This marriage settlement was dated in the year 1689, and it appeared therefrom that Thomas Wooley Senr. had six sons, of whom Edward was the youngest. There was other very distinct evidence of the relationship in which Frances Wooley stood to Thomas Wooley of Wood-hall (the person last seised), but there was no evidence whether the other four of the six sons of Thomas Wooley Senr. had died with or without issue. However, to raise a presumption that they had died without issue, the will of William Wooley, the eldest son of Thomas (whose marriage-settlement was put in as above stated), was read, and also the will of George Wooley, another member of the family, neither of which mentioned or alluded to either of those sons of Thomas Wooley Senr., or to any descendant of either of them.

Campbell, for the defendants, contended, that the lessors of the plaintiff were not only bound to show that Frances *Wooley was descended from [*404 Edward Wooley, the sixth son of the common ancestor; but must also prove, that all the elder branches of the family were extinct.

VAUGHAN, B. I think that that is what I must leave to the Jury. It will be for them to say, whether, from the evidence given in this case, they have fair reason to suppose that the descendants of these sons of Thomas Wooley Senr. (if they ever had any) are all extinct. These sons are never heard of anywhere, since the date of the marriage-settlement. The wills neither mention nor allude to them, nor to any of their descendants; and no evidence is adduced by the defendants to give the Jury the slightest idea of their existence (b).

Verdict for the plaintiff.

(a) On this point, see the case of *Doe dem. Lloyd v. Passingham*, ante, Vol. 2, p. 441, and the cases collected in the note, *Ib.* 442.

(b) As to the time when the death of a party shall be presumed, Lord *Ellenborough*, in the case of *Doe dem. George v. Jesson*, 6 East. 85, says: "As to the period when a party might be supposed to have died, according to the statute 19 Car. 2, c. 6, with respect to leases dependent on lives, and also according to the statute of bigamy, 1 Jac. 1, c. 11, the presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living. Therefore, in the absence of all other evidence, to show that he was living at a later period, there was fair ground for the Jury to presume that he was dead at the end of seven years from the time when there

**Taunton, Russell, Serjt., and Curwood*, for the lessors of the plaintiff.
Campbell, Richards, and Whately, for the defendants.

[Attornies—*Hyde*, and *Cree*.]

IN the ensuing Term, *Campbell* applied to the Court of King's Bench for a new trial, on two grounds: *First*, that the will of Thomas Wooley of Wood-hall ought not to have been received in evidence without its being proved by the subscribing witness, as it came into operation within thirty years, though dated more than thirty years ago; and *secondly*, that it was incumbent on the lessors of the plaintiff to prove the extinction of all the elder sons of Thomas Wooley, Senr., and of all their descendants; as, without that proof, Frances Wooley was not the heir-at-law of Thomas Wooley of Wood-hall: he admitted that the deaths of the sons might be inferred from the length of time since the year 1689; but he contended that it must also be shown that they died without issue.

LORD TENTERDEN, C. J. I think that there is no weight in either of these objections. The presumption, that, after the lapse of thirty years, the subscribing witnesses may be dead, equally applies to the time of the execution *406] of a will, and to the execution of a deed. After thirty years from the execution of either, the parties may very fairly presume that the witnesses are dead, and save themselves the trouble of looking after them. With respect to the other point, the only evidence before us is, that the parties who would have had a better title than Frances Wooley were in existence in the year 1689. Now I think the Jury might certainly presume that those parties were all dead before this ejectment was brought; but then we are asked to presume that some of them married and left issue. That is calling on us to presume an affirmative fact, of which we have no evidence, and which there is nothing to lead us to presume.

BAYLEY, J. We must presume that things remain in the same state in which they are proved to be; unless there is something to show that the state of things has been altered. It is shown, that these sons of Thomas Wooley were alive at the time of the execution of the marriage-settlement; and if they were alive now, it is quite clear that they must be each of them nearly a hundred and fifty years old. I think, therefore, that the Jury might very properly presume that they were dead; and if so, we have nothing to lead us to suppose that they ever either married or had issue, and in the absence of all evidence we cannot presume it.

LITLEDAL, J., concurred.

Rule refused (a).

was the last account of him." The statute of bigamy, 1 Jac. 1, c. 11, has been repealed by the statute 9 Geo. 4, c. 31; however, by the latter statute, sect. 22, no person is punishable for bigamy, "whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time." This statute, therefore, puts the presumption of the death on the fact, that the party has not been heard of for seven years.

With respect to the party having died without issue: in the case of *Doe dem. Banning v. Griffin*, 15 East, 293, one of the family proved, that, many years before, a younger brother of the person last seized had gone abroad, and that the repute of the family was, that he had died there; and that the witness had never heard in the family of his having been married; and this was held to be *prima facie* evidence that the party was dead without lawful issue, to entitle the next claimant by descent to recover in ejectment. However, in the case of *Richards v. Richards* (cited, Id. 294), the lessor of the plaintiff showed the death of his elder brothers, but not that they died without issue, and no negative evidence of their marriage was given; and there the Court held, that it must be proved that they died without issue, and that "the plaintiff must remove every possibility of title in another person before he can recover, no presumption being to be admitted against the person in possession." This case is cited from Ford's MSS., but it is material to consider whether it is not overruled by the principal case.

(a) Having been unavoidably absent at the time when this motion was made, we are indebted to the kindness of one of the counsel in the case for this report of it.

*BEFORE MR. JUSTICE PARK.

CASH v. GILES. *March 24.*

If one order a certain machine, *e. g.* a threshing-machine, which, when sent to him, turns out to be unfit for use, he should *either* return it immediately, *or else* give immediate notice to the vendor to fetch it away; for if he keep it a long time without doing either, he will be taken to have waived all objections to its goodness.

ASSUMPSIT, to recover the price of a threshing-machine. It appeared, that the defendant bought the threshing-machine of the plaintiff, in the year 1822; and the defendant called several witnesses, who proved that the machine was of no value, because it did not thresh the corn out properly, but, on the contrary, left about one-third of it in the straw. The defendant had never returned the machine, though his witnesses proved that he had only used it twice.

PARK, J. If the defendant meant to insist that this threshing-machine was not a good one, and suitable to its intended purpose, it was his duty either to have immediately returned it, or to have given immediate notice to the plaintiff to fetch it away, as it was of no use; now, instead of that, he keeps it for several years. I am clearly of opinion, that, as he has done so, he has waived all objections to its goodness, and is bound to pay for it.

Verdict for the plaintiff.—Damages 25*l*.

Curwood, and *Carrington*, for the plaintiff.

Campbell, and *Whateley*, for the defendant.

[Attornies—*Wood*, and *Oblins*.]

See the cases of *Milner v. Tucker*, ante, Vol. 1, p. 15, and *Percival v. Blake*, ante, Vol. 2, p. 514.

*GLOUCESTER ASSIZES.

[*408]

BEFORE MR. JUSTICE PARK.

BARTLETT v. LEIGHTON. *April 3.*

An affidavit to verify a plea *puis darrein continuance*, at the Assizes, sworn at the Assize town on the commission day of the Assizes, before a commissioner for taking affidavits, is not good. It should be sworn before one of the Judges of Assize; however, the Judge at N. P. will allow it to be re-sworn before him.

DEBT.—When the case was called on, and before the Jury were sworn, the defendant's counsel put in a plea of release *puis darrein continuance*. The affidavit to verify it was sworn at Gloucester on the 2d of April, before a commissioner for taking affidavits. The second of April was the commission day for the holding of the assizes.

Russell, Serjt., for the plaintiff, objected—That the affidavit was not good, unless sworn before one of the Judges of Assize.

Busby, contra, submitted—That if that were so, perhaps his Lordship would allow it to be re-sworn.

PARK, J. (having conferred with VAUGHAN, B.) My learned brother and myself are both of opinion, that the affidavit should have been sworn before one of the Judges of Assize, as the commissions of the Judges supersede all other commissions in the town where the Assize is held; however, we think we ought to allow the affidavit to be re-sworn before me.

This was accordingly done.

Russell, Serjt., and *Skutt*, for the plaintiff.

Busby, for the defendant.

[Attornies—*Mason*, and *Leighton*.]

See the case of *Pascall v. Hersley, ante*, p. 372.

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*BEFORE MR. BARON VAUGHAN.

REX v. HALL. April 8.

A. had set wires in which game was caught; B., a gamekeeper, found them, and took the game and wires for the use of the lord of the manor; A. demanded them with menaces, and B. gave them up: The Jury found that A. acted under a *bond fide* impression that the game and wires were his property: Held, no robbery.

INDICTMENT for robbing John Green, a gamekeeper of Lord Ducie, of three hare wires and a pheasant. It appeared, that the prisoner had set three wires in a field belonging to Lord Ducie, in one of which this pheasant was caught; and that Green, the gamekeeper, seeing this, took up the wires and pheasant, and put them into his pocket; and it further appeared, that the prisoner, soon after this, came up and said: "Have you got my wires?" The gamekeeper replied, that he had, and a pheasant that was caught in one of them. The prisoner then asked the gamekeeper to give the pheasant and wires up to him, which the gamekeeper refused; whereupon the prisoner lifted up a large stick, and threatened to beat the gamekeeper's brains out if he did not give them up. The gamekeeper, fearing violence, did so.

Maclean, for the prosecution, contended, that, by law, the prisoner could have no property in either the wires or the pheasant; and, as the gamekeeper had seized them for the use of the lord of the manor, under the statute 5 Ann. c. 14, s. 4, it was a robbery to take them from him by violence.

VAUGHAN, B. I shall leave it to the Jury to say whether the prisoner acted on an impression that the wires and pheasant were his property; for, however he might be liable to penalties for having them in his possession, yet, if the Jury think that he took them under a *bond fide* impression that he was only getting back the possession of his own property, there is no *animus furandi*, and I am of opinion that the prosecution must fail.

Verdict—Not Guilty.

Maclean, for the prosecution.

[Attornies—*Blossome & Co.*]

*OXFORD SUMMER CIRCUIT. [*410]

1828.

BEFORE MR. JUSTICE GASELEE AND MR. BARON VAUGHAN.

BERKSHIRE ASSIZES.

BEFORE MR. BARON VAUGHAN.

REX v. HENRY HEDGES. *July 14.*

in an indictment for putting off counterfeit money at a lower rate than its denomination imported, it was alleged that the prisoner put off a counterfeit sovereign and three counterfeit shillings, "for the sum of five shillings." The proof was, that the prisoner said he would let the witness have a bad sovereign at 4s., and three bad shillings at 1s.; and the witness paid for them with two good half-crowns: Held, that this proof supported the allegation.

INDICTMENT on the stat. 8 & 9 W. 3, c. 26, s. 6 (a), for feloniously putting off and paying to one Abraham *Levi, a counterfeit sovereign and three [*411] counterfeit shillings, at a lower rate and value than their denomination imported.

The indictment charged that the prisoner put off the counterfeit sovereign and three counterfeit shillings, "for the sum of *five shillings*." The witness, Abraham Levi, gave the following evidence: "The prisoner said, I should have a cooter (a bad sovereign) at 4s., and three pegs (bad shillings) at 1s., and on his giving them to me I paid for them with two good half-crowns."

Justice, for the prisoner. This being a matter of contract, it must be proved as laid. That was decided in the case of *Rex v. Joyce* (b), Carr. Supp. 184.

(a) By the stat. 8 & 9 W. 3, c. 26, s. 6, it is enacted, that if any person or persons shall take, receive, pay, or put off, any counterfeit milled money, or any milled money whatsoever unlawfully diminished, and not cut in pieces, at or for a lower rate or value than the same by its denomination doth or shall import or was coined or counterfeited for, that then all and every such person and persons shall be deemed and adjudged guilty of felony, *and being thereof convicted, or attainted according to the order and course of the laws of this realm, shall suffer death as in case of felony.*"

Under the above enactment this is not a capital offence, because the benefit of clergy is not taken away, which was essential to the making an offence capital in all acts passed before the 7 & 8 Geo. 4; but in all acts passed since the commencement of the session of Parliament in 1827, the terms, "suffer death as a felon," are sufficient to create a capital offence.

This offence under the stat. 8 & 9 W. 3, c. 26, is stated as a felony not capital in Arch. C. L. 328, and in 1 Curw. Hawk. p. 44, where the offence is treated of, and the clause of the statute set out, but the words printed in italics, *supra*, are omitted.

As to the punishment of felonies not capital, it is by the stat. 7 & 8 Geo. 4, c. 28, s. 8, enacted, that every person convicted of any felony for which no punishment has been specially provided, shall be liable at the discretion of the Court to be transported for seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice, publicly or privately whipped, if the Court shall so think fit, in addition to such imprisonment. And by sect. 9 of the same stat. the Court may, in its discretion, superadd hard labour or solitary confinement, in all cases in which imprisonment may be awarded under this act.

(b) In that case it was charged, in the indictment, that five counterfeit shillings were put off at two shillings. The proof was that they were put off at half a crown. *Thompson, C. B., and Hanth. J.*, held, that, as this was a contract, it must be proved as laid, and directed an acquittal, MS. (O. B.)

Now, in the present case, it is charged that the prisoner put off the whole of the bad money at five shillings, and the proof is that the witness paid 4s. for the bad sovereign, and 1s. for the bad silver.

*412] *VAUGHAN, B.* This is all one contract and one transaction. The whole of the bad money was put off at 5s., and we see that it is paid for with two good half-crowns. If the bad money had been put off at a different sum from that which is charged, the case you have cited shows that that would be a fatal objection. But here you have one contract consisting of two items.

Verdict—Guilty.

Jervis, and *Shepherd*, for the prosecution.

Justice, for the prisoner.

[Attornies—*Powell*, and ———.]

REX v. JOHN SMITH. July 15.

If two bills of indictment be preferred for the same offence, the one charging it capitally, the other as a misdemeanour, and both be found, the Judge will put the party to his election which he will go upon, and direct an acquittal on the other.

INDICTMENT under the stat. 43 Geo. 3, c. 58 (Lord Ellenborough's act), (a) for cutting George Taylor with intent to murder him. There was another indictment against the prisoner, charging this same offence as a common assault.

VAUGHAN, B. I much disapprove of the practice of presenting two different indictments for the same offence. The party should consider his case, and know what he ought to indict for, and not prefer two bills at once, and take the chance of getting a conviction upon one of them. I shall hold him to elect which he will go upon, and I shall direct an acquittal upon the other.

The prosecutor elected to go upon the indictment for the capital offence, and an acquittal was therefore taken on the bill for the misdemeanour. The trial

*413] proceeded on the capital charge, and the prisoner was acquitted of that charge upon the merits.

Rigby, for the prosecution.

[Attorney—*Roberts*.]

(a) This act is repealed by the stat. 9 Geo. 4, c. 31, but its provisions, as to this offence, are in substance re-enacted in sections 11 and 12 of the stat. 9 Geo. 4, c. 31, with the addition of the word *wound* to the words *stab or cut*.

REX v. FLOWER. Aug. 18.

If an indictment contain two counts, one charging the offence as a larceny, the other as a receiving, the Judge will put the prosecutor to elect which he will go upon.

INDICTMENT for larceny in stealing two pigs, with a second count charging the prisoner with a substantive felony in receiving the pigs, knowing them to be stolen.

C. Phillips, for the prisoner, submitted, that as these were distinct felonies, the prosecutor ought to elect which he would go upon.

VAUGHAN, B. I think the prosecutor must elect which of these counts he will go upon, and abandon the other (a).

(a) In the case of *Young v. The King* (in error), 3 T. R. 106, *Buller, J.*, says, "In misdemeanours, it is no objection to an indictment that it contains several charges. The case of felonies

Justice, for the prosecution, elected to go upon the count for receiving.

Verdict—Guilty.

Justice, for the prosecution.

C. Phillips, for the prisoner.

[Attornies— ———, and ———.]

admits of a different consideration. If it appear, before the defendant has pleaded, or the Jury are charged, that he is to be tried for separate offences, it has been the practice of the Judges to quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in his challenge of the Jury; but these are only matters of prudence and discretion. If the Judge who tries the prisoner does not discover it in time, I think he may put the prosecutor to make his election on which charge he will proceed. But if the case has gone to the length of a verdict, it is no objection in arrest of judgment." In the case of *Rex v. Dunn*, Carr. Supp. 82, it was held by the twelve Judges, that in cases where it is *probable* that all the goods alleged to have been stolen were not stolen at one time, but still it be *possible* that they might be so, the Judge at the trial should not put the prosecutor to elect to go upon the stealing of some particular article or articles.

*REX v. MARIA HUGGINS. July 15.

[*414

An inquisition for murder, charging that the prisoner upon a new-born female child did make an assault, and the said new-born child, with "both her hands, in a certain piece of flannel, of no value, then and there feloniously, wilfully, and of her malice aforethought, did wrap up and fold, by means of which said wrapping up and folding the said new-born female child in the piece of flannel aforesaid, she the said new-born female child was then and there suffocated and smothered, of which said suffocation," &c., she instantly died; is good, although the inquisition does not go on to allege that the flannel was folded over the child's mouth, or inclosed the head, or the like.

It is no objection to the laying of the time in a coroner's inquisition, that the offence is stated to have been committed on the "26th day June," omitting the word "of."

INQUISITION for the wilful murder of a female bastard child. The inquisition charged, that, on the "26th day June," &c., the prisoner on the said child "did make an assault; and that the said M. H. her the said new-born child, with both her hands, in a certain piece of flannel, of no value, then and there feloniously, wilfully, and of her malice aforethought, did wrap up and fold, by means of which said wrapping up and folding the said new-born female bastard child in the piece of flannel aforesaid, she the said new-born female child was then and there suffocated and smothered; of which said suffocation and smothering she the said new-born female child then and there instantly died; and so the jurors aforesaid," &c.

Currington, for the prisoner. I submit that this inquisition must be quashed, on three grounds: *First*, because the time is imperfectly laid, it being stated as the "26th day June," instead of the "26th day of June." *Secondly*, because the offence itself is not sufficiently charged, as the indictment does not impute to the prisoner that she did any thing sufficient to cause death. In every indictment for murder, the size and situation of the wound are to be stated, to show that the injury was of such a nature as to be the cause of the death, unless where a limb has been cut off, which is considered to be of itself sufficient to cause death. Now here, the whole that is charged against the prisoner is, that she wrapped the child in flannel, which is not only a harmless, but almost a necessary act for its preservation; and the allegation is defective in not going on to charge that she wrapped the flannel tightly over the child's mouth, or inclosed its head in it, or the like. *Thirdly*, one of the names signed to the inquisition differs from the name of any of the jurors stated in the caption.

*VAUGHAN, B. I think there is nothing in the first objection as to the laying of the time. I cannot read "the 26th day June" to mean any [*415

thing but the 26th day of June (a). As to the manner of charging the offence, I also am of opinion that that is sufficient. When it is charged that the prisoner "feloniously, wilfully, and of her malice aforethought," did wrap up and fold the child in flannel, whereby the child was suffocated, I must understand that to mean a wilful suffocation by those means, which is exactly what is intended to be charged on this inquisition. With respect to the third objection, I am clearly of opinion that that is fatal; and on that ground I shall quash the inquisition.

Inquisition quashed.

Justice, for the prosecution.

Carrington, for the prisoner.

[Attornies—*Slade*, and *Frankum*.]

(a) In the case of *Rex v. Scott*, Russ. & Ry. C. C. R. 415, where an indictment for an offence alleged to be committed, 1 Geo. 4, concluded against the peace of the late king, the word "late" was rejected as surplusage. So in the case of *Rex v. Gill*, Id. 431, where, in a case tried on the Sumner Circuit, 1 Geo. 4, the indictment charged, that the prisoner committed the offence on the 20th of July, "in the fourth year of the reign of King George the Fourth;" it was held, that the words "the fourth year of" might be rejected as surplusage. These cases are, however, of less importance, as, by the stat. 7 Geo. 4, c. 64, s. 20, objections as to the laying of the time of the offence in indictments can only be taken advantage of by demurrer. But that statute does not apply to coroners' inquisitions.

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**REX v. BRINKLETT et al.* July 16.

An indictment for manslaughter described the deceased, who was a Peer of Ireland, as "H. S., Baron M. of C., in the county of R., in that part of the United Kingdom called Ireland." It was proved that H. was his Christian name, S. his family surname, and Baron M. &c., his title: Held, no variance, and that the Court was not bound to construe H. S. to be one Christian name.

MANSLAUGHTER.—The indictment described the deceased as "Henry Sandford, Baron Mount Sandford, of Castlereagh, in the county of Roscommon, in that part of the United Kingdom called Ireland."

Mr. Gascoigne, who was called to prove the name of the deceased, said, that Lord Mount Sandford's Christian name was Henry; that his family surname was Sandford; and his title Baron Mount Sandford.

Curwood, and *Shepherd*, for the prisoners. Upon the face of this indictment the name Henry Sandford must be taken to be one Christian name; because, since the union with Ireland, Peers of Ireland are Peers of the United Kingdom, except for the purposes of sitting in Parliament and voting. A peer has no surname, that being merged in his title; and therefore Henry Sandford must be taken to be laid as one Christian name, which is not proved.

Tufourd, and *Secker*, *contra*. The name of the deceased must be inserted correctly in an indictment for murder or manslaughter, to show with certainty what person was killed. Now here the deceased is described with the greatest particularity. Again, this indictment has nothing vicious on the face of it, *non constat* that what is stated there is not the right name of the deceased. It therefore becomes a mere question of variance; and with respect to that, Mr. Gascoigne proves, that the Christian name and title of the deceased are correctly stated, and that the family surname is also correctly stated, although its introduction may be superfluous. But still, if it is proved that every thing is stated correctly, the mere superfluous introduction of the peer's surname will not vitiate the indictment.

*417] **VAUGHAN, B.* There is no error on the face of the indictment, and the whole question is, whether the evidence of Mr. Gascoigne proves that

there is a variance. Now, I think it does not; we must take what he says all together. However, if, on consideration, I should think the objection valid, I will reserve the point.

Verdict—Guilty.

Talfourd, and *Secker*, for the prosecution.
Curwood, and *Shepherd*, for the prisoners.

[Attornies—*Vowles*, Junr., and *Watmore*.]

IN the course of the Circuit, the learned Baron stated that he had reconsidered the case, and was clearly of opinion that there was no variance, and therefore he should not reserve the point.

In the commission for the trial of Lord Byron, for the murder of Mr. Chaworth, in 1765, his Lordship was styled *William Byron*, Baron Byron of Rochdale, and was so described in the indictment. His Lordship was an English peer, the creation of his title being in the year 1643. However, it can hardly be supposed, that his Lordship's Christian name was *William Byron*, because all through the trial he was addressed by the Lord High Steward, as *William Lord Byron*, and so styled in all the proclamations, &c., during the trial; and at the conclusion of it, the question put was, "what says your Lordship? Is *William Lord Byron*, guilty," &c. 19 State Tr. 1177.

Lord Ferrers was indicted (Id. 85) as Lawrence Earl Ferrers, Viscount Tamworth; and there can be no doubt that the usual way of describing a peer is by his Christian name and his title, omitting his family surname.

*OXFORD ASSIZES.

[*418]

BEFORE MR. JUSTICE GASELEE.

REX v. COMPTON et al. July 18.

On an indictment for burglary, by breaking into a house in the night time, and stealing to the value of 5*l*. or more, the prisoner may be convicted of burglary, or of house-breaking under the stat. 7 & 8 Geo. 4, c. 29, s. 12, or of stealing in a dwelling-house to the value of 5*l*.

BURGLARY.—The indictment charged the prisoners with breaking into the house in the night time, and stealing goods to more than the value of 20*l*.

GASELEE, J. Upon this indictment, if the Jury are satisfied, that there was a breaking in the night time with intent to steal, they may convict these prisoners of burglary; but if they should think the breaking was not in the night time, but that there was a breaking and goods stolen of any value, they may convict the prisoners of house-breaking, under the stat. 7 & 8 Geo. 4, c. 29, s. 12; or if they should think that the evidence of the breaking is not sufficient, they may still, upon this indictment, convict the prisoners of stealing in a dwelling-house, to the value of five pounds.

Verdict—Guilty of burglary.

Curwood, for the prosecution.
Churchill, and *Cooper*, for the respective prisoners.

[Attornies—*B. Aplin*, for the prosecution; and *Cecil* and *Tomes*, for the respective prisoners.]

*REX v. MARY HANKS. July 18.

A cause was referred by a Judge's order to C. D., and by the order it was directed that the witnesses should be sworn before a Judge, "or before a commissioner *duly authorized*." A witness was sworn before a commissioner for taking affidavits, and examined *visâ voce* by the arbitrator: held, that a witness so sworn was not indictable for perjury.

PERJURY, in swearing falsely before Mr. Crews Dudley, an arbitrator appointed under an order of Lord *Tenterden*. It appeared, that an action depending in the Court of King's Bench was referred by an order of Lord *Tenterden* to Mr. Crews Dudley, and by his Lordship's order it was "further ordered, that the respective witnesses should be sworn before the said Chief Justice, or some other Judge of his Majesty's Court of King's Bench, or *before a commissioner duly authorized*." Mr. Dudley was a commissioner for taking affidavits in the Court of King's Bench; and he, under this order, swore the present defendant as a witness, before himself, and signed a *jural*, stating, that she had been so sworn; and he then examined her *visâ voce*. On this evidence the perjury was assigned.

Tufourd, for the defendant, objected—That, although Mr. Dudley was a commissioner duly authorized by his commission to take affidavits, yet he had no authority of any kind to administer an oath for any *visâ voce* examination; and he further objected, that the order of Lord *Tenterden* conferred no new power of swearing witnesses, but merely allowed the witnesses to be sworn before a commissioner *duly authorized*, which meant, authorized by some other means.

GASELEE, J. By the statute 29 Car. 2, c. 5, the Courts are empowered to appoint commissioners for taking affidavits; and if this order had empowered a commissioner for *taking affidavits* to administer this oath, I would have reserved the point, because, whether the Court of King's Bench has any power to authorize their commissioners to take any thing but affidavits, is a question that I should *420] have left them to decide. However, on this order, that *question does not arise, for the order only allows the witnesses to be sworn before a commissioner *duly authorized*; now, as Mr. Dudley was never authorized to administer an oath for a *visâ voce* examination, I am of opinion that the defendant must be acquitted.

Verdict—Not Guilty.

Curwood, for the prosecution.

Tufourd, for the defendant.

[Attornies—Price, and H. Taunton.]

By the statute 29 Car. 2, c. 5, it is enacted, that the Lord Chief Justice and Judges of the Court of King's Bench (and also the Judges of the other Courts respectively), shall and may, by one or more commission or commissions, under the seals of these Courts, empower persons in the several shires of England, "to take and receive all and every such affidavit and affidavits, as any person or persons shall be willing and desirous to make before any of the persons so empowered in or concerning any cause, matter, or thing depending, or hereafter to be depending, or any wise concerning any of the proceedings to be in the said respective Courts, as Masters of Chancery in extraordinary do use to do." And by the latter part of this clause, persons forswearing themselves in such affidavit or affidavits, are made liable to the same penalties as if such affidavit or affidavits had been made and taken in open Court.

WORCESTER CITY ASSIZES.

BEFORE MR. JUSTICE GASELEE.

REX v. SPENCER. July 22.

Indictment for false pretences in passing a note of a bank that had stopped payment as a good note. The prisoner knew that the bank had stopped payment; but it appeared that two only of the partners of the bank had become bankrupt, and that the third had not: Held, that the prisoner must be acquitted.

FALSE pretence.—The indictment stated, that the prisoner “did offer and pay a certain paper writing, partly printed and partly written, purporting to be the *promissory note of Coleman, Smith, and Morris, for the payment of 1*l.*, [421 as copartners and bankers trading under the firm of C., S. & M., and did then and there unlawfully and falsely pretend to one Peter Pollard, that the same was a good and available note of the said C., S. & M., whereas, &c. it was not, at the time it was so offered, a good and available note, as he the said F. S. well knew,” &c. (a).

It was proved, that the prisoner gave the note to the prosecutor in payment for meat; and another witness proved, that he had told the prisoner that the Leominster bank (from which the note was issued) had stopped payment. It was also shown, on the part of the prosecution, that the banking-house at Leominster was shut up, and that Messrs. Coleman & Morris had become bankrupts; but it appeared, on the cross-examination, that Mr. Smith, the third partner, had not become bankrupt.

Busby, for the prisoner, objected, that, as one of the partners had not become bankrupt, the note remained an available note as it respected him; and *non constat*, that, if presented to him, it would not have been paid.

GASELEE, J. On this evidence the prisoner must be acquitted; because, as it appears that the note may ultimately be paid, I cannot say that the prisoner was guilty of a fraud in passing it away.

Verdict—Not Guilty (b).

Godson, for the prosecution.*Busby*, for the prisoner.[Attornies—*Wilson*, and *S. Godson*.]

(a) In the case of *Rex v. Freeth, Russ. & R.*, C. C. R. 127, it was held, that the acts and conduct of a party may be sufficient to constitute a false pretence, without any verbal representations of a false nature; and that the fact of uttering a counterfeit note as a genuine note, is tantamount to a representation that it was so.

(b) For this report, we are indebted to the kindness of one of the counsel in the case.

*REX v. EDWARD HODGSON. July 30.

[*421]

If a prisoner, indicted for embezzlement, does not know the specific acts of embezzlement intended to be charged against him, he should apply to the prosecutor for a particular of the charges; and if it be refused, the Judge will, on motion, supported by proper affidavits, grant an order for such particular to be given, and postpone the trial, if necessary.

Such particular ought, at least, to state the names of the persons from whom the money is alleged to have been received.

It was the duty of a clerk to receive monies daily at N., to enter all such monies so received in

a book, and to remit the amount weekly to L. His entries were all correct, and admitted the receipt of all the monies; but he did not remit them to L., as was his duty: Held, no embezzlement.

EMBEZZLEMENT.—The indictment (which was framed under the stat. 7 & 8 Geo. 4, c. 29) contained counts for three acts of embezzlement, alleged to have been committed within six months.

The prisoner had been the clerk in the Mail Coach Office at Newcastle-under-Lyme; and, at the time he pleaded to the indictment, an affidavit made by the prisoner was put in, in which, after stating that he had been informed that an indictment for embezzlement had been preferred against him, he added, that he was wholly unacquainted with the particular acts of embezzlement intended to be charged against him; and also that he was advised, and verily believed, that, in order to his defence, it was necessary that he should be furnished with a particular of the specific charges intended to be brought forward.

Curwood, for the prisoner, on this affidavit, moved for an order, directing the prosecutor to furnish a particular of the charges. He argued, that, as the indictment gave the prisoner no knowledge of the time at which the offences were supposed to have been committed, nor of the amount of the money, nor of the persons from whom it was said to have been received; it was wholly impossible that the prisoner could make his defence; because, as a coach-office clerk, he had received many hundred sums of money every day. He relied on the authorities collected in Carr. Supp. (a).

VAUGHAN, B. I have referred to those passages of the work which you rely upon; and I think that the authorities there cited are very much to the purpose. Have you applied to the prosecutor for the particular you want?

*423] *Curwood*. No, my Lord; but notice has been given of this motion. VAUGHAN, B. I think you ought to apply to the other side to furnish you with a particular; and if they refuse it, I will grant an order. The clause of the stat. 7 & 8 Geo. 4, c. 29, respecting the framing of indictments for embezzlement, causes the greatest hardship to prisoners. What information does the indictment convey to such a man as this? As a clerk in a coach-office, he must have received money from many hundred persons. I should therefore recommend the prisoner's attorney to apply to the prosecution for a particular; and I think that the prosecutor ought at least to give the names of the persons from whom the sums of money are alleged to have been received; and if the necessary information is refused, I will, on an affidavit of that fact, grant an order, and put off the trial.

R. V. Richards, for the prosecution. The prosecutor will furnish a particular, if your Lordship thinks he ought.

VAUGHAN, B. Without laying down any express rule, I certainly do say that the prosecutor, in a case of embezzlement, ought, in justice to the prisoner, to give him much more information than the indictment contains (b.)

R. V. Richards, for the prosecution, then furnished a particular; with which *Curwood*, for the prisoner, expressed himself quite satisfied.

The facts of the case were as follow:—The prosecutor, Mr. Scott, to whom the prisoner had acted as clerk, was one of the proprietors of the London and

*424] *Liverpool Mail*; and it was the duty of the prisoner to receive money for passengers and parcels, to enter the sums in a book, and to remit the amount weekly to Liverpool. In this book the prisoner had made the following entries:—

	£	s.	d.
" 13 June	1	6	6
15 June	1	17	0
20 June	2	18	0"

(a) 3d Ed. p. 322.

(b) For the clause of the stat. 7 & 8 Geo. 4, c. 29, respecting the framing of indictments for embezzlement, and the authorities on which the application for a particular was founded, see Carr. Supp. 3d Edit. p. 319-324.

as of sums received by him; but it was admitted that the prisoner had made no false entry, and that he had charged himself in the books with all monies that he had received; but it was imputed to him, that, having received these three sums, he had not sent them to Liverpool, as he ought to have done.

VAUGHAN, B. This is no embezzlement: it is only a default of payment. If the prisoner regularly admits the receipt of the money, the mere fact of not paying it over is not a felony. It is but matter of account. (a)

Verdict—Not Guilty.

R. V. Richards, for the prosecution.

Curwood, for the prisoner.

[Attornies—Willim, & Flint.]

(a) In the case of *Rex v. Hall*, 2 Russ. 1242, it appeared by the books of a clerk that he had received much more than he had paid away; and from this the prosecutors (his masters) wished it to be inferred that he must have embezzled some particular note or piece of money; but *Garraw, B.*, held, that this was not enough, and that it was necessary to prove that some distinct act of embezzlement had been committed.

*GLOUCESTER ASSIZES.

[*425]

BEFORE MR. BARON VAUGHAN.

REX v. DANIEL CORDY and another. Aug. 18.

Practice.—It being questionable whether a particular count in an indictment for felony was not bad on demurrer, upon an objection that would be aided by verdict, and this being pointed out to the Judge before plea pleaded—His Lordship, to save the public time, directed the trial to proceed, saying, that if the prisoner should be convicted on evidence, which, in his opinion, was applicable to this count only, he would consider it as demurred to, and allow the demurrer to be argued, putting the prisoner in the same situation as if the count had been demurred to in the first instance.

INDICTMENT, for cutting, under the statute 9 Geo. 4, c. 31. The *first* count laid the offence to be with intent to maim; the *second*, with intent to disfigure and disable; the *third*, with intent to do some grievous bodily harm; and the *fourth* and *fifth* counts, with intent to prevent a lawful apprehension.

Before plea pleaded, *Carrington*, for the prisoners, stated, that the fourth and fifth counts would be bad on demurrer, as they did not sufficiently allege the cause of the apprehension (a); and he mentioned this, because these defects were such as could not be taken advantage of, either in arrest of judgment or as matter of error; as, even without the disputable allegations, these counts charged the offence in the words of the statute creating it, which is good under the statute 7 Geo. 4, c. 64, s. 20, except upon demurrer. With respect to the other counts, he admitted that they were free from objection.

VAUGHAN, B. As there are three counts of the indictment clearly good, I think the best course for the saving of the public time will be to allow the trial to proceed. If the prisoners are acquitted on the merits, the goodness of these latter counts becomes immaterial; and that will likewise be the case if the

(a) An indictment for cutting, with intent to resist a lawful apprehension, ought to state the cause of the apprehension, so as to show that the apprehension was a lawful one.

prisoners are convicted on any one of the three clearly good counts; however, if *there should be a conviction, and I should think that the evidence applied to the fourth and fifth counts only, I will consider them as demurred to, and let you in to argue the goodness of the allegations; and if they shall turn out to be not good, I will put the prisoners in the same situation as if these counts had been demurred to, and the demurrer argued in the first instance.

The prisoners were acquitted on the merits (a).

Justice, for the prosecution.

Carrington, for the prisoners.

[Attornies—*Blossome, W. & B.*, and ———.]

(a) The course of proceeding suggested by the learned Baron tends much to the saving of the public time, because, on the trial of an indictment, containing several clearly good counts, and only one or two disputable ones, it would rarely happen that the prisoner should be convicted on the disputable counts only, and acquitted on all the others. However, it being enacted by the statute 7 Geo. 4, c. 64, s. 21, "That, where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute," it behoves the prisoner's counsel, in all cases within the operation of this enactment, not to let a verdict pass against his client on a count having any defect which would be aided by verdict. This can only be prevented by a demurrer to such count; and though, it is true, that in most cases the verdict might not be found on that count only; yet, we believe that a case has occurred on one of the circuits, where a prisoner was convicted only on particular counts of an indictment, and that these counts (originally not good) were aided by this enactment.

As to whether a judgment on a demurrer to an indictment for felony is *conclusive* against the prisoner, or whether it is, *that he should answer over*, has been doubted: however, the better opinion certainly is, that, in cases of *felony*, the prisoner can only have final judgment against him after a conviction upon the merits; and that the prisoner is not precluded from disputing the charge, merely because a plea of *autrefois acquit*, or *convict*, a plea of pardon, *demurrer, or other matter, beside the justice of the case, may have been adjudged against him. Indeed this is clearly so in the case of a plea of *autrefois acquit* being found against the prisoner. On this subject see 2 Curw. Hawk. c. 31; 1 Stark. C. L. 315, and 4 Bl. Com. ch. 26.

MORRIS v. DAVIES, and HARRIET, his Wife. Aug. 21.

If husband and wife are in such a situation that sexual intercourse *might* have taken place, the law presumes that it did take place, unless such facts are proved as satisfy the Jury *beyond all doubt* that no such intercourse did take place; and, therefore, unless such facts are proved, a child born of the wife is legitimate, if the husband and wife were in such a situation that sexual intercourse might have taken place between them, at a time, when, by the course of nature, the husband could have been the father of the child.

If, after the trial of an issue out of Chancery, the Jury are locked up for many hours, and are not likely to agree when the Judge is about to leave the town—The Judge will discharge them of his own authority, if the parties decline consenting to their discharge; but if a Jury be under such circumstances, in a cause depending between party and party, *semble*, that the Judge would order that the Jury should follow him in a cart.

This was a third trial of the issue, whether the plaintiff was the legitimate son of William and Mary Morris (the second trial of which is reported, *ante*, p. 215). Lord Lyndhurst, C., directed a third trial, on the ground, that the two former verdicts were contrary to each other, and the last of them unsatisfactory to the learned Baron before whom the case was tried, and also because some fresh evidence had been adduced at the second trial.

The facts were proved on both sides precisely as stated, *ante*, p. 216, except that, as the witness, Mary Evans, was not called, what is there stated as the effect of her testimony was not in proof at the present trial.

GASELLE, J. (in summing up.) The question to be determined here is,

whether Mr. and Mrs. Morris were in such a situation that sexual intercourse *might* have taken place between them, at such a time that Mr. Morris *could*, by the course of nature, have been the father of the plaintiff. For, if such sexual intercourse *might* have taken place, the law presumes that it *did* take place, unless the facts proved on the other side are such as satisfy you, beyond all doubt, that no such sexual intercourse did in fact take place. In the case of *Head v. Head* (a), the Lord Chancellor and Vice Chancellor seem to have entertained some doubt, whether, after evidence was given, *showing an [428 opportunity of sexual intercourse, any evidence could be received on the other side, which did not go to show a physical impossibility on the part of the husband; however, in that case, the precise point did not arise. I much regret that I have not now the assistance of my learned Brother *Vaughan* (b), before whom this cause was so ably tried on two former occasions; however, I will read you the opinion of my learned Brother, delivered by him at the last trial, as I have reason to know that the opinion was delivered by him after much consideration, and was satisfactory to the profession. [Here his Lordship read the whole of the opinion of *Vaughan*, B.,] from these Reports (c.) Such was the opinion of my learned Brother, after much consideration, and I have stated it to you as containing the rules, which, according to the laws of England, ought to govern you in considering of the legitimacy of the plaintiff.

The Jury retired at about two o'clock on Saturday, August 23, and were locked up all night; and this being *the last case to be tried*, Mr. Justice *Gaselee*, at about nine o'clock in the morning of Sunday, August 24, sent for the Jury to his lodgings, and asked them if they were likely to agree on their verdict. The foreman (Captain Lloyd, R. N.) stated, that eleven of the jurors had agreed that the verdict should be for the plaintiff, but that the twelfth would not concur with them, and could not assign any reason for his refusal. Captain Lloyd also stated, that the eleven jurors were satisfied, by the evidence, that there had been opportunity for the sexual intercourse.

GASELEE, J. As matter of form, I will ask the parties whether they consent to the Jury being discharged without giving any verdict.

Curwood, for the plaintiff (d). If this were an ordinary case of an [429 issue joined in a Court of law, I should feel it a duty to relieve eleven gentlemen so circumstanced, by consenting to their discharge; but as this is an issue directed by the Lord Chancellor for the information of his conscience, I do not consider that I have any power to give such consent, and I cannot take the responsibility.

GASELEE, J. Then, gentlemen, I shall take the responsibility on myself, on the ground that this is an issue out of Chancery. I might, in an ordinary case, take you in a cart to the bounds of the county, and there discharge you (e); but I think it right to state to you the grounds of my discharging you now. This issue is directed to inform the conscience of the Lord Chancellor, and he may send it down again for trial after repeated verdicts, if those verdicts are not agreeable to his sense of justice, or he may even decree contrary to a verdict, if he thinks proper. Indeed, it will be for the Lord Chancellor to consider, whether the opinion of eleven jurors, so expressed, may not be as satisfactory to him as a formal verdict.

Captain Lloyd. My Lord, we request that the Lord Chancellor may be informed that eleven of us were unanimous in favour of the plaintiff, without leaving the jury-box.

GASELEE, J. I shall now take upon myself the responsibility of discharging you, and you are, therefore, discharged without giving any verdict.

(a) Sim. & Stu. 160, and 1 Turn. 138.

(b) Mr. Baron *Vaughan* left Gloucester several days before.

(c) *Ante*, p. 217.

(d) All the defendant's counsel had left the town.

(e) Gloucestershire is the last county in the Oxford Circuit.

The Jury then separated (a).

*430] *Russell, Serjt., Curwood, and Whateley, for the plaintiff.
Tuunton, Campbell, Peake, Serjt., and R. V. Richards, for the defendants.

[Attornies—Watson & Harper, and Chadborne.]

(e) Lord Hale says (H. P. C. 297, n.), that in very ancient times it was not necessary in civil cases that all the twelve jurors should agree; and that in case of a difference among the Jury, the method was, to separate one part from the other, and then to examine each of them as to the reasons of their differing in opinion; and if, after such examinations, both sides persisted in their former opinions, the Court caused both verdicts to be fully and distinctly recorded, and then judgment was given *ex dicto majoris partis juratorum*. And he cites the cases of the Abbot of Kirkstede v. Elmund De Eynacourt, 56 Hen. 3, and *Tristram v. Siminel*, 14 Edw. 1, where this practice was adopted; but *Bracton*, who wrote *temp.* Hen. 3, in treating of the assize of *novæ disseisinæ*, says (lib. 4, fo. 185), that when the Jury cannot agree, "*affortietur assiza*," i. e. the Jury shall be increased by the calling of additional jurors. However, the necessity of the petit Jury being unanimous has been long established. In the *Mirror*, c. 4, s. 24, it is said, that if the jurors in petit assizes be of divers opinions, they are not, therefore, to be threatened or imprisoned. And in 41 Assis. pl. 11, the Jury were sworn to try the assize, and as one of them would not agree with the other eleven, they were remanded all that day and the next without eating or drinking; and then the Judges demanded of the twelfth Juror, whether he would accord with his companions. He said he never would, and that he would rather die in prison. The verdict of the eleven was then taken, and the twelfth sent to prison. But this being held by all the Justices to be no verdict, a new *venire facias* issued, and the juror was released from prison; and "the Justices said, that they ought to have carried the assize in carts till they were agreed."

In Bro. Abr. tit. Verdict, pl. 49, it is laid down, that a "*verdict de xi. ou le xii. ne voet agree est void verdict; et per curium les Justices duisoit aver eux carry in cartes ove eux, tanq. ils sera agree*." And Mr. Justice Blackstone says (3 Com. ch. 23), "If the Jurors do not agree in their verdict before the Judges are about to leave the town, though they are not to be threatened or imprisoned, the Judges are not bound to wait for them, but may carry them round the Circuit from town to town in a cart." It, therefore, appears that the Jury are not to be discharged at the borders of the county, except in cases which occur in the last county of the Circuit; and that, in all other cases, they are to follow the Judges from county to county, till they shall be agreed. And the reason of their being discharged at the boundary of the last county in cases of this kind, which have arisen in that county, seems to be, that the authority of the Judge as a Judge at Nisi Prius is then at an end.

On the Circuit, the Judges have one commission of Assize and Nisi Prius, and one commission of Oyer and Terminer for their whole Circuit, but their commissions of gaol delivery are separate for each county.

The authorities above cited relate to civil causes: with respect to criminal cases, it is laid down in *Rex v. Ledingham*, 1 Vent. 97, that, "in cases of life and member, if the Jury cannot agree before the Judges depart, they are to be carried in carts after them; so they may give their verdict out of the county." With request to the discharging of a Jury who cannot agree in a criminal case, Lord Coke says (3 Inst. 110), "If any person be indicted of treason or of felony or larceny, and plead not guilty, and thereupon a Jury is returned and sworn, their verdict must be heard, and they cannot be discharged." Mr. Serjeant Hawkins says (2 Curw. Hawk. 619), that "it seems to have been an ancient uncontroverted rule, that a Jury sworn and charged in a capital case cannot be discharged without the prisoner's consent, till they have given a verdict; and notwithstanding some authorities to the contrary in the reign of King Charles the Second, this hath been holden for clear law, both in the reign of King James the Second and since the Revolution." However, in Sir John Wedderburn's case, Fost. 23, (where the law on this subject is very much discussed), the Judges agreed, "that, admitting the rule laid down by Lord Coke, to be a good general rule, yet it cannot be universally binding, nor is it easy to lay down any rule that will be so." And they said, that "the rule cannot bind in cases where it would be productive of great hardship or manifest injustice to the prisoner."

Before leaving this subject, it may be proper to remark, that in the case of *Tristram v. Siminel* (above cited), the whole Jury consisted of only eleven, the verdict of ten being for the plaintiff, and the verdict of the eleventh for the defendant, and judgment was given for the plaintiff, "*pro dicto majoris partis juratorum standum est*."

*COURT OF COMMON PLEAS.

SECOND SITTING AT WESTMINSTER, IN EASTER TERM, 1828.

BEFORE LORD CHIEF JUSTICE BEST.

ROBERTS v. HAYWARD. May 7.

A party occupied premises, under an agreement for three years, at 45*l.* a year, which expired at Midsummer, 1826; he did not then go out, nor did his landlord take any steps to compel him, but at the Michaelmas following, gave him notice to quit at Lady-day, 1827, or pay the rent of 50*l.* a year. He continued in, but refused to pay more than the 45*l.* rent: Held, that, under the circumstances, he must be taken to have acquiesced with the new proposal, and was bound to pay the rent of 50*l.*

REPLEVIN.—The defendant made cognizance as bailiff of the plaintiff's landlord. The plaintiff pleaded, first, *non tenuit*, second, *riens in arrear*, and third, a tender of 11*l.* 5*s.* The distress was for a quarter's rent, from Lady-day to Midsummer, 1827, and the principal question in the cause was, whether the rent, which the plaintiff was to pay for that quarter, was to be at the rate of 45*l.* or 50*l.* a year.

The agreement under which the premises were originally let was for three years from Midsummer, 1823, at 45*l.* a year, payable quarterly. This expired at Midsummer, 1826. The plaintiff did not quit the premises at that time, and the landlord did not then take any steps to compel him; but on the 29th of September, 1826, he served him with the following notice:—

"I hereby give you notice to quit the house and fixtures, now in your occupation, at Lady-day next, viz. 1827, or in default thereof to pay rent for the house at 50*l.* a year from and after that day; and if you continue to occupy after that day, you will be considered by me as agreeing to pay that rent."

Wilde, Serjt., for the defendant, contended, that, under the notice, the plaintiff was bound to pay the rent of 50*l.*; because, as the agreement had expired, he was not in as a yearly tenant, and therefore the landlord might require *him either to quit possession at once, or, if he continued in, to pay an [*433 increased rent.

Spunkie, Serjt., for the plaintiff, contended, that a fresh year of the tenancy commenced at Midsummer, 1826, which must be taken to be on the same terms as those of the old agreement; and that such fresh year having so commenced, the landlord was not in a condition to put any other terms upon the plaintiff, or to turn him out before the expiration of it. The plaintiff could not be treated both as trespasser and tenant.

BEST, C. J. The tenancy under the agreement expired at Midsummer, 1826. Immediately after that time, the plaintiff was a trespasser; but the landlord was not obliged to treat him as such, but might make proposals to him, to renew the relation of landlord and tenant between them. This he did, and the plaintiff did not say, I will go out directly. His silence on the subject is tantamount to his saying, I will continue in on the terms of your proposal. I am of opinion, that, under the circumstances, the distress was regular. I think the landlord had a right to make any terms he pleased for the time subsequent to Lady-day, 1827, and, if the plaintiff would not accept them, to turn him out of possession.

The tender of 11*l.* 5*s.* being a quarter's rent, at 45*l.* a year, having been proved, the defendant had a verdict on the first and second pleas, and the plaintiff on the third.

Spankie, Serjt., and *Lee*, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attornies—*Nicol*, and *Partington*.]

*434] In the course of the Term, *Spankie*, Serjt., moved for a *new trial but the Court were of opinion that the decision at *Nisi Prius* was correct, and refused to grant a rule.

ADJOURNED SITTINGS AT WESTMINSTER, AFTER EASTER TERM, 1828.

BEFORE LORD CHIEF JUSTICE BEST.

PULLEN v. WHITE. May 23.

If certain parts of a book are used to refresh the memory of a witness for the plaintiff, and the defendant's counsel, in his address to the Jury, observes upon the general state of the book, and refers to other parts of it, such observations do not give the plaintiff's counsel the right of reply.

ASSUMPT.—A ledger and cash-book had been referred to, for the purpose of refreshing the memory of one of the plaintiff's witnesses, and particular parts of them only were used in the plaintiff's case.

Wilde, Serjt., for the defendant, in addressing the Jury, observed upon the general state of the books, and the mode in which the accounts were kept, and referred to other parts besides those which were used by the plaintiff's witness.

Andrews, Serjt., rose to reply.

Wilde, Serjt., objected.

Andrews, Serjt., submitted, that if in the plaintiff's case only a part of a book was made use of, and the other side referred to other parts, it entitled the plaintiff's counsel to a reply.

BEST, C. J. I am of opinion that you have not the right of reply. The known rule is decidedly against you. Whether this is to form an exception, is the only question that is arguable; and I do not think there is much in that.

*435] **Andrews*, Serjt., and *Platt*, for the plaintiff.

Wilde, Serjt., and *Comyn*, for the defendant.

[Attornies—*Price*, and *Fuller & S.*]

See the cases of *Dowling v. Finigan*, ante, Vol. 1, p. 587: and *Loyd v. Freshfield*, ante, Vol. 2, p. 325.

DUFFILL v. SPOTTISWOODE, Esq., et al. May 23.

As action by the owner of goods, let for an unexpired term, against the Sheriff, for taking them under an execution against the party who hired them, is not maintainable, if it appear that the Sheriff has not sold. And it is in such case the duty of the party letting to give notice to the Sheriff, of the limited nature of the hirer's interest.

THE first count in the declaration stated, that the plaintiff was the owner and proprietor of divers goods and chattels, to wit, &c., which said goods had been let to hire by the plaintiff to one Thomas Lofting, for a certain term then to come and unexpired, and that the same were then in the possession of the said Thomas Lofting under and by virtue of the said letting; yet the defendants, intending to injure, &c., the said plaintiff, in his reversionary interest and property in the said goods and chattels, and to deprive him of the benefit and advantage thereof, whilst the said plaintiff so was the owner, &c., and whilst the goods were so let and in the possession, &c., unjustly seized and took the said goods and chattels from and out of the possession of the said Thomas Lofting, and converted, and absolutely disposed thereof, to their own use.

The second count was in trover. Plea—Not Guilty.

The plaintiff was a broker and appraiser, and the defendants were the Sheriff of Middlesex and two of his officers, and the action was brought to recover the value of certain furniture and other articles, which were seized in December, 1827, under a *fi. fu.* against the goods of one Thomas Lofting.

Lofting was called as a witness, and stated, that being desirous of furnishing a lock-up house in the year 1825, he applied to the plaintiff for the loan of furniture; *and the plaintiff sent him a quantity, accompanied by an inventory, which expressed the terms upon which it was let. This inven- [436] tory was offered in evidence to prove the agreement between the plaintiff and Lofting. It was not stamped, nor was it signed by the parties.

Wilde, Serjt., for the defendants, objected to its being read, on account of the want of a stamp.

Taddy, Serjt., and Thesiger, for the plaintiff, contended, that an agreement not signed did not require a stamp. They cited *Ramsbottom v. Tunbridge* (a) and *Hawkins v. Warre* (b).

Wilde, Serjt. *Ramsbottom v. Tunbridge* was not an action on an agreement, it was for use and occupation. There was a perfect parol contract, and a paper collateral to the contract was delivered by the auctioneer to the party. The case of *Hawkins v. Warre* is not like the present; for there the unstamped paper was produced to negative the assertion, that the draft of the lease constituted the final agreement.

Barr, C. J. I shall not receive the paper, because I am of opinion that it is in this case the evidence of the *contract, and requires a stamp, although [437] it is not signed by the parties. I think that if goods are delivered, accompanied by a written paper, that paper must be produced in evidence, otherwise it is impossible to know on what terms the party holds them. I consider this case as distinguishable from *Ramsbottom v. Tunbridge*, because, in that case, the paper mentioned was only notice to the party, and not a paper delivered over as this was, accompanying goods, and expressing the terms upon which those goods were parted with.

(a) 2 M. & S. 434. That case decided, that a written paper, delivered by the auctioneer to the bidder, to whom lands were let by auction, containing a description of the property, the term, and the rent, &c., but not signed by any one, was not such a minute of the agreement as was required to be stamped by the 48 Geo. 3, c. 149, nor such a writing as would exclude parol evidence.

(b) 5 D. & R. 512. In that case a witness had deposed, that the settled draft lease was the final agreement of the parties, for one of whom he acted as agent; and it was held, that an unstamped memorandum, written afterwards by him, but not signed by any body, was admissible to show that the settled draft was not the final agreement.

In addition to the goods which had been let by the plaintiff to Lofting, in 1825, there were others which Lofting had himself purchased and transferred to the plaintiff in March, 1827, in consideration of 91*l.*, part of which sum had been previously lent. These goods were also allowed to remain in Lofting's possession by the plaintiff, under a written agreement, by which Lofting was to pay 9*s.* a week for the hire. Both the agreements were stamped during the continuance of the cause. It appeared that, the day after the seizure, the plaintiff gave notice to the Sheriff, that "the whole of the goods" were his "sole property," and threatened an action unless the man in possession was immediately withdrawn.

Wilde, Serjt., for the defendant, contended, that the plaintiff must be non-suited. The proof necessary to support the first count is, that the defendants sold and converted the goods to their own use. The letting averred is for an unexpired term; and if the allegation of the sale had not been made, the declaration would have disclosed no cause of action. If the allegation had been merely of the letting and seizure, the declaration would have been demurrable. With respect to the count in trover, the case of *Gordon v. Harper* (a), decides that *438] trover cannot be brought by a landlord against the Sheriff, for "taking in execution furniture which has been let with a house; because, during the existence of the lease, he has not the right of possession which is necessary to support the action. Again, where a person against whom an execution issues, has a limited interest in goods taken by the Sheriff and not the general property, if the owner claims the goods without giving notice of the limited interest, he cannot maintain an action for them. The case of *Dean v. Whittaker* (b), is an authority to show that, in this case, the plaintiff ought to be called.

Barstons, on the same side. There is no place limited for the using of the goods. It is a general letting, and the plaintiff did not give any notice that he had determined the limited interest. In the case of *Dean v. Whittaker* the pleadings were similar to the present. The mere removal of the goods is no evidence of a conversion; because, for aught that appears, Lofting himself might have lawfully removed them from one place to another under the letting to him.

Taddy, Serjt., and *Thesiger*, for the plaintiff. The question is, whether the Sheriff has not seized the goods and carried them away. The carrying away is evidence of conversion. In *Dean v. Whittaker*, the Sheriff had not sold the goods, and the landlord obtained them from him on payment of the sum indorsed upon the writ; but in our case the Sheriff has carried them away, and it does not appear that he has not sold them.

*439] *Best*, C. J. There is certainly that distinction between the case of *Dean v. Whittaker* and the present, viz. that it appears in *Dean v. Whittaker* that the Sheriff had not sold.

Wilde, Serjt., for the defendants. Nor has he sold in this case. The goods are now lying in the hands of the Sheriff's broker.

Best, C. J. If you will call a witness and prove that fact, I shall consider that you have brought yourself within the decision in *Dean v. Whittaker*, and, on the authority of that case, I will direct the plaintiff to be called.

The evidence suggested was then given, and his Lordship directed a

Nonsuit.

(a) 7 Term Rep. 9.

(b) 1 Carr. & P. 347. That case, which was decided at Nisi Prius by Lord Tenterden, and was afterwards moved in the Court above, does not appear to have been mentioned in any of the Term Reports. It was an action on the case, for taking in execution goods which had been let on hire. And it decides two points: first, that if the sheriff has not sold, the action is not maintainable, and secondly, that it is the duty of the party by whom the goods are let, to give a notice to the Sheriff, informing him of the nature of the interest which the tenant has in them.

Taddy, Serjt., and *Thesiger*, for the plaintiff.
Wilde, Serjt., and *Barstow*, for the defendants.

[Attornies—*Railton & M.*, and *Dickinson & S.*]

In a case which followed the preceding, the Jury retired to consider of their verdict, and a fresh Jury being called, only five appeared. *Best*, C. J., inquired for the summoning officer, and was informed that he was not in attendance. His Lordship said, that in future he should fine such officer if he did not attend; for it was his duty to be present, as it had been determined by the Twelve Judges that, without his evidence, the Jury could not be fined.

*ADJOURNED SITTINGS IN LONDON, AFTER
 EASTER TERM, 1828.

[440]

BRANDON v. OLD. *June 4.*

A publican cannot recover for beer furnished to third persons by the order of an individual who has previously become intoxicated by drinking in his house.

Action to recover the balance of a publican's bill.

It appeared that the defendant, who was seventy years of age, and had recently come into the possession of some property, was in the frequent habit of drinking at the house of the plaintiff, and was sometimes there on Sundays for six or seven hours together. He was often intoxicated, and would give beer to any one that came to the house. The charge on one day was for eighty-six pints of ale, besides spirits; and on another day, for one hundred and thirty-four pints of ale. Sums had been paid on account at different times, amounting, in the whole, to 32*l.* The balance claimed was 21*l.*

Menevether, Serjt., for the defendant, contended, that if, from the character of the bill, the Jury should be of opinion that the beer charged for was consumed in tippling, the plaintiff could not recover, as such tippling was clearly illegal. There could be no doubt with respect to that which was drunk on the Sundays; and with regard to the spirits, the plaintiff also could not recover for them. He referred to the stat. 3 Geo. 4, c. 77 (a).

Best, C. J., in summing up, said—Drunkenness is forbidden by the common law; but it has also been forbidden by statute, from the reign of King Charles the Second down to the present time. Publicans are not to allow tippling, and particularly on Sundays. It is clear that this *plaintiff has allowed [441] this old man, the defendant, to drink in this illegal way. It is admitted that 32*l.* has been paid; and if, in your judgment, this is as much as the plaintiff is entitled to, then you will find your verdict for the defendant. If a man, when in his senses, give beer to others, there is no doubt but that he must pay for it. But if he does it when in a state of intoxication, he will not be liable;

(a) By that act, publicans are to enter into a recognizance, one condition in which is, that they 'shall not wilfully or knowingly permit drunkenness or tippling.'

because the publican, in such case, would be taking advantage of an offence which he himself had been instrumental in producing. If you think the 32*l.* is enough, after deducting the demand for spirits, to pay for all the ale which this publican ought to have allowed this man and his friends to drink, then you will find your verdict for the defendant.

Verdict for the defendant.

Wilde, Serjt., and *Talfourd*, for the plaintiff.

Marewether, Serjt., for the defendant.

[Attornies—*T. B. Hudson*, and *Slade & J.*]

WRIGHT v. TREVEZANT. June 4.

An agreement "between A. B. and C. D.," by which "A. B. agrees to pay C. D. 140*l.* a year, in quarterly payments, for a house, garden, &c. (describing the situation), for the term of seven, fourteen, or twenty-one years, at the option of the tenant, the rent to commence from the 1st January," &c., is a lease, and not merely an agreement for one.

ASSUMPSIT to recover a quarter's rent from the 1st of January, to the 1st of April, 1828, under the following instrument:—

"MEMORANDUM OF AGREEMENT made between Peter Trevezant, Esq., and Frederick Wright.—Peter Trevezant agrees to pay Frederick Wright the sum of 140*l.* *per annum*, in quarterly payments, for the house, garden, stable, and coach-house, No. 1, Frederick's Place, situate on the rise of Brixton Hill, for the term of seven, fourteen, or twenty-one years, at the option of the tenant at the end of every seven years; the rent to commence from the 1st of January, 1827."

*442] *The paper was dated the 29th December, 1826, and was stamped with a lease stamp. The defendant entered into possession on the 1st January, 1827, and quitted on the 24th of December in that year, having paid a year's rent, and having, on the 11th June, given six months' notice of his intention to quit at the end of the year, which notice the defendant rejected by letter of the 7th of July. The keys were also tendered to the plaintiff, who refused to accept them.

Wilde, Serjt., for the defendant. The tenancy was determined by the notice given expiring at the end of the year. The paper is an agreement merely, and not a lease. It contains no stipulations of the kind, which every one would expect to find, if the parties had intended it as their final arrangement, and meant that it should operate as a lease. The whole of the agreement is on the part of the tenant. There is no granting on the part of the plaintiff. There are none of those stipulations which are usual in instruments which are intended to regulate the holding. There is no statement as to when possession is to be given: the commencement of the term is only to be ascertained by inference. The affirmative proof is very scanty; and the negative is very abundant. The instrument is all in the future: it is dated the 29th of December; and the rent is to commence from the 1st of January following. There are no words of present demise. The rent is to commence *in futuro*; and the words are more consistent with the period from which rent is to be reserved in the lease, than the period at which possession is to be taken under the agreement. The paper contains nothing more than the minutes of an arrangement to be carried into effect by the execution of a future lease.

Pearse, on the same side. The cases show that the intention of the parties, to be collected from the words of *the instrument, ought to be the guide of the Court in deciding upon it. In *Bacon's Abridgment*, title "Lease" [*443] (a), it is said, that, "if the most proper and authentic form of words, whereby to describe and pass a present lease for years, is made use of, yet, if upon the whole deed there appears no such intent, but that they are only preparatory and relative to a future lease to be made, the law will rather do violence to the words, than break through the intent of the parties." In the present instrument, there are no words of demise, nor are there any words importing immediate possession. The words "the rent to commence," instead of "the term to commence," merely show an intention that the rent, when possession should be given, should not exceed a certain sum, and that the agreement should be evidence of the amount of rent, until a lease should be executed. In the case of *Clayton v. Burtenshaw* (b), the words were, as in this case, all on one side. The principle which is to be extracted from the cases is, that the intention of the parties in the words is to be the guide of the Court in construing the nature of the agreement.

Adams, Serjt., for the plaintiff. The principle now is, that if it appears that the parties contemplated a future lease, it is not a present demise. The question is, whether it is to be gathered from the words that the parties contemplated a future lease. In *Morgan* on the demise of *Dowding v. Bissell* (c), the words of the agreement were, "Mr. Dowding agrees to let," &c. "at the yearly rent," &c. "and under all usual covenants and agreements as between landlord and tenant," &c.; and the Court inferred from this that the parties contemplated the making of a fresh instrument.

**BEST*, C. J. Have you any case where a man agrees to take at a [*444] certain rent, and the landlord says nothing?

Adams, Serjt. I have not any decided case of that kind; but what I rely on is, that in the present case, there is no reference to any future lease intended between the parties. In *Doe v. Groves* (d), there was such reference; but it was still held that the instrument was to be considered as a lease, and that the provision for a future lease to contain further covenants, was for the better security of the parties. The omission of such reference in the present case, shows the full intention of the parties to create a present demise. There is a total absence of all circumstances from which any future instrument is to be presumed. The words "seven, fourteen, or twenty-one years, at the option of the tenant," show that the landlord, during those periods, could not get rid of the tenant; and therefore he must be taken to hold for that time.

Putteson, on the same side. The case of *Clayton v. Burtenshaw* differs from the present. There the supposed landlords were not parties; and there was no mention of the time at which the term was to commence. It is similar to *Dunk v. Hunter* (e), and the rest of the cases in which no term is mentioned. The words "for the term of seven, fourteen, or twenty-one years" amount to a grant of the term. The words "rent to commence," have the same effect as the words "possession to be taken" would have. A lease for years may commence *in futuro*. It is only necessary that it should appear when possession is to be taken; and it is not necessary that it should be immediate. In the paper in question there is no express reference to any future instrument. We may collect the words, the landlord agrees to let, from the whole of the instrument itself.

**Wille*, Serjt., in reply. The question is, Whether it is intended that the party should take a present interest, or whether it is intended that [*445] another instrument should be executed. I admit that there are no words of

(a) The title is "Leases and terms for years. [K] By what form of words leases may be made."

(b) 7 D. & R. 800; S. C. 5 B. & C. 41.

(c) 15 East, 244.

(c) 3 Taunt. 65.

(e) 5 B. & A. 322.

reference to a future instrument ; but the intention to have one may be inferred from what is omitted, as well as gathered from what is directly mentioned. There are cases in which the Courts have held a particular paper to be a lease, although that paper stated that a lease was to be subsequently granted ; and so, on the other hand, the Court may also infer from the absence of important provisions, that another instrument was contemplated. The paper in this case not only does not contain that which is usual and formal ; but it does not contain that which the interests of the parties require. He cited the case of *Colley v. Streeton* (a).

BEST, C. J. The only principle applicable to cases of this kind is, that if, in the instrument relied on, there is that which, in point of law, will satisfy the word lease, then it will operate as a lease, unless it was the intention of the parties that another instrument should be executed. No particular form of words is necessary. All that is required is, that the premises to be let should be mentioned, and the rent to be paid, and that the commencement and expiration of the term should also appear ; and if there be any uncertainty in any of these particulars, then the instrument will not be a lease. But if we can find all these particulars set out, then it will be a lease, if the parties intended that it should be. I think that, *446] looking at the instrument in this case, I can discover all the requisite particulars. It is said "the rent to commence," and not "the term to commence ;" but as it appears that the rent is to be paid "for the term," is not the commencement of the rent expressive of the commencement of the term ? If I had seen any stipulation, as in the case of *Colley v. Streeton*, with respect to usual covenants, I should have thought that another paper was to be introduced. It is said that there are no words of demise ; but the words "agrees to demise," are not ordinary words of demise ; and yet those words have been held to be sufficient, if, from the whole, it appears that a demise was the intention of the parties. We are to consider here, whether there is not that which is equivalent to a demise. If it can be gathered from the whole of the paper, it will be enough, without any specific mention. Where one agrees to pay rent, and the other, by signing the agreement, consents to accept the rent, he agrees to grant that for which the rent is to be paid. By agreeing to accept rent, he agrees to demise the premises. I am of opinion that this paper contains all that is necessary to make a valid lease, and therefore that the plaintiff is entitled to a verdict.

Verdict for the plaintiff.

Adams, Serjt., and *Patteson*, for the plaintiff.
Wilde, Serjt., and *Pearse*, for the defendant.

[Attornies—*Dacie*, and *Broughton & W.*]

(a) 3 D. & R. 522. That case decides, that an instrument, whereby A. agrees to let, and B. to take and rent certain premises, "to hold *henceforth* for a term of thirty-four years," &c. &c., and B. binds himself to keep the premises in tenantable repair during the term, with a further agreement on the part of A. to grant a lease on the like terms, *with usual covenants*, within three months, is not a lease, though it contains words of present contract.

*447]

*BLANDY v. ALLAN. June 5.

Acceptances of a factor for his principal, which are provided for by the principal before they become due, do not constitute such a demand against the principal as to enable the factor previous to the 1st of October, 1826, when the 2d section of the 6 Geo. 4, c. 94, came into operation, to pledge the warrants for goods belonging to the principal, as a security for advances made to himself.

TROVER for Madeira wine. Plea—Not Guilty.

The plaintiff was a merchant at Madeira, having a factor in London of the name of Mitchell. In the months of December, 1825, and January, 1826, the plaintiff consigned to Mitchell a quantity of Madeira wine, and Mitchell, being in possession of the dock warrants, on the 16th of January pledged them with the defendant, for the purpose of raising money. At the time of the pledging, Mitchell was under acceptances for the plaintiff, upon which the balance was against the plaintiff to the amount of 2050*l.*; but the balance on the cash account was in the plaintiff's favour to the amount of 1400*l.* The plaintiff used to provide for his bills as they became due by previous consignments of wine, and did so provide for the particular bills which were running at the time of the pledging. The defendant was not informed of the particular mode of dealing between the plaintiff and Mitchell. The warrants did not contain any intimation of the plaintiff's being the owner of the wine.

Wille, Serjt., for the plaintiff. Neither the act of the 4 Geo. 4, c. 83, nor such part of the 6 Geo. 4, c. 94, as was in operation at the time of the pledging, will be found to apply to this case. The 2d section of the 6 Geo. 4, is the section applicable to such a state of facts as the present; but that did not come into operation till October, 1826, and the transaction in question took place in the January preceding. That statute was passed in the month of July, 1825; and the time between that date and October in the following year, was given to enable merchants abroad to change their correspondents, if they should think it right, in consequence of the alteration in the law. With respect to the state of the account between the plaintiff and Mitchell at the time of the pledging, I admit that if Mitchell had a right to treat acceptances as money, the balance was in his favour. But the *case of *Fletcher v. Heath* shows that he [*448 had no such right (a).

Spankie, Serjt., for the defendant. The dock warrants state the wine to have been imported by Mitchell, and bonded by him, and the transfer is from Mitchell to the defendant. Those documents, upon the face of them, do not contain any intimation from which the defendant could conclude that the wine did not belong to Mitchell. It appears also that the wine was imported not from Madeira but from Demarara. I rely, first, on the 2d section of the 4 Geo. 4, c. 83, which enables a party to take goods in pledge from the consignee (b). I consider also that the 3d and 5th sections of the 6 Geo. 4, c. 94, are [*449 applicable to the case (c). The question depends on the true *meaning

(a) 1 M. & Ryl. 335. A merchant purchased and paid for East India silks, the warrants for which he sent to his broker, accompanied by bills to nearly their value, drawn upon the broker, which the broker accepted, but did not pay when due. Acceptances of the principal's nearly to the amount of the broker's, were sent to him for the purpose of meeting them. The broker applied them to his own private use, and afterwards pledged the warrants with a third person. It was held in trover by the principal against such third person, that the broker had no lien upon the warrants, which he was in a situation to transfer, and therefore the plaintiff recovered in the action.

(b) That section enacts, in substance, that it shall be lawful for any person to take goods, &c. or the bills of lading for the delivery of them, in deposit or pledge from the consignee; but that in such case such person shall acquire no further or other right, title, or interest in, upon, or to them, than was possessed, or could or might have been enforced by the consignee at the time of the deposit.

(c) The 3d section of the 6 Geo. 4, c. 94, provides, in substance, that from and after the passing of the act (viz. 5th July, 1825), in case any person, &c. shall accept and take any such goods, &c. in deposit or pledge, from any such person so entrusted, &c. [as in the 2d section mentioned.] without such notice as is there mentioned, as a security for any debt or demand due and owing from such person so entrusted, &c. before the time of such deposit, &c. such person so accepting shall acquire no further or other right, &c. than was possessed, or could or might have been enforced by the person, &c. so entrusted, &c. at the time of the deposit; but that such person, &c. shall and may acquire, possess, and enforce such right, title, or interest as was possessed and might have been enforced by such person so entrusted, &c. The 5th section of the same statute enacts in substance, that from and after the passing of the act, goods, &c. or the documents, &c. may be taken in pledge of a factor, notwithstanding the receiver knows that the party is a factor; but that in such case no other right shall be acquired than the factor could, at the time of the deposit, have himself enforced.

of the words "at the time of such deposit or pledge as aforesaid." And the question will be, whether Mitchell, on the 16th of January, 1826, was in a situation to claim any lien on the goods of the plaintiff. From the evidence it appears, that, supposing the securities to have run out, and the liabilities also, then the balance on that day would have been in favour of Mitchell. If the pledgee on that day had looked into the state of the account, taking the assets on the one hand and the liabilities on the other, he would have found that the balance was against the plaintiff to the amount of 2050*l*. Under these circumstances I contend, that Mitchell had a lien on the goods, he being under responsibilities for the plaintiff. There was in reality no cash balance; for the 1400*l*. was required to meet the acceptances which were then running. The object of the Legislature is, in transactions between an innocent owner and an innocent pledgee, to favour the pledgee and not the person who has placed such extensive confidence in his agent. At the time of the pledging the wine could not have been taken out of the hands of the factor, without payment of the whole of the balance due to him. The case of *Fletcher v. Heath* was a case of general lien, and not the case of a specific deposit; the right there claimed was on an ultimate balance, and the question did not come within the acts of Parliament. The present case is one of a single deposit, and is as it were a mere insulated transaction.

Patteson, on the same side. The object of the acts of Parliament was to give the right which we are contending for in this case. What difference would it make supposing the party to be in actual advance of cash? If *the
 *450] owner were afterwards to pay it off, no doubt the lien would be gone. And there is no difference in principle, between such a case and the present. Any other decision would do away with the effect of the acts altogether. A man might, before the acts, have held as the servant of the factor; and the construction contended for, on the part of the plaintiff, would make the acts themselves confer no other right. What security is there if the pawnee's rights are to fluctuate, according as the rights of the owner and the pawner fluctuate? The judgment of Lord *Tenterden*, in the case of *Fletcher v. Heath*, certainly appears, in parts, to be very strong, but the whole is to be taken *secundum subjectam materiam*. The first part appears to be consonant with the act of Parliament. The second part seems not perfectly consistent with the former, unless it be taken *secundum subjectam materiam*. For there were circumstances in *Fletcher v. Heath*, which show that Billinge, the broker, never had any lien. In Manning and Ryland's report of that case, Lord *Tenterden* is reported to have alluded to the 8th section (a), and to have said, "It follows from that provision, that Billinge, the broker, had no lien upon the warrants
 *451] at the time when he pledged them, and consequently that the *defendants could derive no lien from him, and have no right to detain the warrants as against the plaintiff, the principal."

Best, C. J. It is insisted that this case is governed by the 2d section of the 4th Geo. 4, and by the 5th section of the 6th Geo. 4. It does not appear to me, that the 2d section applies to the case at all, because it is there said, that the pledgee shall have no other right than the consignee had and could enforce at the time of the deposit. The effect of that is, that if the owner had borrowed

(a) That section provides, "that nothing in the act contained shall extend or be construed to extend, to subject any person or persons to prosecution for having deposited or pledged any goods, &c. provided the same shall not be made a security for, or subject to, the payment of any greater sum or sums of money, than, at the time of such deposit or pledge, was justly due and owing to such person or persons, from his, her, or their principal or principals: Provided, nevertheless, that the acceptance of bills of exchange by such person or persons, drawn by or on account of such principal or principals, shall not be considered as constituting any part of such debt so due and owing from such principal or principals, within the true intent and meaning of this act, so as to excuse the consequences of such a deposit or pledge, unless such bills shall be paid when the same shall respectively become due." This section, and the 7th, 9th, and 10th, are repealed by the stat. 7 & 8 Geo. 4, c. 27. However, the 7th and 8th sections are, in substance, re-enacted by the stat. 7 & 8 Geo. 4, c. 29, s. 51.

money of the factor, as the factor would have a right to enforce the payment of the money, so the pledgee would have the same right. It is only transferring to the pawnee the same right as was possessed by the factor. Then, as to the 5th section of the 6th Geo. 4, it says, notwithstanding the pledgee has notice that the pledger is a factor, he may accept a deposit; but then it goes on to say, that he shall acquire no other right than was possessed, or could or might have been enforced by the said factor, at the time of such deposit. This goes a shade beyond the former clause, but it gives the pawnee not a right to detain, but only such right as the factor could enforce. I admit that the factor, if he is under acceptances, has a right to detain until those acceptances are discharged, yet he has not any *right to enforce*; and, by right to enforce, I mean, right to call for the payment of money. I think that the 8th section renders it perfectly clear, for it says, that the factor shall not be liable to prosecution for having deposited goods, provided they are not made a security for the *payment of any greater sum of money* than was justly due from the principal at the time of the deposit. This plainly shows, that the liability intended is a pecuniary liability, and that in such case only the factor is protected. The section further provides, that the acceptance of bills of exchange by the factor or agent, on account of his principal, shall not be considered as constituting any part of his debt, so as to excuse the consequences of the pledge, unless they shall be paid when they become due. Under *these* words, whatever may be the situation of the factor, ^[452] though he is under liabilities to the amount of several thousand pounds, yet if he pledges when there is no cash balance, he is liable to suffer transportation. All this goes clearly to show, that the former section is confined to money liabilities, and does not extend to acceptances. And any other construction would be absurd, because, though a factor may be under acceptances to-day, yet to-morrow those acceptances may be met by the principal. And it appears that, in the present case, the factor was actually relieved from his acceptances by his principal. It would be a mischievous construction to say, that a man might pledge goods under such circumstances. It appears to me, that the principle of the decision in *Fletcher v. Heath*, is, that liability under acceptances is not sufficient to entitle a man to pledge. In such case, he has only a right to hold, *nomine pæna*, till the liabilities are discharged. I had formed this opinion before I was made acquainted with the case of *Fletcher v. Heath*. I think that the plaintiff is entitled to a verdict.

Verdict for the plaintiff—The warrants were delivered up.

Wilde, Serjt., and *Telfourd*, for the plaintiff.

Spankie, Serjt., and *Patteson*, for the defendant.

[Attornies—*Brooking & S.*, and *Gilbank*.]

CASES

AT

NISI PRIUS.

PROMOTIONS.

IN Michaelmas Term, 1828, JAMES PARKER, Esq., was appointed one of the Judges of the Court of King's Bench, *vice* Sir G. S. HOLROYD, Knight, resigned. In the following vacation, Thomas Denman, Esq. Common Serjeant, received a patent of precedence, and took his seat accordingly.

COURT OF KING'S BENCH.

SITTINGS IN LONDON, AFTER MICHAELMAS TERM, 1828.

BEFORE LORD TENTERDEN, C. J.

WILMOT v. SMITH. Dec. 2.

If an attorney send a letter to demand payment, and the debtor make a tender to him, that is a good tender unless the attorney disclaims his authority at the time; and, if the attorney be absent, he is bound by the acts of those whom he allows to represent him at his office. Therefore, after such a letter being sent, a tender to the clerk of the attorney at his office (the attorney being absent) is good.

If A. agrees to make an article of certain materials for a stipulated price, but puts in materials of a better kind, he is not at liberty on that account to charge more than the stipulated price, nor can he require the article to be returned, because the buyer will not pay an increased price on account of the better materials.

Goods sold. Pleas—*First*, General issue; *Second*, a tender of 4*l.* 10*s.* Replication denying the tender.

*454] *This action was brought to recover the sum of 5*l.* 5*s.*, being the price of a printing press, with a wrought iron bottom; and the defence was, that the plaintiff had agreed to furnish a press with a cast iron bottom, at the price of 4*l.* 10*s.* It was admitted, that wrought iron was considered to be the best, but that cast iron would also answer the purpose very well; and it was further proved, that the plaintiff had offered to take the press back again.

To support the plea of tender, it was proved, that the defendant, accompanied by another person, called at the office of the plaintiff's attorney, where they found two of his clerks, and that the defendant then stated, that he came in consequence of a letter from Mr. Platt, demanding 5*l.* 5*s.*; upon which one of

the clerks said, that Mr. Platt was not at home, but was expected soon. It further appeared, that, shortly after this, a person came in (who was in fact an articulated clerk of Mr. Platt), and that, on his coming in, one of the other clerks said to him. "This is Mr. Smith, come to offer 4*l.* 10*s.*," to which the articulated clerk, without stating that he was not Mr. Platt, replied, "I cannot receive less than 5*l.* 5*s.*—Mr. Wilmot will not take less;" and upon this the defendant tendered 4*l.* 10*s.*, not being aware that the person to whom he tendered it was not the plaintiff's attorney.

J. Williams, for the plaintiff. A tender to the clerk of the plaintiff's attorney is not good; a tender even to the attorney himself would not be good.

Lord TENTERDEN, C. J. Where the tender is made after a letter sent by the attorney to demand payment, the case is different. If I were to hold, that a tender to an attorney who had authority to write for payment (he not disclaiming his authority at the time), was not a good tender, defendants would be deluded, as they would not think it necessary to go to the plaintiff and make a tender to him. And, if the attorney is absent from his office, I *shall hold that [455] he is bound by the acts of those persons whom he allows to represent [455] him in his office (a).

J. Williams, in his reply, contended, that, as the defendant did not return the press when he had the opportunity of doing so, he was bound to pay a fair price for it, which was 5*l.* 5*s.*

Lord TENTERDEN, C. J. (in summing up.) Although the putting in of the superior materials may have fairly enhanced the price of the press; yet, if the plaintiff has stipulated to complete it with materials of an inferior value, but which would still have been sufficient for use, he is bound by his bargain, and cannot charge more than the stipulated price; and I am of opinion, that he cannot compel the defendant to rescind the contract by returning the press (b).

Verdict for the defendant.

J. Williams, and *Platt*, for the plaintiff.

Brodrick, for the defendant.

[Attornies—*Platt*, and *J. Nokes*.]

(a) In an Anonymous case, 1 Esp. N. P. C. 349, it was proved, in support of a plea of tender, that the defendant had sent a sum of money by a servant to the plaintiff's house; this servant took it there and gave it to a servant of the plaintiff, who retired, and appeared to go with the money to the master. Lord Kenyon left it to the Jury to say, whether the money had been tendered, and they found that it had. In the case of *Goodland v. Blewith*, 1 Camp. 477, it was held, that a tender to an agent authorized to receive payment, is as good as a tender to the creditor in person. In the case of *Noffat v. Parsons*, 5 Taunt. 307, a creditor had told his clerk, previously authorized to receive money, not to receive a sum from the defendant, and the clerk, on the sum being tendered, refused to receive it, and assigned the reason; this was held to be a good tender, and *Mansfield, C. J.*, observed, that a tender to a managing clerk would suffice. See also the case of *Blow v. Russell*, ante, Vol. 1, p. 365.

(b) See the case of *Cash v. Giles*, ante, p. 407.

*HILL v. JOHNSON. Dec. 2.

[456]

In *assumpsit*, by the indorsee against the drawer of a bill of exchange, the defence was, that time had been given to the acceptor. To meet this defence, a copy of a paper that the defendant had promised to sign, was offered in evidence. By this the defendant consented to the plaintiff's using any means to obtain payment from the acceptor, without prejudice of his right to recover from the drawer: Held, that this paper did not require a stamp.

Assumpsit by the plaintiff, as the indorsee, against the defendant, as the drawer of a bill of exchange for 52*l.*, which bill had been accepted by Colonel Ormeby.

The defence was, that the plaintiff had given time to the acceptor, and had taken a warrant of attorney from him, on which judgment had been entered up, and part of the amount paid.

To meet this case, the plaintiff's counsel proposed to put in a copy of a paper, which a witness had taken, by the desire of the plaintiff, to the defendant for his signature, and which the defendant had promised to sign, and return to the plaintiff. This paper was as follows :—

"I, James Johnson, hereby consent to Mr. R. Hill using any means he can to enforce payment from Colonel Ormesby, for my bill drawn by me, and accepted by the said Colonel Ormesby, without prejudice to his right to recover against the drawer."

Campbell, for the defendant. I submit, that this requires a stamp. It is clearly evidence of an agreement between the plaintiff and the defendant, even if it is not of itself an agreement.

Lord TENTERDEN, C. J. I think it may be read without a stamp.

The paper was read, and the cause was ultimately referred.

F. Pollock, and *Gunning*, for the plaintiff.

Campbell, and *Chitty*, for the defendant.

[Attornies—*Virgo*, and *Raphael*.]

*457]

*FERGUSON v. CARRINGTON. Dec. 3.

If goods be sold on a credit, the vendor cannot, before the credit has expired, maintain *assumpsit* for goods sold, even though he can prove that the goods were not bought in the fair way of trade, but for the fraudulent purpose of being immediately resold at an under price : *Semble*, that trover is his proper remedy.

Goods sold. Plea—General issue. It was opened, on the part of the plaintiff, that the goods had been sold by the plaintiff, a ribbon manufacturer, to the defendant, a haberdasher, at a credit which had not expired at the time of the bringing of the action ; and that acceptances of the defendant were given to the plaintiff for the amount. However, it was argued on the part of the plaintiff, that if these goods were bought, not for the regular purposes of trade, but with a fraudulent intent of selling them directly afterwards at an under price, to raise money, the defendant could not set up as a defence, that the credit had not expired.

A witness proved the sale and delivery of the goods, and that the defendant had accepted bills for the price of them, which bills had not become due. The plaintiff's counsel then proposed to call a witness to show how the goods had been disposed of.

Sir J. *Scarlett*, for the defendant. I submit that this is not evidence. This is an action for goods sold, and how are we to be prepared to meet a case of supposed fraud ? We come here to show that these goods were sold upon credit, and that that credit has not expired.

F. Pollock, for the plaintiff. The manner of treating the goods is most material to show that this was a fraudulent transaction.

Sir J. *Scarlett*. The mode of treating the goods cannot alter the original contract. It might be good evidence in trover ; but if the plaintiff bring an action upon the contract for goods sold, this evidence is not admissible.

*458] Lord TENTERDEN, C. J. The plaintiff alleges that the *defendant did not buy these goods in the regular course of trade, but that he bought

them for the fraudulent purpose of having them resold at a low price; and the plaintiff wishes, as the time of credit has not expired, to abandon the contract and prove fraud. Now this I think he cannot do, for he cannot treat it as a sale in one view, and reject it in another.

Nonsuit.

F. Pollock, and Goulburn, for the plaintiff.

Sir J. Scarlett, and Thesiger, for the defendant.

[Attornies—*E. Isaacs, and Haslem & B.*]

Jan. 24, 1829.

F. Pollock now moved to set aside the nonsuit; but the Court refused a rule, and held, that although the plaintiff might have perhaps been entitled to maintain an action of trover, yet, that if he went upon the contract, he must take that contract as it actually was, and must, if he affirmed the contract, affirm it altogether.

In the course of the discussion the case of *Parker v. Patrick* (a) was cited, and Lord Tenterden, C. J., observed, that the authority of that case had been questioned.

(a) 5 T. R. 175. In that case it was held, that if goods be obtained from *A.* by false pretences, and pawned to *B.* without notice, and *A.* convict the offender and get possession of his goods, *B.* may maintain trover; but the Court distinguished the case from those where a felony had been committed, because in such cases the owner was, by the stat. 21 Hen. 8, c. 11, entitled to restitution on his prosecuting the offender to conviction. However, that statute having been repealed by the stat. 7 & 8 Geo. 4, c. 27, and the restitution of goods being regulated by the statute 7 & 8 Geo. 4, c. 29, s. 97, this distinction between the restitution of goods obtained by felony and by false pretences seems to be an end.

*HAWKINS, surviving Executor of WILLAN, v. SHERMAN. Dec 3. [*459]

A. agreed to take an assignment of a lease of a house, which was out of repair, from *B.*, and by the agreement it was stipulated, that all out-goings should be paid by *B.* up to April 22d; and, by an assignment indorsed on the lease (executed by *B.* but not by *A.*), *B.* assigned the residue of the term, subject to the performance of all the covenants of the lease, which, from the 22d day of April, ought to be observed on the part of the tenant. The lease contained a covenant to keep the premises in repair, and so to deliver them up; and, after the assignment, the reversioner sued *B.* and recovered for dilapidations which occurred before April 22d; Held, that *B.* could not maintain an action on the case against *A.* for these dilapidations, even though it could be proved that *A.* gave a smaller price, because the premises were out of repair: Held, also, that the Judge could not look beyond the written instruments viz. the written agreement and the assignment. If *B.* assign the lease of a house to *A.* by deed, subject to certain covenants, and *A.* take possession, whether *B.*'s remedy for a breach of the covenants is by an action of covenant, though *A.* never executed the deed—*Quare*.

CASE.—The first count of the declaration stated, that the testator was, in his lifetime, possessed of certain messuages, &c. for the remainder of a term of forty-one years, from Christmas 1786, granted to him by the corporation of London, as Governors of Christ's Hospital, subject to certain covenants in a certain indenture of lease contained, that is to say, among other things, that the said testator should, from time to time during the term, repair the demised premises, and yield them up at the end of the term in sufficient repair, of which the defendant had notice. That, on the 1st of May, 1823, the testator assigned his interest to the defendant from the 22d of April, 1823, subject to all the covenants contained in the lease, which, "from the said 22d of April, on the

part of the tenants, lessees, or assignees, were or ought to be observed, performed, and kept." That the defendant entered, and that it became his duty to observe and perform all the covenants in and by the said indenture reserved, mentioned, and contained, and which, from the said 22d of April, on the part of the tenants, lessees, or assignees, were or ought to have been performed. Breach, that the defendant did not observe, perform, and keep the covenants, &c., in this, that he did not, from the said 22d of April, sufficiently repair, &c., by reason whereof the Governors of Christ's Hospital recovered a sum of 378*l*. 15*s*. against the testator, by the judgment of the Court of Common Pleas. The second count stated a lease as in the first count mentioned, and that it was assigned to the defendant, and that it became his duty to perform the covenants. *460] Breach, that the defendant did not perform the "covenants (without specifying any), by reason of which the governors recovered a sum of 378*l*. 15*s*. against the testator. Third count, that the testator agreed to sell to the defendant and another, who agreed to buy the premises subject to the covenants in the lease, whereby it became the defendant's duty to repair. Breach, that he did not. Fourth count, that the defendant occupied the premises subject to the covenants of the lease, and that, contrary to his duty, he did not repair. Fifth count, that the defendant became tenant from year to year, and that, contrary to his duty, he permitted the premises to become ruinous for want of needful repair. Sixth count, similar, except that it stated that the testator had demised to the defendant for a certain term of years. Seventh count, that the defendant was tenant, and treated the premises in an untenantlike manner. Plea—Not guilty.

The case opened on the part of the plaintiff was, that the defendant had, in the year 1823, purchased of the testator the residue of a term in the Bull and Mouth Inn, and that he bought at a lower price, from the premises being then out of repair; and it was also stated that an assignment of the lease having been prepared, it had been executed by the plaintiff but not by the defendant; and that the Governors of Christ's Hospital had sued the testator since the date of the assignment, and had recovered a sum of 378*l*. 15*s*. against him.

The lease from Christ's Hospital to Mr. Willan was put in. It was dated December 15th, 1785, and by it the Hospital demised the Bull and Mouth Inn to Mr. Willan for forty-one years, at a rent of 100*l*. a year, subject to certain covenants, one of which was, that the premises should be kept in good repair, and so be delivered up at the end of the term.

An agreement between the executors of Mr. Willan, and the defendant and others, dated April 22d, 1823, was also put in. By this, the former agreed to *461] sell, and the latter to buy, the Bull and Mouth Inn; and it was also *agreed that the lease should be assigned, and that all out-goings should be paid by the executors up to April 23d.

The assignment of the term to the defendant, which was indorsed on the back of the lease, was offered in evidence. It was executed by the plaintiff, but not by the defendant.

Campbell, for the defendant. This is not evidence against the defendant. It has never been executed by him.

Lord TENTERDEN, C. J. The executors agree to assign the lease, and they have executed an assignment. I think I must receive it, to show that the plaintiffs have performed their part of the agreement.

The assignment was read. By this the plaintiffs assigned the residue of the term to the defendant, "to hold to him, his executors, administrators, and assigns, from the said 22d day of April, for and during all the rest, residue, and remainder of the said term, subject to the payment of the rent and to the performance and observance of all and every of the covenants, in and by the said indenture reserved and contained, which from the said 22d day of April, on the part of the tenants, lessees, or assignees, were, or ought to be observed, performed, fulfilled, and kept."

Lord TENTERDEN, C. J. The difficulty here is, to add any thing to the terms contained in this deed of assignment. It is an assignment, subject to the payment of rent and performance of covenants, from the 22d day of April. Now, upon those words, I cannot say that the defendant is liable to dilapidations before that time.

Sir J. Scarlett, for the plaintiff. If this were an action founded on the covenant, it might be so; but the question *here is, as to what was the implied agreement between the parties. Now, I mean to say, that the defendant purchased with reference to the existing state of the premises, and not as if the executors were bound to put them into complete repair up to that day. [462]

Lord TENTERDEN, C. J. The general rule is, that where there is a written covenant, you can add nothing to it. Here, there was not only a written agreement, but an actual assignment upon it. Can I look further than those instruments? I think you must divide the sum, and take only for the dilapidations since the defendant came into possession.

Sir J. Scarlett. If the premises continued out of repair, he continued to break the covenant; and though the dilapidations occurred before the assignment, they continued to be a breach after.

Campbell, for the defendant. It is no doubt a continuing covenant as between lessor and lessee, but not so as between assignor and assignee.

Lord TENTERDEN, C. J. I should recommend the parties to agree upon some certain amount. I am quite sure, it would be much better for them.

Verdict for the plaintiff.—Damages 60*l.*, by consent.

Lord TENTERDEN, C. J. Now the case is over, I will state the difficulty that I felt, which is this: I am very much inclined to think, that, the defendant having taken possession under the assignment, the action should have been covenant, although he never executed the deed (a).

*F. Pollock. I understand, that that point was much considered before this declaration was prepared. [463]

Sir J. Scarlett, F. Pollock, and T. F. Ellis, for the plaintiff.

Campbell, and Hill, for the defendant.

[Attornies—*Lyon & Co.*, and *Rees & Co.*]

(a) See the case of *The East India Company v. Lewis*, ante, p. 358; and also, the case of *Burnett v. Lynch*, 5 B. & C. 589, 8 D. & R. 368, where the law on this subject was much discussed. In that case, where the same difficulty was raised, the Court held, that an action on the case, for a breach of duty, would lie, and doubted whether an action of covenant was maintainable.

FOWLER v. COSTER. Dec. 5.

Assumpsit.—Plea in abatement, that the promises were "made jointly with A." Replication, that they were not made jointly with A. On the trial of this issue, the defendant begins.

Assumpsit by the plaintiff, as the indorsee, against the defendant, as the drawer of certain bills of exchange. Plea in abatement, that the several promises in the declaration mentioned, were made jointly with a person named Cunningham. Replication that the promises were not made jointly with Cunningham (a).

(a) The forms of this plea and replication, will be found, 3 Ch. Pl. 449 and 615.

Lord TENTERDEN, C. J., held, that on these pleadings the defendant had the right to begin (a).

Verdict for the plaintiff.

Campbell, and *Comyn*, for the plaintiff.

Sir *J. Scarlett*, and *R. S. Richards*, for the defendant.

[Attornies—*Walker*, and *Llewellyn*.]

*464] *IN the ensuing Term, *R. S. Richards* moved for a new trial, on the ground that the verdict was against evidence; but the Court refused a rule.

(a) In the case of *Robey v. Howard*, 2 Stark. 555, where the defendant had pleaded in abatement, that the promises were made jointly with G. D., and the replication denied that the promises had been made jointly, it was held that the plaintiff had the right to begin, as he had to prove his damages. However, this case seems to be overruled in the principal case, as well as by the cases of *Cooper v. Wakley*, post, p. 474, and *Cotton v. James*, post.

GEORGE v. RADFORD. Dec. 5.

A Sheriff's officer having a warrant from the Sheriff to arrest a party for debt, went to the party and read his warrant to him, and then, having taken a fee, proceeded to the party's attorney, to let him know it, for bail to be put in. After this, the officer returned that he had taken the party: *Semble*, that this is no arrest.

In an action for a malicious arrest, the plaintiff's counsel had closed his case, and the defendant's counsel had begun to address the Jury, when the Lord Chief Justice said, he would nonsuit, on the ground that there was no evidence of malice. The plaintiff's counsel wished to adduce further evidence, but was not permitted, the Lord Chief Justice observing, that the rule of not permitting a party to adduce fresh evidence, after such party had closed his case, had been already too much relaxed.

CASE for a malicious arrest. Plea—General issue. The declaration stated, that the plaintiff was "arrested by his body and imprisoned."

To show an arrest and imprisonment, a Sheriff's officer, named Walbank, was called, who stated as follows:—"I received a warrant from the Sheriff of London, to arrest the plaintiff; I went to his house, and told him I had a writ against him for 50*l.*, at the suit of Mr. Radford; and I read a paper to him; I told him, that as I knew him, I would take his word, but that he must give bail. He gave me a fee, I think about two pounds or under, and I went to his attorney, and told him what had occurred, and that bail must be put in. I did not lock the plaintiff up, nor did I take him away; however, I made a return that I had arrested him."

Sir *J. Scarlett*, for the defendant. This is neither an arrest nor an imprisonment. The officer neither touched the person of the plaintiff, nor did he detain him.

Brougham, for the plaintiff. It has been repeatedly held, that, to constitute an arrest, there need not be an actual touching of the party, nor a locking him up. In the *case of *Berry v. Adamson* (a), where the Court held that *465] there had been no arrest, the officer had not even gone near the party. But here the officer goes to arrest the plaintiff, he states what he comes for, and the plaintiff acquiesces in the arrest.

Chitty, on the same side. In *B. N. P.* 62, it is said, that there need not be

(a) *Ante*, Vol. 2, p. 503.

an actual touching, to constitute an arrest, and that if the party acquiesces, it is sufficient. Now, that the plaintiff in this case submitted to the arrest is clear, from his giving the officer two pounds. It therefore stands thus: the officer goes for the purpose of arresting, and having stated what he comes for, his authority is acquiesced in; and the present defendant afterwards admitted that there was a good arrest, as he declared against the plaintiff as in custody of the Marshal (a).

Lord TENTERDEN, C. J. This case is not exactly like that of *Berry v. Adamson*. I will therefore reserve the point.

Sir J. Scarlett. It is not necessary that there should be a touching of the party, or a locking him up; but I never heard, that giving two pounds not to be arrested, was an arrest. Here the officer reads a paper, gets some money, and then goes away, without requiring the party to go with him.

Lord TENTERDEN, C. J. If the party had gone with the officer, that would have been enough.

Sir J. Scarlett. It is doing away with common sense, to introduce these constructive arrests, which only introduce fine distinctions. What shall we say to this case? *Suppose the officer had looked through the window, and said, I have a writ, what shall I do with it? Oh, says the party, take it to my attorney. Is this an arrest? If it be, we shall soon come to arresting by means of a twopenny-post letter. [*466]

Lord TENTERDEN, C. J. I own that my strong opinion is, that this is no arrest, but as the opinions of others may not coincide with mine, I will, to save the expense of coming here again, let the case proceed. I am bound to say, that I much disapprove of this mode of executing writs, as it enables these officers to obtain sums of money for not doing their duty.

The plaintiff's case then proceeded to its close, and Sir J. Scarlett had begun to address the Jury for the defendant, when

Lord TENTERDEN, C. J., stopped him, observing, that there was no evidence of malice, and that therefore the plaintiff must be nonsuited.

Brougham, for the plaintiff, wished to call more witnesses.

Lord TENTERDEN, C. J. You had closed your case, and Sir J. Scarlett had begun to address the Jury. If you had any more evidence, you should have adduced it before you had closed your case. I cannot receive it now.

Brougham. The strict rule has been very much relaxed.

Lord TENTERDEN, C. J. Perhaps too much, as, I am sorry to say, a great many other rules have been. The plaintiff must be called.

Nonsuit.

**Brougham*, and *Chitty*, for the plaintiff.

Sir J. Scarlett, and *Jeremy*, for the defendant.

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[Attornies—*Nias*, and *Rogers & Son*.]

(b) This form of declaring proves little, because the form is the same on servicable process, where there is no arrest.

KNIGHT v. HUGHES, Gent., One, &c. Dec. 6.

A. & B. were sureties for C., a collector of taxes, who became a defaulter. The obligees sued A., and recovered; Held, that in an action for contribution, brought by A. against B., A. could only recover half the amount of the verdict against him, and that he could not recover from B. either the half of the taxed costs of the obligees, or the half of his own costs of defending the action brought by the obligees.

Held also, that if A., after the verdict in the action against him on the bond, obtain a sum of money from C., he must take that in reduction of the amount of the verdict, and cannot apply it either to pay his own costs or the taxed costs of the obligees.

Assumpsit for money paid. Pt 1.—General issue. This action was brought for contribution (a). The plaintiff and the defendant had been sureties *468] for a person named Winkles, as collector of the assessed taxes of the parish of St. Mary, Islington. Winkles having become a defaulter, separate actions were brought against the plaintiff and the defendant on their bond; the former of these actions had been tried, and a verdict had passed against the present plaintiff for 1149*l.* (b), but the action so brought against the present defendant on the bond had not been proceeded in. The present plaintiff had paid the amount of that verdict, and the taxed costs of Mr. Loveland (the then plaintiff), and he also had incurred costs in his own defence.

It was admitted on the part of the defendant, that the plaintiff was entitled to a verdict for one half of the amount of the original verdict, subject to the deduction of two sums which the present plaintiff had succeeded in recovering from Winkles, the principal, which would reduce the moiety now to be recovered to 516*l.*

F. Pollock, for the plaintiff. I submit that the defendant is liable to pay half of the original plaintiff's taxed costs, and one half the costs of the defence of the original action, as well as to pay a moiety of the amount of the verdict.

Lord TENTERDEN, C. J., inquired if there was any authority in support of that proposition.

F. Pollock replied, that he had not been able to find any.

*469] Lord TENTERDEN, C. J. In the absence of any authority to that effect, I shall hold that the defendant is only liable to pay one moiety of the amount of the verdict.

Busby, for the defendant. I submit that from that moiety we have a right to deduct half of the two sums obtained by the plaintiff from Winkles.

F. Pollock. Those two sums being received of Winkles, the present plaintiff has, I apprehend, a right to set them against the costs.

Busby. That would be so if the question were between the plaintiff and the principal; but, as between the two sureties, it is otherwise.

Lord TENTERDEN, C. J. I think that, in this case, whatever the plaintiff has received since the verdict, in respect of this transaction, must, as between these parties, be considered as having been received in reduction of the amount of the verdict, and that the plaintiff has no right to retain such sums against the

(a) On the subject of contribution, Lord Kenyon, in the case of *Turner v. Davies*, 2 Esp. 478, says, "I have no doubt that where two parties became joint sureties for a third person, if one is called upon and forced to pay the whole of the money, he has a right to call on his co-security for contribution, but where one has been induced so to become surety at the instance of the other, though he thereby renders himself liable to the person to whom the security is given, there is no pretence for saying that he shall be liable to be called upon by the person at whose request he entered into the security."

As to contribution, where the parties were *tort feorsors*, see the case of *Merryweather v. Nison*, 8 T. R. 186, (cited *ante*, Vol. 2, p. 417, n.); and as to cases where the original action had been *in tort*, see the case of *Woolley v. Batte*, *ante*, Vol. 2, p. 417.

With respect to the liability of a principal to indemnify his bail, it was held in the case of *Fisher v. Fallow*, 5 Esp. 171, that, where a person becomes bail for another, he is entitled to recover from his principal all the expenses he has been put to by reason of it; and the principal having absconded, it was held, that the bail might recover the expenses of sending after his principal, to take him, in order to render him; but not the expenses of a suit commenced against him (the bail) by the person he sent after the principal, for a compensation for his services, which suit he had improperly defended: and in that case Lord Ellenborough said, "The relation of principal and bail is this—The principal engages to indemnify the bail from all expenses fairly arising from his situation as bail. I think the indemnity goes against all charges which are necessary to secure themselves. The bail have a right to surrender their principal in their own discharge, and for their own security. If, therefore, the principal absconds, so that he cannot be had, the bail may take every proper and necessary step to secure him."

In the case of *Reason v. Widdam*, 1 C. & P. 434, it was held, that a person cannot maintain an action for his trouble and loss of time, in going to a place to become bail for another.

(b) That case is reported *ante*, p. 106.

costs. However, I will give Mr. *Pollock* leave to move to increase the amount of the verdict, from 516*l.* to 574*l.* (a); which would give the plaintiff these two sums to set against the costs, if the Court should think he has a right to do so.

Verdict for the plaintiff.—Damages 516*l.*

F. Pollock, and *C. Cresswell*, for the plaintiff.

Busby, for the defendant.

[Attornies—*Godman*, and *Hughes*.]

(a) No motion was made.

*CROCKER v. MOLYNEUX. Dec. 6.

[*470]

A servant being engaged for a year at thirty guineas and a suit of clothes, was provided with a livery suit on his entering the service. He was wrongfully turned away within the year: Held, that he could not maintain trover for the clothes, that not being the proper form of action.

TROVER, for a suit of clothes. Plea—General issue. It appeared that the plaintiff was hired as a servant, by the defendant, on the 16th June, 1827, at thirty guineas a year, and a suit of clothes; and that he had, on entering the service, been provided by the defendant with the clothes in question, which were a sort of livery suit, which the plaintiff wore when his mistress drove out. It was also proved, that the defendant dismissed the plaintiff, without any sufficient cause, before the year had expired.

Campbell, for the defendant. The plaintiff must be nonsuited. To support an action of trover, the plaintiff must have a property in the clothes. Now these clothes were not to become his property, till he had served the year.

J. Williams, contra. I submit, that as he was hired for a year upon the terms of having wages and clothes, he is entitled to the clothes if he was willing to have stayed his year; but he was prevented from doing so, by the wrongful act of the defendant.

LORD TENTERDEN, C. J. This action is founded in property. If the plaintiff was dismissed without reasonable cause, whereby he was prevented from becoming entitled to this suit of clothes, he has his action for that; but he cannot maintain an action of trover, because he has no property in the clothes till he has served a year.

Nonsuit.

J. Williams, and ———, for the plaintiff.

Campbell, for the defendant.

[Attornies—*Sparkes*, and *Knight*.]

For this report we are indebted to the kindness of a friend at the bar.
See the case of *Archard v. Horner*, *ante*, p. 349.

*GREEN v. BOTHEROYD. Dec. 6.

The stat. 25 Geo. 2, c. 36, relating to places for public dancing, music, &c., extends to licensed taverns and hotels: and it is no defence, that the company frequenting the performances were respectable, or that the admission money was not received for the benefit of the keeper of the house.

The 13th sect. of that stat. which gives a form of declaration, extends to common informers.

DEBT for penalties under the stat. 25 Geo. 2, c. 36, for keeping a house for the public performance of music, without a license (a). Plea—General issue.

On the part of the plaintiff it was proved, that the defendant kept a tavern called the King's Arms, in Beech Street, Barbican, and that on Tuesdays and *472] Fridays there were concerts, to which the price of admission was *two-pence. Evidence was also given that there had been a search at the clerk of the peace's office, and that no entry of any license could be found there.

Brougham, for the defendant. I submit that the houses contemplated by this act of Parliament, were not such as the defendant's. This act was never intended to prevent a concert in a licensed tavern or hotel, because, by this act, there is a power given to seize all persons who are found therein; indeed, the defendant's house is not a house kept for music or dancing. I also have to submit that the 13th sect. of this act does not apply to common informers. It cannot be said, that there is no other class of persons that this section can apply to, as the 5th sect. relates to parish officers, who are called upon to prosecute houses of ill fame.

Lord TENTERDEN, C. J. I am quite against you upon both points; but if you can make any thing of them you may mention them hereafter (b).

Witnesses were called to show that the two-pences received for admission to these concerts, were paid over to the performers, and that the defendant therefore did not receive any benefit from the money taken for admission; and evidence was also given to show that those who frequented the house were respectable persons, and that they behaved in a peaceable and orderly manner.

Lord TENTERDEN, C. J. The witnesses in this case have proved that the defendant has kept a room for a public entertainment of music, to which persons were admitted at two-pence a head. Now it is quite immaterial, whether he received this for his own benefit or for others. With regard to the respectability *473] of the company, that can *make no difference; for if they had been the members of the two houses of Parliament, with their wives and daughters, the law would equally apply.

Verdict for the plaintiff for one penalty of 100*l.* (c).

(a) The declaration was framed under s. 13 of that stat. (which was made perpetual by the stat. 28 Geo. 2, c. 19). It was in the following form: "London, to wit—J. G., the plaintiff in this suit, complains of R. B., the defendant in this suit, being in custody of the Marshal of the Marshalsea of our lord the now King before the King himself, of a plea that he render to him the sum of 3,600*l.*, of lawful money of Great Britain, which he owes to and unjustly detains from him. For that whereas the said defendant, on the — day of —, in the year —, and within the space of six calendar months before the commencement of this suit, at London, to wit, in the parish of St. Mary-le-Bow, in the ward of Cheap, was indebted to the said plaintiff in divers, to wit, thirty sums of 100*l.* each, amounting in the whole, to wit, to the sum of 3000*l.*, being forfeited by an act, intituled, 'An act for the better preventing thefts and robberies, and for regulating places of public entertainment, and punishing persons keeping disorderly houses,' whereby, and by force of the statute in that case made and provided, an action hath accrued to the said plaintiff, to demand and have of and from the said defendant, the said sum of 3000*l.*, parcel of the said sum above demanded. And whereas also, &c." [There were five other counts exactly in the same form, each for 100*l.* "other parcel of the said sum above demanded:" and the last count only varied in stating it to be, "residue" instead of "parcel" of the sum. Each of these six counts stated the offence to be on a different day.] The declaration then concluded, "yet the said defendant, though often requested so to do, hath not, as yet, paid to the said plaintiff the said sum of 3,600*l.* above demanded, or any part thereof, but he so to do hath hitherto wholly neglected and refused: and therefore the said plaintiff brings his suit, &c. pledges," &c.

(b) No motion was made.

(c) By the stat. 25 Geo. 2, c. 36, s. 2 (made perpetual by the stat. 28 Geo. 2, c. 19), it is enacted that any house, room, garden, or other place, kept for public dancing, music, or other

Sir J. Scarlett, and Chitty, for the plaintiff.
Brougham, and Patteson, for the defendant.

[Attornies—Whitely, and Thomas.]

public entertainment of the like kind, in London or Westminster, or within twenty miles thereof, without a licence for that purpose, shall be deemed a disorderly house or place, and the person keeping the same shall forfeit 100*l.* to such person as will sue for the same. By sect. 13, a short form of declaration is directed; and by sect. 14, actions must be commenced within six calendar months after the offence committed.

In the case of *Archer v. Willingrice*, 4 Esp. 186, Lord Ellenborough held, that, to make a party liable to a penalty under this act, it is not essential that he should take money for admission; and that it was sufficient to show that dancing was publicly carried on in a house belonging to the defendant, without its being duly licensed. His Lordship also said, that the asking of money for admission would be evidence of ownership. His Lordship confirmed the case of *Bellis v. Burghall*, 2 Esp. 722. In that case, a room, kept by a dancing master, where persons met for the purpose of dancing, but to which no persons were admitted but subscribers, or persons introduced by them or by the defendant as their and his friends, and to which persons were not indiscriminately admitted, was held not to be within this act.

*ADJOURNED SITTINGS AT WESTMINSTER, AFTER MICHAELMAS TERM, 1828. [474]

BEFORE LORD TENTERDEN, C. J.

COOPER v. WAKLEY. Dec. 12.

If, in an action for a libel, the defendant plead justifications, without pleading the general issue, and the affirmative of the issue be on the defendant, he is entitled to begin, and the plaintiff has not, in such case, a right to begin, with a view of proving the amount of his damages. If a defendant, in an action for libel, imputing want of skill to a surgeon, plead that the plaintiff did want skill, and that he performed an operation in an unsurgeonlike manner, occupying unnecessary time, and causing unnecessary pain, these are all affirmatives on the part of the defendant.

LIBEL.—The declaration stated, that the plaintiff, long before, &c., “had been, was, and still is a surgeon, and had used, exercised, and carried on the profession and business of a surgeon with great credit and reputation, to wit, in the county aforesaid;” that he had been and was surgeon of a certain hospital called Guy’s Hospital, and nephew of Sir Astley Cooper, Bart.; and that the defendant composed, wrote, and published a certain libel. Different parts of this libel were set forth in the first four counts of the declaration. It professed to describe an operation of lithotomy performed by Mr. Cooper, calling it a tragedy; and, from the circumstances it professed to state, it imputed to him a want of skill. The fifth count of the declaration stated a distinct libel, which professed to be a reply to certain statements that had appeared in the newspapers; this libel stated, *inter alia*, that the operation occupied fifty-five minutes, “the average maximum of time in which this operation is performed by skillful surgeons being about six minutes.” This libel also imputed that Mr. Cooper had been indebted for his elevation to a corrupt system; and that, whatever might be his private virtues, he would never have been placed in a situation of such deep responsibility, had he not been the nephew of Sir Astley Cooper. By means, &c. the plaintiff “has been and is greatly prejudiced,” &c.

The first plea (a) (which was to the first four counts of the declaration), stated,

(a) There was no plea of the general issue.

*475] that the plaintiff did perform the operation of lithotomy on one S. P.; and this plea then went on to re-assert all the statements of the libel in the very words of the libel, *mutatis mutandis*.

The second plea (which was to the fifth count of the declaration only), stated that the plaintiff ought not to have or maintain his aforesaid action, "because he says, that before," &c., to wit, on, &c., at, &c., the said plaintiff being such surgeon as aforesaid, had performed the said operation of lithotomy, and "did not extract the stone until the end of fifty-five minutes, the average maximum of time in which such operation is performed by skillful surgeons being about six minutes; and that the said operation was a melancholy exhibition, and was performed by the said plaintiff without proper and sufficient skill, dexterity, and self-possession; and that the said plaintiff did not perform the said operation with that degree of skill which the public has a right to expect from a surgeon of Guy's Hospital. That the said case did not present such difficulties, as no degree of skill could have surmounted in less time or with less disastrous consequences; and that the said patient lost his life, not because his case was really one of extraordinary difficulty, but because the said plaintiff performed the said operation upon him as aforesaid." This plea went on to aver, that the plaintiff owed his elevation to a corrupt system, &c. (in the words of the latter part of the libel stated in the fifth count).

The third plea stated, that, "as to the publishing of so much of the said supposed libellous matters in the said declaration mentioned, as impute to the said plaintiff unskillfulness as a surgeon in the performance of the said supposed operation therein mentioned;" the said defendant says, that the said plaintiff ought not to have or maintain, &c. because he says, that before, &c., to wit, on, &c., at, &c., "the said plaintiff performed the said operation of lithotomy in the said second plea mentioned, and therein occupied a long space of time, to wit, the space of fifty minutes, being a much longer time than was necessary or proper, or than a skillful surgeon would have occupied in that behalf; and that the said *476] plaintiff then and there performed the said operation in an unskillful and unsurgeonlike manner; and did then and there by such unskillfulness cause the said patient a much greater degree of pain and suffering than he would otherwise, and but for that cause, have incurred; and that it was and is doubtful and questionable whether or not the death of the said patient was caused by such unskillfulness aforesaid; and whether, if due and proper skill had been used in the said operation, the life of the said patient would not have been saved; wherefore the said defendant afterwards, to wit, &c. published," &c.

The fourth plea was, that as to the publishing of so much of the said libellous matters in the introductory part of the said last plea mentioned, as impute to the said plaintiff unskillfulness as a surgeon in the performance of the said supposed operation therein mentioned, the said defendant "by leave, &c., says, that the said plaintiff ought not to have or maintain, &c.; because he says, that before, &c. the said plaintiff performed the said operation of lithotomy in the said second plea mentioned, and therein occupied a long space of time, to wit, the space of fifty minutes, being a much longer time than was necessary or proper, or than a skillful surgeon would have occupied in that behalf; and that the said plaintiff then and there performed the said operation in an unskillful and unsurgeonlike manner, and did then and there by such unskillfulness cause the said patient a much greater degree of pain and suffering than he would otherwise, and but for that cause, have incurred, wherefore," &c.

The fifth and sixth pleas went to justify those parts of the libels which stated that Mr. Cooper was indebted for his elevation to the influence of a corrupt system, &c.;—and the seventh plea stated, that Guy's Hospital was a public hospital, and that the plaintiff, being the editor of a periodical and critical work called the *Lancet*, published the alleged libels, they being true and correct reports of what had occurred.

Replication, *de injuria*.

**R. Scarlett*, for the plaintiff, having opened the pleadings—

Sir *J. Scarlett*, as the plaintiff's leading counsel, contended, that the plaintiff had the right to begin, the affirmative of the issue being upon his client; and he argued, that, as the issue was, whether the plaintiff had performed an operation in an unskilful and unsurgeonlike manner, and had occupied too much time, it was incumbent upon the plaintiff to give evidence of his skill.

Lord TENTERDEN, C. J. That he occupied too long a time is an affirmative.

Sir *J. Scarlett*. Besides this, I submit, that as the damages are unliquidated, that gives the plaintiff a right to begin, to show the extent of the injury he has received.

Lord TENTERDEN, C. J. Till the issue is tried that question does not arise.

The defendant, in person, relied on the cases of *Hodges v. Holder* (a), *Jackson v. Hesketh* (b), and *Bedell v. Russell* (c).

*Sir *J. Scarlett*. On the question of skill or no skill, the proof of the affirmative is proof of the skill. The plaintiff here complains of the defendant's charging him with want of skill; and the defendant, by his pleas, has put the plaintiff's skill in issue. Now, as the defendant has denied the skill of the plaintiff, it lies upon the plaintiff to prove it; and the last case cited shows that Lord Chief Justice *Best* thought that the plaintiff should have begun, and would have so held, except that he felt himself bound by the previous authorities.

Lord TENTERDEN, C. J. (addressing the defendant.) You see that Sir *James Scarlett* contends, that certain parts of your pleas call upon him to prove an affirmative. It therefore becomes material to consider what these several pleas are. In the second plea, you allege that the operation was performed by the plaintiff without proper and sufficient skill, and that the operation did not present such difficulties as no degree of skill could have surmounted; but because the operation was performed as aforesaid, you justify the publication. The third plea is, that the plaintiff, in performing the operation, occupied a longer time than was necessary, and performed it in an unsurgeonlike manner, causing greater pain to the patient than was necessary;—and the fourth plea is, that the operation occupied a longer time than was necessary, and was performed in an unskilful manner. These being the allegations of the pleas, Sir *James Scarlett* contends, that he should begin by proving the plaintiff's skill. Now, upon that, do you wish to make any further observation?

The defendant. I charge the plaintiff with unskilfulness, and come here prepared to prove it.

Lord TENTERDEN, C. J. As the decision in this case will probably be

(a) 3 Camp. 366. That was an action of trespass *quare clausum fregit*, and the defendant had pleaded, that, as to coming with force and arms, and whatever else was against the peace, he was not guilty; and as to the residue, a right of way, which was denied by the replication. *Bayley, J.*, held, that the defendant should begin, as not guilty as to the force and arms was not a general issue, and did not throw any necessity of proof upon the plaintiff.

(b) 2 Stark. 518. In this case the pleadings were exactly similar to those in the case of *Hodges v. Holder*. *Bayley, J.*, after conferring with *Wood, B.*, held the defendant entitled to begin, observing, that the denial of what was against the peace was put in merely to save a fine to the king; and *Bayley, J.*, also said: "The party who has to prove the affirmative of the issue ought to begin; and where there are several issues, and the proof of one of them lies upon the plaintiff, he is entitled to begin. The question of damages never arises till the issue has been tried."

(c) R. & M. 293. This was an action for assaulting, beating, and shooting at the plaintiff. Pleas (without the general issue), that the plaintiff was a mariner on board a ship, of which the defendant was commander, and that the plaintiff was engaged in a mutiny, to suppress which the defendant committed the trespasses. Replication *de injuria*. *Vaughan, Serjt.*, for the plaintiff, contended, that he had a right to begin, to show the amount of damages; and he argued, that the previous cases had been mere questions of right; this, on the contrary, was one where the damages were the essence of the inquiry. *Best, C. J.*, observed, that, but for the authorities, he should have thought that the onus of proving damages gave the plaintiff a right to begin; but his Lordship said, that it being of the utmost consequence that the practice should be uniform, he should consider himself bound by the cases; and he directed the defendant's counsel to begin.

quoted as a precedent, I shall avail myself of the assistance of the other learned Judges (a).

His Lordship then went out of Court to confer with *Bayley*, *Littledale*, and *J. Parke*, *Js.*, and on his return said: "I am of opinion that the defendant has a right to begin. The general rule is, that that party on whom the affirmative lies has to begin; and in one, at least, of the cases cited, the plaintiff was seeking to recover unliquidated damages. I mean the case of *Bedell v. Russell*. It has been said, that here the affirmative is upon the plaintiff:—however, upon reading these pleas, I find nothing of that kind. The plaintiff must, in the first instance, be taken to exercise his profession with skill, as no one is presumed to have misconducted himself; and, if the defendant asserts that the plaintiff wanted skill, and occupied unnecessary time in the performance of an operation, it lies upon him to prove it; and so, if the defendant says, that an operation was unskillfully performed, and caused more pain than was necessary, it lies upon him to prove that also. It is incumbent upon the defendant to make out the truth of all these assertions; and till that is done, the plaintiff is not called upon to go into any evidence. I ought also to add, that my learned brothers concur with me in this opinion."

*480] *The defendant then stated his case to the Jury, and called his witnesses. After that the plaintiff's counsel addressed the Jury, and called witnesses; and the defendant replied.

Lord TENTERDEN, C. J., left it to the Jury to say, whether the allegations of the pleas had been made out to their satisfaction.

Verdict for the plaintiff.—Damages 100*l*.

Sir *J. Scarlett*, *F. Pollock*, and *R. Scarlett*, for the plaintiff.

The defendant, in person.

[Attornies—*Paterson & Peile*, and *Fairthorn & Lofty*.]

(a) Their Lordships were sitting in the Bail Court, under the King's warrant.

As it is now decided, that if a defendant pleads affirmative justifications without the general issue, he has a right to begin; there is little doubt that plaintiffs will exercise their ingenuity to make the defendants put the general issue on the record. Now, one way in which this can be effected is, by adding another count to the declaration, charging the defendant with some supposed cause of action which can be joined with the real one, but which has no foundation in fact, *e. g.* in trespass *quare clausum fregit*, to add a count for an assault. Now, as this supposed assault never happened, the defendant must plead the general issue to this count, and so put the affirmative of one of the issues upon the plaintiff; however, if it appeared at the trial that this was a mere trick to get the reply, it is by no means clear that the Judge would allow it to prevail; and whether it did prevail or not, the plaintiff would do well to consider whether the attempting a trick of that sort would not do him more harm with the Jury than the reply itself would do him good.

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*VINCENT *v.* COLE. Dec. 18.

A. had built a house for B. under a written contract, not admissible in evidence for want of a stamp. A. sued B. for the value of certain works about the house, alleging them to be extras, and not included in the contract: Held, that the Court could not look at the unstamped contract to ascertain whether those works were included in it or not, and that the plaintiff must be nonsuited.

Work and labour. Plea—General issue. The plaintiff, a builder, sought to recover a sum of 91*l*. for extra work. It was opened, that the defendant had employed the plaintiff to rebuild a house, No. 23, Greek Street, Soho, under a contract, at the price of 525*l*., and that the plaintiff, besides doing this (for which the sum of 525*l*. had been paid), had pulled down a shed, and made certain excavations, which were charged as extra work, these things not being

included in the contract; and it was also alleged, that the plaintiff was entitled to recover one half of the expense of a party wall as extra work, as only one moiety of the expense of it was included in the contract.

The surveyor, who proved that the work had been done, stated, that a written agreement had been drawn up and signed by the parties.

This agreement was produced, but it was not stamped.

Sir J. Scarlett, for the defendant. Whether certain works were within the terms of a written agreement or not, can only be proved by the agreement itself; and if such agreement is not stamped, it cannot be read, and the plaintiff must be called.

Gurney, for the plaintiff. We do not sue on the written agreement. This work was not done under it. The agreement, therefore, forms no part of our case. However, I submit, on the authority of the case of *Rex v. Pendleton* (a), that the Court may look at this unstamped agreement, to see that the work for which we seek to recover is not included in it.

Sir J. Scarlett. The objection I take was not made at the sessions in the case of *Rex v. Pendleton*, and that is so stated by Mr. Justice Le Blanc (b).

*Lord TENTERDEN, C. J. Unless I look at the agreement, how can I tell whether the taking down of the shed and the excavations are not within the terms of it; and without that, how can I say, that the plaintiff was not to build the entire party wall?

Sir J. Scarlett. If this objection does not prevail, very great uncertainty will be introduced in the practice of proving written instruments.

Lord TENTERDEN, C. J. I think the safest course will be, to exclude this evidence. With respect to the necessity of proving written instruments by the production of the instruments themselves, I know that I hold more strictly than some other Judges. I think that I ought to nonsuit the plaintiff.

Nonsuit.

Gurney, and Archbold, for the plaintiff.

Sir J. Scarlett, and John Evans, for the defendant.

[Attornies—Selby & B., and Elkins.]

In the ensuing Term, Gurney moved to set aside the nonsuit, but the Court refused a rule.

(a) 15 East, 449.

(b) Id. 451.

In the case of *Rex v. Holy Trinity, in Kingston on Hull*, 7 B. & C. 611, it was held, that, although there might be a written instrument defining the terms of a tenancy, yet the fact of the tenancy might be proved by parol; and Mr. Justice Littledale observed, that payment of rent was evidence of a tenancy, and might be proved without any written instrument. However, in the case of *Strother v. Barr*, 5 Bing. 136, which was an action for an injury done to the plaintiff's reversion, the question was, whether parol evidence, that the occupier was tenant of the plaintiff, was sufficient proof that the reversion was in the plaintiff, it being proved that the occupier held under a written agreement. But upon this point the Court was divided in opinion.

The cases in which an unstamped instrument is evidence for collateral purposes, will be found collected in 1 Phill. Law. of Ev. p. 518, and 2 Saund. Pl. & Ev. 828.

*THOMPSON v. LEWIS. Dec. 19.

[483]

If in an action for an apothecary's bill, it appear that the plaintiff, on and prior to the 1st of August, 1815, was a curer of certain local complaints, but did not keep any shop or make up the prescriptions of physicians, he will not be entitled to recover the amount of his bill.

ASSUMPSIT by the plaintiff, as an apothecary, to recover for certain draughts supplied to the defendant, and also for dressings to be applied to a wound in the defendant's arm.

To prove that the plaintiff was in practice as an apothecary, on or before the 1st day of August, 1815, witnesses were called, who stated, that they had known the plaintiff attend people from a period antecedent to that date, and down to the present time, but on their being asked whether the plaintiff was a quack who attended people for particular disorders, no cure no pay, the witnesses said they did not know. There was no evidence of the plaintiff's keeping a shop till long after the year 1815, or of his having any shop-boy to carry out medicine, or of his ever having made up the prescription of any physician, though one of the witnesses said that he considered the plaintiff to be capable of making up a prescription.

The defence was:—*First*, that the plaintiff was a person who undertook to cure particular disorders, no cure no pay, and that, therefore, he had not practised as an apothecary on or before the 1st day of August, 1815; and *second*, that he had agreed not to charge the plaintiff anything unless he effected a cure, which he had not done; and to prove this second defence, evidence was adduced on the part of the defendant.

Lord TENTERDEN, C. J. (in summing up.) To support this action, it must be proved that the plaintiff practised as an apothecary on or before the 1st day of August, 1815. It is contended, on the part of the defendant, that the plaintiff was not an apothecary, but merely a person who went about to cure certain local complaints, no cure no pay; now, if that be so, I think that that is not a sufficient practising as an apothecary to satisfy this act. *The merely
*484] going about curing these particular local complaints not being, in my judgment, a practising as an apothecary. The duty of an apothecary is to prepare the medicine directed by the prescriptions of physicians; and, in the fifth section of the stat. 55 Geo. 3, c. 194, it is recited, that, "it is the duty of every person using or exercising the art and mystery of an apothecary, to prepare with exactness, and to dispense such medicines as may be directed for the sick by any physician lawfully licensed." In the present case, there is no evidence that the plaintiff ever made up a single prescription: indeed it does not appear that the plaintiff kept any shop till very lately. You will therefore say, whether the plaintiff was a mere curer of local complaints, or whether he was in the habit of making up the prescriptions of physicians. If the evidence convinces you of the latter, there is no doubt of the plaintiff's having practised as an apothecary; and it will then become material to consider the second point, whether, in this instance, he was to be paid only in the event of effecting a cure. Now, on this point, one of the witnesses has proved that the plaintiff agreed "to take nothing if he did not effect a cure," which cure it appears he has not effected. If you believe that witness, the defendant will, on that ground, clearly be entitled to your verdict.

Verdict for the defendant.

Reader, and Platt, for the plaintiff.

Sir J. Scarlett, for the defendant.

[Attornies—*Wade, and Tanner.*]

By the stat. 55 Geo. 3, c. 194, s. 21, "No apothecary shall be allowed to recover any charges claimed by him in any Court of law, unless such apothecary shall prove on the trial that he was in practice as an apothecary prior to or on the 1st day of August, 1815, or that he has obtained a certificate to practise as an apothecary from the master, wardens, and society of apothecaries." *485] In the *case of The Apothecaries' Co. v. Warburton*, 3 B. & A. 40, it was held, that the mere administering of medicine is not enough to justify the conclusion that the party practised as an apothecary; and if evidence is given that the party could not read prescriptions, and did not know the weights and measures used by apothecaries, it is cogent evidence from which a Jury may presume that he did not practise as an apothecary. In the case of *Brown v. Robinson*, ante, Vol. 1, p. 264, it was held, that administering medicines while in the service of another person as an apothecary's assistant, is not a practising as an apothecary, though the

person as administering the medicines is himself paid for them. And in the case of *Alison v. Haydon*, ante, p. 246, it was decided, that admission as a member of the Royal College of Surgeons does not entitle a party to charge for medicines administered by him while attending a patient suffering under typhus fever; but it was there held, that he may charge for medicine administered in a surgical case, where the medicine is subservient and subordinate to the discharge of his duty as a surgeon. In the case of *Steed v. Henley*, ante, Vol. 1, p. 574, it was held, that if a party, who furnishes medicines, cannot recover the price of them under the stat. 55 Geo. 3, c. 194, he cannot recover even for the phials in which such medicines were contained.

As to proof of certificates of examination, see the cases of *Walmisley v. Abbot*, ante, Vol. 1, pp. 309 & 496, and *Chadwick v. Bunning*, ante, Vol. 2, p. 306.

WEBB v. HILL and another. Dec. 19.

In a declaration for a malicious arrest, the termination of the former suit was alleged thus: "That the defendants did not prosecute their suit, but therein wholly failed and made default, and thereupon it was considered that they should take nothing by their bill, and that their pledges should be in mercy, and the plaintiff go thereof without day, *prout patet per recordum*: Held, that this allegation was not proved by the production of a rule to discontinue on payment of costs, and the proof of the payment of such costs.— Held, also, that the Court cannot reject the allegation of the judgment of *nonpross*, as, without that, it would not be shown how the suit was terminated.— Held, also, that this was not a variance amendable under the stat. 9 Geo. 4, c. 15.

CASE, for a malicious arrest.—The declaration stated, that the defendants maliciously, and without probable cause, sued out a bill of Middlesex, marked for bail for the sum of 15*l.*, upon which the plaintiff was arrested and imprisoned; and the termination of the former suit was averred in the following manner:—"And the said plaintiff in fact saith, that the said defendants did not prosecute their said suit against the said plaintiff, but therein wholly failed and made default, and thereupon afterwards, to wit, in *Michaelmas Term in the [486] first year of the reign, &c., it was considered by the said Court of our said lord the King, before the King himself, that the said defendants should take nothing by the said bill or writ, but that their pledges to prosecute should be in mercy, and that the said plaintiff should go thereof without day, as by the record and proceedings thereof, still remaining in the said Court of our said lord the King himself, at Westminster aforesaid, more fully and at large appears; and the said suit was and is thereby ended and determined, to wit, at Westminster aforesaid, in the county aforesaid." Plea—General issue.

To prove the allegation as to the determination of the suit in which the present plaintiff was arrested, a rule of Court was put in. This rule was of the morrow of St. Martin, 1 Geo. 4; and it was thereby ordered, that the action should be discontinued on payment of costs. The costs had been taxed and paid, but no judgment had ever been entered of record.

Lord TENTERDEN, C. J. It appears to me that this rule does not show that there was a judgment of the Court, as stated upon the record.

Denman, C. S., and *Carrington*, for the plaintiff, cited the case of *Bristow v. Haywood* (a).

Lord TENTERDEN, C. J. The form of the declaration in *Bristow v. Haywood*, does not appear by the report. I should have held, that this rule was *prima facie* evidence of the suit being at an end, if the declaration had been so framed as to meet the case.

(a) 4 Camp. 214. In that case, it was held, that putting in a rule to discontinue the former suit, on payment of costs, and proving the costs taxed and paid, was *prima facie* evidence of the determination of that suit; but in the case of *Kirk v. French*, 1 Esp. 80, Lord Kenyon held, that putting in a judge's order to stay proceedings on payment of costs, and proof of the payment of those costs, was not.

**Carrington*. Perhaps your Lordship will think this a case in which leave should be given to amend the record, under the recent stat. 9 Geo. 4, c. 15.

Lord TENTERDEN, C. J. It does not appear to me that there is any thing to amend by. This can hardly be said to be an incorrect setting out of a written instrument.

Denman, C. S. I would submit that there is a sufficient allegation of the determination of the suit, without that part of the declaration which states the judgment of the Court.

Lord TENTERDEN, C. J. I should be very sorry to stop a case of this kind; and, as my learned Brothers are now sitting, I will take the opportunity of consulting them.

His Lordship then left the Court, to confer with *Bayley*, *Littledale*, and *J. Purke, Js.*, and on his return said, "I have consulted with my learned Brothers, and we are all of opinion, that the proof so entirely varies from the allegation, that I am obliged to nonsuit. In all actions for malicious prosecution, whether founded on a civil or criminal proceeding, you must not only show the prior proceeding ended, but must show how. It was contended on the part of the plaintiff, that I might reject the allegation, that there was a judgment, and take the residue of the count without it. That would only leave it, that the parties did not prosecute the suit, but would not show in what way it was determined. Now, a declaration drawn in that form would be demurrable; but as there can be no demurrer here, I must not permit the plaintiff to go on, rejecting such parts of his declaration as would make the rest insufficient on a demurrer. Again, take it that the declaration states that the defendants did not prosecute their suit, but made default—Would that do? I think not, because the term

*488] *default* has a legal meaning. If the *defendant makes a default, he has judgment against him, and if the plaintiff makes default, the judgment is, that he shall take nothing by his bill. Besides this, there is in the present case, not only a difference in form, but in substance. If the judgment be a mere judgment of *nonpros*, which is what is alleged here, the mere judgment is not enough to raise even a presumption of the want of probable cause, as a plaintiff may have that judgment against him, from a mistake or from the negligence of his attorney in not proceeding with sufficient despatch. In the case of *Sinclair v. Eldred* (a), it was held that a judgment of *nonpros* was no proof of a want of probable cause; but in the case of *Nicholson v. Coghill* (b), the Judges all take this distinction, that a judgment of *nonpros* does not show a want of probable cause, but that a discontinuance is to be considered as *prima facie* evidence of the want of probable cause; the latter is the plaintiff's own act, and the former but an omission. This, therefore, shows that there is in this case not only a variance in form, but in substance, and that the proof would vary according to the mode in which the original action had been determined. I have also asked my brother Judges respecting the point very properly submitted to me as to the amending of the record; and they are of opinion that this is not a case in which I can give leave to amend under the act of Parliament, as this is not the misstating of a written instrument, but the statement of a judgment of the Court, of which there is no proof. I am very sorry for it, but I am bound to call the plaintiff.

Nonsuit.

Denman, C. S., and *Carrington*, for the plaintiff.

Sir *J. Scarlett*, for the defendants.

[Attornies— ———, and *Burt, Adlington & Co.*]

(a) 4 Taunt. 7.

(b) 6 D. & R. 12.

*ADJOURNED SITTINGS IN LONDON, AFTER MICHAELMAS
TERM, 1828.

BEFORE LORD TENTERDEN, C. J.

BASHAM v. LUMLEY, Knight. Jan. 8.

Seemle, that the governor of a British colony has the ecclesiastical power of an ordinary, without that authority being expressly named in his commission.

If a governor of a colony has the authority of the ordinary, he has no power to commit a churchwarden who refuses to account, he ought to proceed upon a citation, and must excommunicate.

TRESPASS.—The *first* count of the declaration was for false imprisonment, and the *second*, for an assault. Pleas. *First*—General issue. The pleas, from the *second* to the *seventh*, stated, in substance, that the Bermuda Islands were one of his Majesty's colonies, and that the laws of England, in force in England in the year 1612, were in force in those islands, so far as the same were applicable; that the defendant was governor and ordinary, having authority in all matters ecclesiastical there; that the plaintiff had served the office of churchwarden, and having refused to give up his accounts he was cited before the defendant, as ordinary; and that still refusing to deliver up his accounts, the defendant committed him, as he lawfully might. *Eighth* and *ninth*, that the defendant had committed the trespasses jointly with Alexander Needham, and that the plaintiff had recovered against him for the very same trespasses (a).

(a) As the form of pleading a prior recovery against a co-trespasser, and this species of replication to it, are not to be found in the printed collections, the following forms may be acceptable, more especially as the learned counsel, by whom these pleadings were respectively settled, have been since promoted to the bench.

Form of the Pleas.

Eighth plea.—And as to the said trespasses in the introductory part of the said second plea mentioned, by the said defendant above supposed to have been committed; the said defendant, by like leave of the Court, here says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says, that the making the said assault in the said first count mentioned, and the making the said assault in the said last count mentioned, are one and the same assaulting, and that the said seizing and laying hold of the said plaintiff in the said first count mentioned, and the said beating and ill treating the said plaintiff in the said last count mentioned, are one and the same seizing and laying hold of and beating and ill treating; and the said defendant further says, that the said several trespasses in the introductory part of the said second plea mentioned, were done and committed by the said defendant jointly with Alexander Needham. And that, after the committing the said several trespasses, in the introductory part of this plea mentioned and referred to, and before the commencement of this suit, to wit, on the — day of —, —, in his Majesty's Court of King's Bench, in the said Bermuda Islands, the said plaintiff impleaded the said Alexander in a certain plea of trespass, for the committing the very same identical trespasses in the introductory part of this plea mentioned and referred to, his said Majesty's Court of King's Bench in the said Bermuda Islands, then and there having lawful and competent authority, cognizance, and jurisdiction to hold plea of the said trespasses in the introductory part of this plea mentioned and referred to, and such proceedings were thereupon had in his Majesty's said Court of King's Bench in the said Bermuda Islands, in that plea, that afterwards, and before the commencement of this suit, to wit, on the — day of —, —, the said plaintiff, by the consideration and judgment of the said Court of King's Bench in the said Bermuda Islands, recovered in the said plea against the said Alexander 500*l.* for his damages, which he had sustained by reason of the said trespasses in the introductory part of this plea mentioned and referred to; and also of — for his costs and charges by him about his suit in that behalf expended: whereof the said Alexander was convicted.

[And that the said plaintiff, for obtaining execution of the said judgment afterwards, to wit, on the — day of —, —, sued and prosecuted out of his Majesty's said Court of King's Bench in the said Bermuda Islands, a certain writ of our said lord the King, of execution, directed to a certain officer in that behalf, by which said writ of execution the said officer was commanded to take the body of the said Alexander, and also the lands, goods, and chattels of the said Alexander, in execution upon the said judgment, for the said damages and costs *et*

*490] Replication to the pleas, from the *second* to the *seventh*, de **injuria*; to the *eighth* and *ninth*, that the plaintiff only recovered against Needham for part of the trespasses. *Rejoinder, that the plaintiff recovered for the very same trespasses.

*492] *It appeared, that the plaintiff and a person named Till had been churchwardens of the parish of St. George, in the Bermuda Islands, from Easter 1820 to Easter 1821, and that Sir William Lumley was the governor of that colony. It also appeared, that the plaintiff and the other churchwarden had, in the month of June, 1821, refused to deliver up their accounts and pay over their balances to their successors in office, alleging, that they had been allowed a period of sixty days for that purpose by the vestry of the parish; however, it was asserted that that vestry was illegally constituted. It also appeared, that, on the 17th of July, 1821, Sir William Lumley went to the vestry, and gave a summons to a constable, whereby he was ordered to summon the plaintiff and Till "to appear *forthwith*," before the defendant, who was there stated to be governor, commander-in-chief, and ordinary, to be dealt with according to law. It appeared, that the plaintiff refused to obey this summons, and that, by the direction of Sir William Lumley, the constable brought him by force; and that, on the plaintiff and Till both again refusing to deliver up their accounts, they were committed to prison by the defendant, under a warrant, by

recovered by the said plaintiff against the said Alexander as aforesaid; which said writ of execution, afterwards, and before the commencement of this suit, to wit, on the — day of —, —, was delivered to the said officer to be executed in due form of law, under and by virtue of which said writ of execution the said officer, to whom the said writ of execution was directed, afterwards, and before the commencement of this suit, to wit, on the — day of —, —, seized and took in execution divers goods and chattels of the said Alexander, and thereout levied a certain sum of money, to wit, the sum of 5*l.*, parcel of the damages and costs aforesaid, to wit, at London aforesaid, in the parish and ward aforesaid.]

And the said defendant avers, that the said trespasses in the introductory part of this plea mentioned and referred to, and the said trespasses for which the said plaintiff impleaded the said Alexander in his said Majesty's Court of King's Bench, in the said Bermuda Islands, are the very same trespasses, and were committed jointly by the said defendant and the said Alexander, to wit, at London aforesaid, in the parish and ward aforesaid. And this he the said defendant is ready to verify: wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

The *ninth* plea was *verbatim* the same, omitting that part between the brackets.

(Signed)

J. Littledale.

Form of Replication.

And the said plaintiff, as to the said pleas of the said defendant by him eighthly and ninthly above pleaded, saith, that he the said plaintiff, by reason of any thing in those pleas alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him, the said defendant; because he saith, that a part only of the said trespasses in the introductory part of the said eighth and ninth pleas referred to, were committed by the said Alexander Needham jointly with the said defendant. And that the said plaintiff impleaded the said Alexander Needham, and recovered the said judgment against him for such part only of those trespasses in the said Court of King's Bench in the said Bermuda Islands, without this, that the said trespasses, in the introductory part of the said eighth and ninth pleas mentioned and referred to, and the said trespasses for which the said plaintiff impleaded the said Alexander Needham, as in the said eighth and ninth pleas mentioned, were the very same trespasses in manner and form as the said defendant has in those pleas alleged. And this he the said plaintiff is ready to verify: wherefore he prays judgment, and his damages by him sustained, by reason of the committing of the said trespasses, to be adjudged to him, &c.

(Signed)

J. Parke.

Rejoinder, that the trespasses were the very same, concluding to the country.

N. B. The way in which only a part of the trespasses were committed by the defendant and Alexander Needham jointly, was this: Sir William Lumley ordered a constable to take the plaintiff into custody, and the constable having done so, the plaintiff was, by the order of Sir William Lumley, transferred into the custody of Needham, who was the gaoler; it therefore follows, that the plaintiff could not have recovered against Needham for any more than the latter part of the trespass. If the plaintiff had recovered against Needham for the whole of the same trespasses, that would have been a bar. "In actions in which the damages are uncertain, a recovery and execution against another for the same cause is a bar to another action for the same cause; as in trespass done by several, a recovery and execution against one is a bar in an action against the others for the same trespass." Com. Dig. tit. Action. (K. 4.)

"So a recovery is sufficient without execution; for, by the judgment, a matter before uncertain is reduced to a certainty." 1*b.*

which the keeper of the prison was directed to keep them without bail or main-prize till they should deliver up their accounts. It was proved, that under this warrant the plaintiff was kept in prison fourteen days, and then discharged.

Upon these facts it was contended, on the part of the plaintiff, that, admitting that the defendant had the ecclesiastical authority of ordinary, still he had no power to imprison, and that, as ordinary, he could only act according to the forms of the ecclesiastical law, and enforce his orders by excommunication.

**Tindal*, S. G., for the defendant. Even admitting that the defendant [493] was not acting within the letter of his authority, it will be most important for me to show that he honestly believed he had a right to do as he did. I take the authority of the governor to stand thus: If there be a certain island where there are no inhabitants, and where the possession is entirely vacant, and English subjects go and colonize there, they carry with them such of the then existing English laws as are applicable to their situation. Without some rule of that sort, there would be an entire disunion in the society of every new colony; and it therefore follows, that if no other law is declared for the particular colony, the law of the mother country prevails. With respect to the Bermuda Islands, they were colonized in the year 1612, and being between 200 and 300 leagues distant from the main land of America, they were at that time uninhabited by Indians. The settlers at that time must, therefore, have carried with them not only the English common law, but there must also be the ecclesiastical power of an Ordinary, for there are churches in the Bermuda Islands, and there is a rate for the repair of them; and it is quite clear that some one must have authority to preserve order in them. Now, these things being regulated only by the ecclesiastical law, it must be taken, that the settlers carried with them a certain portion of the ecclesiastical law; and I therefore contend, that the power of administering it resides in the governor, as the representative of his Majesty, who is the supreme head of the English church; and if the governor is ordinary, he has a right to compel the churchwardens to account. Indeed, independently of this necessity for some person to have the power of the ordinary, I shall show, that in one of the local acts of the legislature of this colony, the governor is called Ordinary, that in another, the fees of his secretary for citations are fixed; and I also shall show that he grants probates, administrations, and marriage licenses; and that, as far back as the year 1689, there were causes in which the grant of letters of *administration was [494] contested, which were decided by the governor.

It was proved that the governor granted probates, letters of administration, and marriage licenses; and it was also shown, that, from the year 1689 to 1705, several cases of disputed administration were determined by him.

To show that the governor had no power as ordinary, the plaintiff's counsel put in his commission as evidence in reply. By this Sir William Lumley was appointed governor, but there was no express grant of any ecclesiastical authority, except a power of collating to ecclesiastical benefices.

Lord TENTERDEN, C. J. How does he get his power in testamentary cases?

Sir J. Scarlett. By an act of the local legislature passed in the year 1787.

Lord TENTERDEN, C. J. But the governors acted before.

Sir J. Scarlett. Perhaps the commissions of former governors might give greater power.

The local act passed in the year 1787 was read. It was an act to regulate the governor's power to grant administration of the effects of intestates (a).

Tindal, S. G. I submit that the governor of a British colony is ordinary *virtute officii*, and it needs no more to be inserted in his commission than his power of administering the common law. With respect to the collation to benefices, as that is a part of the prerogative of the crown, it was considered necessary that that should be inserted in the commission.

(a) This local act was a copy almost verbatim from the stat. 22 & 23 Car. 2, c. 10.

*Sir *J. Scarlett*, in reply. I deny that the governor is *ipso facto* the ordinary in this colony; and if, in former times, he acted in testamentary causes, that proves nothing, because former governors might have had the power given them by the commissions under which they acted, or by the written instructions given to governors when they go out, which written instructions are always given in aid of the commission; and if any person is authorized to act by written instructions, he cannot go beyond such instructions.

LORD TENTERDEN, C. J. The only justification upon which any evidence has been offered in substance, amounts to this, that the defendant did the acts complained of in his character of ordinary of these islands, and that he therefore is justified. There has been some discussion at the bar, whether the defendant is ordinary or not. It does not appear to me to be necessary that I should give a decided opinion upon that point, but I should rather think that the governor of this colony is possessed of that authority. His commission gives him authority as governor; one act of the Legislature there regulates his jurisdiction in cases of intestacies, and another prescribes the fees to be taken in certain cases, which are applicable to the duty of the ordinary; these acts, therefore, evidently treat him as having the jurisdiction of ordinary, and unless he had some authority, all probates and all marriage licenses that he has ever granted are totally void; and though there is nothing in the commission that particularly relates to the power of ordinary, yet I think that his general authority as governor embraces it. However, I do not decide the point, and I think it better that I should abstain from doing so; but even supposing that this defendant had this authority, he must exercise it in a legal manner; and if he has not done so, his justification fails. Now, here, it appears that the defendant ordered the plaintiff to be brought before him; and because he refused *496] to deliver up the books, the defendant committed him to prison. These acts the law will not justify, because, although the defendant might be an ecclesiastical judge, still, to be justified in his acts, he must proceed by a regular citation, and even then an ecclesiastical judge cannot commit, he can only excommunicate. The plaintiff is therefore entitled to a verdict.

Verdict for plaintiff.—Damages 1000*l*.

Sir *J. Scarlett*, and *Alderson*, for the plaintiff.

Tindal, *S. G.*, *Gurney*, and *Justice*, for the defendant.

[Attornies—*Adlington & Co.*, and *Fownes & Co.*]

BAIN v. CASE. Jan. 9.

In *assumpsit*, on a policy of insurance, the Jury ought not to allow the plaintiff interest, unless evidence be given that he had applied to the underwriter, to settle the loss, soon after it happened, and notified to him the ground of such application.

Lloyd's list is evidence against the assured, if it be shown that the broker had read it, before the policy was effected. A ship stayed at a particular port, for a period of one hundred and nine days, and whether this was an unreasonable time, was held to be a question of fact for the Jury.

ASSUMPSIT on a policy of insurance on one-third of the brig *Nancy*, lost or not lost from the 22d day of January, at all or any ports and places in the Northern and Southern Pacific Ocean, Rio de Janeiro, Gibraltar, and Malta, all or any of them. The *first* count stated a loss by pirates, the *second* by a capture by persons unknown.

The loss was in fact by the vessel being seized by the patriot authorities at
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Pisco, previous to the time when the Chilian government was recognized by this country.

The first ground of defence was, that there was a concealment on the part of the assured; for that the Chilian government had declared the coast of Peru to be in a state of blockade, from 22 deg. 48 min., to 2 deg. 12 min. south, and that all vessels with false or double papers were to be considered as enemies' property. This had been notified in Lloyd's list on 26th December, 1820, and it was alleged that this vessel had double papers, which was a circumstance not communicated to the underwriters. Another ground of defence was, that the vessel had remained one hundred and nine days at the port of St. Blas, which was alleged to be an unreasonable time. However, *it [497 was stated by the captain, that he stayed in the hope of getting permission to land his cargo, as negotiations were pending with the government there, for permission for him to do so.

To make out the first ground of defence, the broker, through whom the policy was effected, was asked to produce Lloyd's list.

F. Pollock, for the plaintiff, objected that Lloyd's list was not evidence.

Lord TENTERDEN, C. J. I believe Lloyd's list has been admitted in evidence, as against the underwriters, but has it ever been given in evidence against the assured?

Sir J. Scarlett. The broker will prove that he knew of this declaration of blockade before the present policy was effected.

Lord TENTERDEN, C. J. That, I think, makes it evidence.

The broker stated, that he had read this announcement in Lloyd's list, before the effecting of the policy. The declaration of the blockade was read from Lloyd's list, but it could not be made out that the vessel had double papers.

Lord TENTERDEN, C. J. (in summing up.) It is said, that this policy was put an end to, by the vessel's staying at St. Blas for one hundred and nine days, because that was an unreasonable time. Whether it was an unreasonable time is a question of fact.

Verdict for the plaintiff.

The Jury wished to know whether they ought to give interest; the plaintiff's counsel having asked them to allow *interest to the plaintiff in the shape [498 of damages, on the ground that the loss had happened so long back as the year 1822.

Lord TENTERDEN, C. J. (To the Jury.) On the subject of interest, I intended to make some observations to you, after you had given your verdict. I think you cannot allow it in the present case. I am of opinion that the assured cannot recover interest (which it is in many cases very desirable that he should), unless he has made a distinct application to the insurer, to pay the amount of the loss, and has notified to him the ground of such his application.

F. Pollock, and *R. V. Richards*, for the plaintiff.

Sir J. Scarlett, *Campbell*, and *Chitty*, for the defendant.

[Attornies—*Davies & R.*, and *Blackstock & B.*]

REX v. MUNTON. Jan. 12.

To support an indictment for perjury committed on a trial at the Quarter Sessions, three witnesses who heard the party examined, stated what he swore on that trial; and the party was convicted, although neither of the witnesses took down the evidence as it was given, and neither of them professed to state the whole of the evidence that he gave. To show that the perjury was wilful and corrupt, evidence may be given of expressions of malice used by the party towards the person against whom he gave the false evidence.

PERJURY.—The indictment charged the defendant with having falsely sworn, on the trial of an indictment, at the London Sessions, that Mr. Michael Pearson had committed an assault upon him, and upon this the perjury was assigned. Plea—Not Guilty.

To prove what the defendant swore on the trial, at the London Sessions, Mr. Pearson, the prosecutor, Mr. Field, his attorney, and Mr. Fellowes, his partner, were called. They all heard the defendant examined, but neither of them had taken any notes of the evidence, as it was given. The prosecutor had, on the *499] evening of the day on which the trial at the Sessions took place, made a memorandum of what the defendant had sworn. Mr. Field had also made another memorandum of it, either on the same night, or the next morning, but this he had destroyed on seeing that the prosecutor's memorandum was more complete than his. Mr. Fellowes spoke from memory only. Neither of these witnesses professed to give the whole of what the defendant swore at the Sessions, and they stated that the giving of his evidence occupied an hour.

To show that it was false, several witnesses proved, that the prosecutor was at a distant part of the town at the time when the supposed assault was charged to have been committed.

To show that the defendant had wilfully and corruptly sworn to what was not true, three witnesses were called, who proved, that between the times of the alleged assault and the trial at the London Sessions, they heard the defendant use expressions of malice towards the prosecutor.

The defence was, that the defendant had sworn falsely by mistake.

LORD TENTERDEN, C. J., left it to the Jury to say, whether the defendant had wilfully and corruptly sworn to that which was false, or whether he had been mistaken.

Verdict—Guilty.

Sir J. Scarlett, Starkie, and Crompton, for the prosecution.

Tindal, S. G., Denman, C. S., and Patteson, for the defendant.

[Attornies—Sharp & Field, and Newman.]

*500] ***FURTHER ADJOURNED SITTINGS AT WESTMINSTER,**
AFTER MICHAELMAS TERM, 1828.

BEFORE LORD TENTERDEN, C. J.

PAUL, Bart., Assignee of RICH, Bart. v. DOWLING. Jan. 14.

The making of bricks for sale, from clay taken from a man's own land, does not constitute him a trader, within the meaning of the bankrupt laws; nor will it be a trading, if such person buy chalk for the purpose of burning with the clay, to improve the bricks, and afterwards sell a portion of the chalk, when converted into lime.

TROVER, for furniture. Plea—General issue. The whole question was, whether Sir Charles Henry Rich, Bart., was a trader within the meaning of the bankrupt laws, by reason of his having sold lime. It appeared that on the death of his father, in the month of September, 1824, Sir C. H. Rich came into the possession of a brick kiln, and that at that kiln bricks were made for sale from earth taken from Sir C. H. Rich's own land. It also appeared, that, where the

bricks were burnt, chalk was burnt with them, and it was distinctly proved, that it was the practice in the county of Berks, in which this kiln was situate, to put chalk with the bricks, with a view of improving their quality, although it appeared that bricks could be made without it. This chalk was purchased by Sir C. Rich; and it appeared that a great proportion of it, when burnt and converted into lime, was used by him in some extensive repairs at his mansion and farm buildings; however, it was shown, that about thirty bushels of it were sold by him, at 9*d.* per bushel, principally to his own tenants, who got it of him as matter of favour; but, it was proved, that in two or three instances, lime was sold to strangers, upon their mere application at the kiln.

Sir J. Scarlett, for the defendant. If a gentleman, having a landed estate, is doing repairs, and he buys chalk and burns it into lime, the greater part of which is used by himself, and the surplus sold; this I conceive to be *no trading, because it is merely incidental to the enjoyment of his estate, [*501 and because he does not seek his living by buying and selling. Again, if the owner of lands burn bricks from earth taken from his own estate, and buy chalk to burn with them, such chalk being necessary for the burning of the bricks, he will not become a trader, though he may sell any part of the lime that he does not want; for, if the occupier of lands purchase any commodity, for the purposes of his occupation, he may sell the surplus that he does not want for his own use, without becoming a trader within the meaning of the bankrupt laws; and with respect to making bricks from one's own land, for the purpose of sale, that is, by itself, clearly not a trading.

Lord TENTERDEN, C. J. If the owner of lands make bricks from his own earth, taken from his own land, and sell those bricks, he is not a trader within the meaning of the bankrupt laws; however, if a person buy chalk, and convert it into lime for the purpose of selling it and making a profit of it in that state, it is equally clear that he is a trader. With respect to the present case, I am of opinion, in point of law, that, though Sir C. H. Rich bought chalk, and burnt it into lime, and sold it, yet if he did that as a mode which was considered best for using his brick earth, that is not a trading; and that, if a person buy a commodity for the carrying on of another business, and afterwards sell some of it, that will not make him a trader in that commodity; and in this case, before you can say, that Sir C. H. Rich was a trader, you must be satisfied that he carried on the business of a burner of lime, with a view of making a profit of that business. And I think we must not inquire very nicely, whether it was necessary to use chalk in the burning of bricks; for I think that if it was only considered to be most expedient to use chalk in the burning of bricks, and that the lime was not in fact burnt for the purpose of making a distinct profit by it, that then it is no trading. A question has been raised, whether this *clay required to have [*502 chalk burnt with it, and perhaps, in strictness, it might be considered that chalk was unnecessary; however, I am of opinion, that if this chalk was really burnt for the sake of the bricks, you ought not to say that there was a trading. The question therefore is this, was this chalk bought for the more convenient making of the earth into bricks; or was it bought by Sir C. H. Rich, for the purpose of using it in a double trade of lime burning and brick making, which was carried on by him with a view of deriving a separate profit from each.

Verdict for the defendant; and the foreman of the Jury added:—"We find that there was no trading."

Gurney, Denman, C. S., and Manning, for the plaintiff.

Sir J. Scarlett, and *Smirke*, for the defendant.

[Attornies—*Yatman*, and *Sandys & Co.*]

LEWIS and another v. DAVIS. *Jun. 14.*

If the shearing of cloth from list to list by shears be known, and the shearing it from end to end by means of rotary cutters be also known, and a person construct a machine to shear from list to list by means of rotary cutters; this is a new invention, and will entitle the inventor to maintain a patent for it.

If A., in 1818, take out a patent for "improvements in a machine for which J. L. took out a patent in 1815," it is necessary for A., on the trial of an action for the infringement of his patent, to put in J. L.'s patent and specification; but it is not material whether a machine made according to the specification of J. L. would be useful or not, if it be shown that a machine constructed according to A.'s specification would be so.

CASE, for the infringement of a patent, for a machine for shearing woollen cloths. **Plea**—General issue.

The patent to the plaintiffs was dated 15th January, 1818, and it was for
 *503] "improvements of a machine for shearing and cropping woollen cloths, the same being improvements on a machine for which John Lewis had obtained a patent on the 27th of July, 1815." The plaintiffs' specification was put in; it was dated 14th July, 1818, and it stated: "We claim, as our invention,—*First*, the application of the flat spring for directing and pressing the cloth to the cutting edges;—*Second*, the application of the triangular steel wire on the cylinder;—*Third*, a proper substance to brush the cloth;—*Fourth*, to shear with rotary cutters from list to list, in the manner specified."

F. Pollock, for the defendant. As these are alleged to be improvements on a former machine, for which a patent was granted in the year 1815, the specification of that patent must be produced. How can the Jury say that these are improvements, without they know what the original machine was?

Rotch, for the plaintiffs. I submit, that that is unnecessary, because the plaintiffs' specification is perfect; any one who reads that may make the machine without looking to any earlier specification.

Lord TENTERDEN, C. J. When these parties applied to the Crown in the year 1818, they might have applied for a patent for their invention without reference to any thing that had gone before. Now, that they have not done; on the contrary, they profess to have improved a machine already known. That machine may be used by any one after fourteen years from the earlier patent, but any new matter which is included in the present patent is not open to every body till fourteen years from a later period. It is, therefore, material to show what are the improvements contained in the plaintiffs' patent. Now, I cannot
 *504] say what are improvements upon a given thing, without knowing what that thing was before; for aught I know, all the things mentioned in the plaintiffs' specification may have been included in the former specification.

The specification of the patent of 1815 was read. That was for a machine with rotary cutters, which were to shear the cloth from end to end.

It appeared, that the defendant's alleged infringement of the patent consisted in making a machine with rotary cutters, to shear from list to list, but that he had not used either the 1st, 2d, or 3d of the improvements stated in the plaintiffs' specification. It was also proved, that shearing from list to list, by machinery to carry shears, was known before the date of the plaintiffs' patent; and also that rotary cutters to shear the cloth from end to end were known before that time. It was proved, that the plaintiffs' improvements were all useful.

F. Pollock, for the defendant. The old mode of shearing was from list to list by machinery to carry shears in that way. The plaintiffs have combined a rotary cutter, which was a thing well known before, with three other things which the defendant has not infringed upon. Now I submit, that the rotary cutter being old, we had a right to use it in shearing from list to list, which was the old way of shearing by means of shears, though perhaps rotary cutters had only been used in shearing from end to end. The defendant has not infringed on any of the three things which the plaintiffs claim. The plaintiffs

have no right to claim the going from list to list as his invention, and we have only sheared in that way with a rotary cutter instead of shears, that species of cutter being old, and not of the plaintiffs' invention.

Lord TENTERDEN, C. J. It is not material whether a machine made under the patent of 1815 is useful or not, *as it is shown that the plaintiffs' machine is highly useful. The case stands thus: it appears that a [*505 rotary cutter to shear from end to end was known, and that cutting from list to list by means of shears was also known. However, if, before the plaintiffs' patent, the cutting from list to list, and the doing that by means of rotary cutters, were not combined, I am of opinion, that this is such an invention by the plaintiffs as will entitle them to maintain the present action.

Verdict for the plaintiffs.—Damages 1s.

Sir J. Scarlett, Brougham, Campbell, and Rotch, for the plaintiffs.

F. Pollock, Denman, C. S., and Plutt, for the defendant.

[Attornies—Adlington & Co., and T. White.]

In the ensuing Term, F. Pollock moved for a new trial on affidavits, but no question was made as to either of the points decided at the trial.

COTTON v. JAMES, Gent., one, &c. Jan. 18.

In trespass for taking goods, the defendant pleaded (without the general issue) a justification under the warrant of commissioners of bankrupt, and averred, that the plaintiff "had become bankrupt within the true intent and meaning of the stat. 6 Geo. 4, c. 16." Replication, denying that the plaintiff became bankrupt: Held, that on these pleadings the defendant had the right to begin.

If a plea contain distinct allegations of a trading and petitioning creditor's debt and then go on to state, that the plaintiff "became bankrupt," and in the replication the plaintiff protest the trading and petitioning creditor's debt, and deny that the plaintiff "became bankrupt," this merely puts in issue the act of bankruptcy, and the words "became bankrupt," coupled with the other two allegations, will be held to extend to the act of bankruptcy only.

TRESPASS.—The *first* count of the declaration was for breaking and entering the plaintiff's house, and taking his goods;—*Second* count, for taking and carrying away *the goods and converting them. Plea (a)—That before [*506 the time when, &c. the plaintiff was a trader, and became indebted to the defendant in a sum upwards of 100*l*., and that he "became a bankrupt within the true intent and meaning of the statute," then and still in force concerning bankrupts. That the defendant petitioned the Lord Chancellor, and that a commission issued, upon which the plaintiff was declared a bankrupt, whereupon the commissioners granted their warrant, directed to Charles Cutler their messenger, to seize, &c.; and that he did so seize, &c. The plea went on to state, that the trespasses were committed before the choice of an assignee, and that the defendant was the petitioning creditor. Replication, protesting the petitioning creditor's debt, the trading, the commission and adjudication, and the

(a) There was no plea of the general issue. It seems that, under sect. 44 of the bankrupt act, 6 Geo. 4, c. 16, a plea of the general issue would have been sufficient without any special plea; and that the defendant chose to plead specially, merely for the purpose of obtaining the reply.

warrant, and denying that the plaintiff "did become a bankrupt within the true intent and meaning of the said statute (a)."

(a) By sect. 27 of the bankrupt act, 6 Geo. 4, c. 16, the commissioners may grant a warrant to the messenger to break open any house, &c., where any property of the bankrupt shall be reputed to be, and to seize it; and by sect. 31, no action shall be brought against the messenger for any thing done under the commissioners' warrant, prior to the choice of assignees, unless perusal and a copy of the warrant have been demanded; and if such demand has been complied with, the petitioning creditor must be made defendant in any action brought for any thing done under the warrant. These sections of the bankrupt act are set out in Arch. Bank. Law, pp. xxxii, xxxiii.

As these forms of plea and replication are not to be found in any printed collection, copies of them will no doubt be acceptable: more especially as in the plea there is a statement of the trading, commission, &c., in the proper form under the new bankrupt act, which will be found useful in drawing a plea by a bankrupt who has obtained his certificate after action brought, as well as in cases like the present.

Plea.—And the said defendant, in his own proper person, comes and defends the force and injury when, &c., and says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says, that the said goods, chattels, and effects in the said first count of the said declaration mentioned, and the said goods, chattels, and effects in the said second count mentioned, are and were one and the same goods, chattels, and effects, and not other or different; and that the seizing and taking, &c. of the said goods, chattels, and effects in the said first count mentioned, and the seizing and taking, &c. in the said second count mentioned, are and were one and the same seizing and taking, and not other or different. And the said defendant further saith, that long before, and continually thence until, and at the time of the suing out of the commission of bankrupt hereinafter mentioned, and thence until the time of committing the said supposed trespasses in the said declaration mentioned, the said plaintiff was a builder and trader, within the true intent and meaning of the statute made, and then and still in force concerning bankrupts, to wit, at the parish aforesaid, in the county aforesaid, and during all the time aforesaid, there sought his livelihood thereby. And the said plaintiff so being a builder and trader as aforesaid, and so seeking his livelihood as aforesaid, afterwards, to wit, on the 8th day of January, in the year of our Lord 1828 aforesaid, at the parish aforesaid, in the county aforesaid, became and was indebted in the way of his said trade to the said defendant, a subject of this realm, in a certain sum upwards of 100*l.*, to wit, in the sum of 21*l.* 1*9s.* of lawful money of Great Britain, for a true and just debt due and owing from the said plaintiff to the said defendant. And the said plaintiff being so indebted, and being such builder, and so seeking his livelihood as aforesaid, and being a subject of this realm, he, the said plaintiff, afterwards and before the issuing of the commission hereinafter mentioned, to wit, on the 10th day of October, in the year aforesaid, at the parish aforesaid, in the county aforesaid, became a bankrupt within the true intent and meaning of the said statute made and in force concerning bankrupts. And the said defendant so being a creditor of the said plaintiff, and being wholly unsatisfied and unpaid his said debt, he, the said defendant, afterwards, to wit, on the 16th day of October, in the year aforesaid, at the parish aforesaid, in the county aforesaid, duly presented his certain petition in writing, according to the form and effect of the said statute, to the Right Honourable Lord Lyndhurst, then and now being Lord High Chancellor of Great Britain, praying him to grant unto the said defendant, his Majesty's commission of bankrupt, as by the said petition, reference being thereunto had, will more fully appear. And the said defendant avers, that he then and there, and before the commission was granted, duly made the affidavit, and gave bond to the said Lord Chancellor according to the directions of the said statute. Whereupon afterwards, to wit, on said 16th day of October, in the year aforesaid, to wit, at the parish aforesaid, in the county aforesaid, a certain commission of bankrupt, under and sealed with the Great Seal of Great Britain, bearing date at Westminster, the day and year last aforesaid, grounded upon the said statute and petition of the said defendant, was duly awarded and issued against the said plaintiff, directed to certain commissioners therein named, to wit, Archibald Elijah Impey, Montague Farrer Ainslie, William Villiers Surtees, Robert Grant, and Charles Bathurst, Esqrs., whereby the said lord the King named, assigned, appointed, constituted, and ordained them his special commissioners, and thereby gave full power and authority to them four, or three of them, to proceed according to the said statute, and to take such order and direction with the body of the said plaintiff, as also with all his lands, tenements, and hereditaments, both within this realm and abroad, as well copy or customary hold as freehold, which he had in his own right before he became bankrupt; as also, with all such interest in any such lands, tenements, and hereditaments as the said plaintiff might lawfully depart withal, and with all his money, fees, offices, annuities, goods, chattels, wares, merchandizes, and debts, wheresoever they might be found or known, and to make sale thereof, or otherwise order the same for satisfaction and payment of the creditors of the said plaintiff, and to do and execute all and every thing and things whatsoever towards and for all other intents and purposes, according to the ordinance and provision of the said statute, commanding them the said commissioners, four or three of them, to proceed to the execution and accomplishment of the said commission, according to the true intent and meaning of the same statute, with all diligence and effect, as by the said commission, duly entered of record in the proper office for that purpose, will more fully appear; which said commission is still in full force and effect. And the said defendant further saith, that the said commission being delivered to the said commissioners by virtue thereof, and by force of the said statute, the said Archibald Elijah Impey, William Villiers Surtees, and Charles Bathurst, three of the said commissioners in the said commission named, afterwards, to wit, on the 24th day of October, in the year aforesaid, the due proof being made in that behalf, adjudged and declared the said plaintiff to have been

*As soon as the pleadings had been opened, *F. Pollock*, for the defendant, claimed the right to begin, as the *affirmative was on the defendant. [*508 And he relied on the case of *Cooper v. Wakley*, ante, p. 474.

and to become a bankrupt before the issuing of the said commission, and at the time of the issuing thereof to be a bankrupt within the true intent and meaning of the statute made and then in force concerning bankrupts, to wit, at the parish aforesaid. And the said defendant further says, that, afterwards, to wit, on the said 24th day of October, in the year aforesaid, to wit, at the parish aforesaid, the said Archibald Elijah Impey, William Villiers Surtees, and Charles Bathurst, three of the said commissioners, under and by virtue of the said commission, and by force of the said statute, made their certain warrant in writing, under their respective hands and seals, directed to Charles Cutten, their messenger, and his assistant, and also to all mayors, bailiffs, constables, headboroughs, and all other his Majesty's loving subjects, whom they the said commissioners required to be aiding and assisting in the execution thereof, as occasion should require; and by which said warrant they the said commissioners required, authorized, and empowered them, and every one of them, forthwith to enter into and open the house and houses of the said plaintiff, and also into all other place and places belonging to him the said plaintiff, where any of his goods were or were suspected to be, and should there seize all the ready money, jewels, plate, household stuff, goods, merchandizes, books of account, and all other things whatsoever belonging to him the said plaintiff; and such things as he should so seize he should cause to be inventoried and appraised by honest men of skill and judgment, and the same he should return to them the said commissioners, with all convenient speed, and what he should so seize he should safely detain and keep in his possession until they the said commissioners should give him order for the disposal thereof; and in case of resistance, or of not having the key or keys of any door or lock belonging to him the said plaintiff, where any of his goods were or were suspected to be, that he should break open, or cause the same to be broken open, for the better execution of that their warrant, which said warrant afterwards, and before the said several times when, &c., to wit, on the day and year last aforesaid, was delivered to the said Charles Cutten, so being such messenger as aforesaid, to be executed in due form of law. By virtue of which said warrant, and by force of the said statute, the said Charles Cutten so being such messenger as aforesaid, at the said several times when, &c., peaceably and quietly entered into the said dwelling-house, in which, &c., in order to seize and take, and did seize and take, the said goods, chattels, and effects of the said plaintiff in the said declaration mentioned, the same then being in the said dwelling-house, for the purpose in the said warrant mentioned, and hath from thence hitherto kept and detained the same under and by virtue of such statute, commission, and warrant as aforesaid; and in so doing, he the said Charles Cutten, so being such messenger as aforesaid, did necessarily and unavoidably make a little noise and disturbance in the said dwelling-house; and because he had not and could not procure from the said plaintiff or any other person whatsoever the keys of the said doors and locks in the said declaration mentioned, he the said Charles Cutten was obliged to force and break open the same, and the staples and hinges thereof, in order to seize certain of the said goods and effects then being within the said doors, as he lawfully might for the cause aforesaid, doing no unnecessary damage to the said plaintiff on the said occasions, which are the said several supposed trespasses, whereof the said plaintiff hath above thereof complained against him the said defendant. And the said defendant avers that the said supposed trespasses were done and committed previous to the choice of an assignee, and that he the said defendant was the petitioning creditor for the said commission. And this he the said defendant is ready to verify; wherefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

(Signed)

Samuel Conyn.

Replication.—And the said plaintiff saith, that he, by reason of any thing by the said defendant in his said plea above alleged, ought not to be barred from having or maintaining his aforesaid action thereof against him the said defendant. Because, protesting that he the said plaintiff was not at the said times in the said plea mentioned, or at any other time before the suing out the said supposed commission of bankrupt in the said plea mentioned, a builder or trader within the true intent and meaning of the said statute made and then and still in force concerning bankrupts. And also protesting that he the said plaintiff did not, at the said time in the said plea in that behalf mentioned, or at any other time before or since, become, nor was he indebted, in the way of his said supposed trade or otherwise, to the said defendant in the sum of 218*l.* 19*s.* in the said plea mentioned, nor in any other sum of money whatsoever, for a true and just debt owing from the said plaintiff to the said defendant. And also protesting that no such commission of bankrupt, as in the said plea mentioned, ever was awarded or issued against him the said plaintiff in manner and form as in the said plea above respectively mentioned and set forth. And also protesting that the said commissioners in the said plea mentioned, or any of them, did not adjudge or declare the said plaintiff to have been and become a bankrupt before the issuing of the said supposed commission in the said plea mentioned, or to be at the time of the issuing thereof a bankrupt, within the true intent and meaning of the said statute concerning bankrupts, as in the said plea mentioned. And also protesting that the said Archibald Elijah Impey, William Villiers Surtees, and Charles Bathurst, or any or either of them, did not make or deliver any such warrant in writing in manner and form as in the said plea above in that behalf respectively alleged. For replication, nevertheless, in this behalf, the said plaintiff saith, that he the said plaintiff did not, at the said time in the said plea in that behalf mentioned, or at any other time, become a bankrupt within the true intent and meaning of the said statute, in manner and form as he the said defendant hath above in his said plea in that behalf alleged. And this he the said plaintiff prays may be inquired of by the country, &c.

(Signed)

F. Kelly.

And the said defendant doth the like.

*Sir J. Scarlett, *contrâ*. This case is distinguishable from that of
 *510] *Cooper v. Wakley*. In that case, which was *an action for a libel, the
 publication was admitted on the record, and if the defendant failed in
 *511] proving his *justifications, it was not incumbent upon the plaintiff to
 give any evidence whatever, and his counsel need only address the Jury
 on the amount of damages. Now, here, the plaintiff must call witnesses,
 because, although the committing of a trespass is certainly admitted on the
 record, yet, as goods were taken, the plaintiff is obliged to go into evidence as
 to the number and value of those goods. I therefore submit, that the plaintiff is
 entitled to begin, for the purpose of showing what goods were taken, and also
 their value.

Lord TENTERDEN, C. J., held, that on these pleadings the defendant was
 entitled to begin.

F. Pollock, for the defendant, addressed the Jury and called his witnesses.

The plaintiff's counsel contended, that, as the issue was, whether the plaintiff
 "became a bankrupt," it was incumbent on the defendant to show that the
 plaintiff was a trader, and that there was a good petitioning creditor's debt, as
 well as to show an act of bankruptcy; for that the allegation, that a party
 became a bankrupt, was not made out, without proof of a trading and a petition-
 ing creditor's debt, as well as of an act of bankruptcy.

*Lord TENTERDEN, C. J. As there are separate allegations as to
 *512] the trading and petitioning creditor's debt, I shall hold, that this issue
 merely goes to the act of bankruptcy.

The defendant's witnesses not making out a sufficient act of bankruptcy—

Sir J. Scarlett, at the conclusion of the defendant's case, addressed the
 Jury for the plaintiff, and called witnesses to show the amount of damages,
 and—

F. Pollock, for the defendant, replied.

Verdict for the plaintiff.—Damages 400*l*.

Sir J. Scarlett, Brougham, and Kelly, for the plaintiff.

F. Pollock, Denman, C. S., and Comyn, for the defendant.

[Attornies—*Winter & Son, and James.*]

In the ensuing Term, F. Pollock obtained a rule nisi for a new trial, on the
 ground that the damages were excessive.

VESSEY v. PIKE. Jan. 19.

In an action for a libel, the defendant cannot, under the general issue, give evidence of any
 fact in mitigation of damages, which would be evidence to prove a justification of any part
 of the libel. He ought to justify as to that part.

LIBEL. Plea—General issue. The libel, which was published in a news-
 paper, called the Derby Reporter, professed to give an account of an examina-
 tion, touching an order of filiation.

Denman, C. S., for the defendant, wished, in mitigation of damages, to

*513] adduce evidence of what really passed on the examination.

*Lord TENTERDEN, C. J. You are not at liberty to give evidence,

in mitigation of damages, of any fact, which would be evidence to prove a justification of any part of the libel, because you ought to have justified as to that part.

The evidence was not given.

Verdict for the plaintiff.—Damages 1*l*.

Brougham, and *Busby*, for the plaintiff.

Denman, C. S., and *Kelly*, for the defendant.

[Attornies—*J. Vessey*, and *Few & Co.*]

CROSSLEY v. BEVERLEY. Jan. 20.

If one take out a patent, and in his specification state certain improvements in the mechanical parts of his apparatus, which it appears he has invented after the taking out of the patent: this will not invalidate the patent, as the public ought to have the advantage of all improvements down to the time of the specification.

A specification of an invention, for which a patent has been granted, stated the invention to be an improved apparatus to extract gas from pit-coal, tar, or any other substance from which gas, capable of being used for illumination, could be extracted by heat: Held, that the words 'other substance' must mean substance *ejusdem generis*, and that oil was not meant to be included in it, it being shown, that, at the time in question, oil was considered much too expensive to be used for the making of gas for the lighting of streets and buildings, though it was known to afford an inflammable gas.

If in the specification of an improved gas apparatus no direction is given respecting a condenser, which is a necessary part of every gas apparatus; this will not invalidate the patent, if it appear, that every one capable of constructing a gas apparatus must know that a condenser must form a part of it.

CASE, for the infringement of a patent, for making an improved gas apparatus. Plea—General issue. The patent, which was dated December 9th, 1815, had been granted to Mr. Samuel Clegg, and by him assigned to the plaintiff.

The specification, which was dated June 8th, 1816, stated as follows, "my improved gas apparatus is for the purposes of extracting inflammable gas by heat, from pit-coal, tar, or any other substance from which gas or gases, capable of being employed for illumination, can be extracted by heat, for purifying the gas so obtained, and for measuring it out, and distributing it to lamps, lights, or burners, where light or heat is to be produced by the combustion of the said gas." The specification then went on to describe a horizontal flat retort, a purifying apparatus, a gauge or rotative gas-meter, and a self-acting governor. [514]

It was proved by Mr. Farey, who was called for the plaintiff, that this apparatus would not succeed in making gas from oil; and he stated, that it was known, at the date of the specification, that oil, resins, and all other substances which burn with a flame, would yield an inflammable gas, but that, from the great expense of oil, no one then thought that it could ever be useful to light either streets or buildings; and the witness added, that though oil gas had been since used to light some particular places, yet it still continued doubtful, whether oil gas would keep its ground, by reason of the great expense of the oil.

Brougham, for the defendant. This patent is for a machine to make gas from pit-coal, tar, or any other substance. Now it appears that it will not do for oil.

Lord TENTERDEN, C. J. In reading this specification, it is clear, that the words "other substance," coupled with the words "pit-coal and tar," mean other substance *ejusdem generis*.

Brougham. The patent is for gas to be produced from pit-coal, tar, or any

other substance which produces an inflammable gas. Now that is certainly the case with oil.

Lord TENTERDEN, C. J. One must understand this person to speak of those things which were known and used at the time. He could not possibly mean oil gas, it had never been used, because of the great expense; and this man must really have had the spirit of prophecy, to have found out that oil gas ever was to be employed in lighting the streets.

Brougham. There is nothing to prevent a person who *sees this *515] specification from considering that oil gas was meant to be included in it, as it was well known that it was possible to produce gas from oil.

Lord TENTERDEN, C. J. I must understand this party to speak as a practical man, and to speak with reference to those things that were then known and in use.

It appeared from the evidence that the specification did not give any directions respecting a condenser, which was well known to be an essential part of every gas apparatus.

Brougham, for the defendant. The things comprised in the specification will not make a gas apparatus. It will be incomplete for want of a condenser.

Lord TENTERDEN, C. J. A workman who is capable of making a gas apparatus, would know that he must put that in.

Brougham. The specification does not direct it to be put in.

Lord TENTERDEN, C. J. No, but it does not tell you to leave it out. There is nothing in that.

The inventor, Mr. Clegg, was called, and he stated in his cross-examination, that he had invented some of the mechanical parts of the apparatus, which were described in the specification, at times subsequent to the taking out of the patent; he, however, also stated, that before the patent was taken out, he had in his mind a general idea of the whole apparatus.

Brougham, for the defendant, then went to the Jury, on the following grounds, *516] *first*, that the specification was *not sufficiently explicit, as the description of the retort was defective; *secondly*, that one part of the invention was not useful (a); *thirdly*, that Mr. Clegg had invented certain parts of the apparatus described in the specification, at times subsequent to the taking out of the patent.

Lord TENTERDEN, C. J., began to sum up the evidence, but the Jury expressed themselves satisfied, and found a

Verdict for the plaintiff.

Sir J. Scarlett, F. Pollock, Alderson, and Godson, for the plaintiff.

Brougham, *Rotch*, and *Patteson*, for the defendant.

[Attornies—*Burra & N.*, and *Smithson & Co.*]

In the ensuing Term, *Brougham* moved for a rule nisi for a new trial; and he argued, that, as Mr. Clegg invented certain parts of the apparatus described in the specification at times subsequent to the taking out of the patent, it must be taken that the specification was of an invention different from that for which the patent was taken out, and that the patent was therefore void.

(a) In the case of *Hill v. Thompson*, 8 Taunt. 401, Dallas, J., in delivering the judgment of the Court, says, "If any part of the alleged discovery, being a material part, fail (the discovery in its entirety forming one entire consideration), the patent is altogether void; and to this point, which is so clear, it is unnecessary to cite cases." In the case of *Branton v. Hawkes* and others, 4 B. & A. 541, it was held, that a patent for improvements in the construction of anchors, windlasses, and chain cables, could not be supported, unless there were novelty in each invention; and it appearing that there was no novelty in the construction of the anchors, the Court held, that the patent was wholly void.

Lord TENTERDEN, C. J. It appears that the person's *mind was directed to the invention, and that, in the interval between the taking out of the patent and the enrolling of the specification, he perfects it in some of the mechanical parts. The question is, will that make his patent void? No case has so decided, and it would be a very great hardship if it were so. Indeed, I do not see why any time is allowed to the inventor to prepare his specification, unless it be to allow him to mature the mechanical parts of his invention.

BAYLEY, J. It is not only the duty of an inventor to state what he knew at the time of the patent, but the public have a right to be put in possession of all that he knows at the time of the specification.

LITTLEDALE, J. It must be some very strict technical rule to defeat this patent, and I see no reason for extending the doctrine already laid down. There has been no deception practised, and the public ought to have the advantage of the improvements, up to the time of the specification.

PARKE, J., Concurred.

Rule refused.

MEMORANDUM.

On the 22d of January, 1829, the whole of the Middlesex causes in the Lord Chief Justice's paper, as well special as common Juries, were entirely disposed of, and the paper completely cleared: which had not happened for many years before.

*COURT OF COMMON PLEAS.

[*518]

SITTING AT WESTMINSTER, AFTER TRINITY TERM, 1828.

BEFORE LORD CHIEF JUSTICE BEST.

BROAD v. PITT. June 26.

No communications made to an attorney are privileged, but such as are made for the purpose of the attorney's either commencing or defending a suit.

REFLEVIN.—In the course of the cause, a witness was called, who had been attorney for the defendant. He was asked as to some conversation which took place between the defendant and him, when the former executed a deed which the latter had prepared for him as his professional adviser.

Wilde, Serjt., contended, that the conversation was confidential, and could not be received in evidence. He cited *Cromack v. Heathcote* (a).

(a) 2 B. & Bing. 4; reported also, 4 J. B. Moore, 357. That case is said to have decided that communications made by a party to an attorney are confidential, although they do not relate to a cause existing, or in progress, at the time they were made; and therefore, that, where an attorney was applied to by a father to prepare a deed, by which his property was to be assigned to his sons, and stated that there was no consideration for the assignment, on which the attorney refused to prepare it, and it was afterwards drawn by another; the attorney was

Russell, Serjt., contra, referred to *Williams v. Mundie (a)*.

*519] *Wilde, Serjt.* If we apply the doctrine in *Williams v. *Mundie* to the present case, we shall see at once the inexpediency of the rule which is there laid down. The party goes to advise with an attorney, and the attorney may recommend an action, or whatever else he thinks right: and how is the communication of the whole of the circumstances to be made safely, if it is not privileged?

Best, C. J. I am disposed to agree with my Lord *Tenterden*, in excepting only communications made for the purpose of bringing or defending actions. I think this confidence in the case of attorneys is a great anomaly in the law. The privilege does not apply to clergymen, since the decision the other day, in the case of *Gilham (b)*. I, for one, will never compel a clergyman to disclose communications, made to him by a prisoner; but if he chooses to disclose them, I shall receive them in evidence. There is also no privilege of this description in the case of a medical man (c). A man is not acting as an attorney, when he is consulted about a deed; and I cannot distinguish his situation from that of any other man. I can make a distinction where a person requires information for the purpose of defending himself or of commencing an action. I am of opinion that the evidence ought to be received.

It was mentioned to his Lordship, that the case of *Williams v. Mundie* was acted upon in Ireland, at the trial at bar of *Rex v. O'Connell* and others.

Wilde, Serjt., and Platt, for the plaintiff.

Russell, Serjt., and R. V. Richards, for the defendant.

precluded from giving evidence of that fact in an action brought by the son, in which the validity of the deed was attempted to be disputed, although he was not employed in the cause.

(a) R. & M. 34. That case decides that the privilege of not being examined as to facts communicated to an attorney while employed in his professional capacity, extends only to those communications which relate to the purposes either of bringing or defending an action or suit, existing at the time of the communication, or then about to be commenced. This case is also reported in 1 Carr. & P. 158.

(b) Carr. Suppl. 61.

(c) See the *Duchess of Kingston's case*, 11 Harg. Stat. Tr. 243; and *Rex v. Gibbons*, 1 Carr. & P. 97.

*520] *SITTING IN LONDON, AFTER TRINITY TERM,
1828.

BEFORE LORD CHIEF JUSTICE BEST.

BEVAN v. WATERS. June 27.

A livery stable keeper has a lien for the keep and exercise of a horse sent to him for the purpose of being trained.

ASSUMPSIT for money paid, &c. From the evidence, it appeared, that two horses, named Polecat and Blister, the latter belonging solely to the defendant, the former to the plaintiff and defendant jointly, were put into the hands of a person named Boast, who was a stable keeper, for the purpose of being trained. While they were there, the defendant sold to the plaintiff the horse Blister, and his half share of Polecat; but when the plaintiff applied to Boast to deliver them to him, in pursuance of the bargain, he refused to let Blister go, because the defendant had not paid him his charges for training. Notice was given to the

defendant, by the plaintiff's agent, that he could not get the horse on account of Boast's claim. The defendant disputed the correctness of the account in some respects, and, whilst the dispute was going on, the plaintiff paid the charges, in order to obtain the horse, and sought to recover the amount, by this action, from the defendant; 40*l.* was remaining due of the purchase money, at the time at which the horse was to be delivered; but Boast's claim, at that time, amounted to 82*l.*, and was afterwards increased, so that the plaintiff was obliged to pay a sum of 130*l.*, before Boast would deliver the horse to him.

Wilde, Serjt., for the plaintiff. Whatever sum the defendant owed Boast, the plaintiff is entitled now to recover of him, having been obliged to pay it, to obtain the horse, which was standing at a great expense. I submit this, on the principle of several cases. If a man buys goods of another, which, at the time of sale, are in the hands of a third person, having a claim upon them, the buyer has just as much right to pay the demand to obtain them, as a tenant, in the case of a distress for ground rent, is justified in paying to release his goods, and either setting off the payment against his own rent, or recovering it in an action, as so much paid for his landlord. In such a case as the present, the law implies an *assumpsit*. In the case of *Gray v. Hill* (a), it was held, that the plaintiff having repaired premises held by the defendant under a covenant to repair, on a parol promise by the defendant that he would assign him his lease, might, after a refusal to assign, recover, on an implied *assumpsit*, the expense of the repairs. The correctness of that decision was not doubted, but was acquiesced in, and the amount was referred. The plaintiff in the present case was obliged to pay the money by a species of duress upon his goods. The learned Serjeant also cited the case of *Brown v. Hodgson* (b).

Jones, Serjt., for the defendant. In point of law, a trainer has not a lien upon horses. The only case of a lien on horses is that of an innkeeper, but that is a particular case, and rests upon the ground of the obligation of an innkeeper to take them in. The law imposes a particular duty upon him, and therefore it gives him a particular remedy. The question is, was there a just right on the part of Boast to detain? In the case of a distress, the debt is not only due, but the mode of proceeding is also legal; at all events, the payment in a case like the present must be made promptly, and the party cannot lie by for several months, and, while the matter is in dispute, discharge the lien behind the back of the seller. The plaintiff here cannot recover his demand as money paid for the defendant. He must either sue specially for the non-performance of the contract, or require the defendant to pay back the money which he had received for the purchase.

Wilde, Serjt., in reply. This is not the case of a horse standing at livery, but of a horse put at a trainer's stables. There is nothing inconsistent in the trainer's having a lien. The reason why there is no lien in the case of a livery stable keeper is, that the horse in such case is kept for the purpose of being daily used by the owner.

Barr, C. J. In the case of a livery stable keeper there is no lien, because the horse is subject to the control of the owner and may be taken out by him; and the first time it goes away, there is of course an end of the lien. But I think, as at present advised, that a man who has a horse for training, has a lien for the keep and exercise of it. If Boast had not a just claim against the defendant, I think the plaintiff could not maintain this action. I am of opinion, that if a man buys property which is in the hands of a third person, who sets up an unfounded claim, and will not deliver unless that claim is paid, the purchaser is bound to give notice to the seller, and cannot, after several months,

(a) R. & M. 420.

(b) 4 Taunt. 189. That case decides, that if a carrier, by mistake, delivers to B. goods consigned and sold to C., and B. appropriates the goods, and the carrier, on demand, without action, pays C. their value, the carrier may recover it against B. as money paid to B.'s use; but not as the price of goods sold and delivered to B.

go and pay the demand; because he may, by his delay, deprive the seller of his evidence of the incorrectness of the claim. If the plaintiff in this case had paid without giving notice, I should have decided that he could not recover. It was determined in the reign of Queen Anne (*a*), that a livery stable keeper had not a lien upon a horse for its keep, and I decided upon that principle in a case in this Court lately (*b*). But in the present case there is a difference, for *the trainer* has not only to *keep the horse, but also to prepare it for racing; *523] and therefore I think he has a lien upon it. For I take it to be a common law principle, that if a man has an article delivered to him, on the improvement of which he has to bestow trouble and expense, he has a right to detain it until his demand is paid. On the facts in this case, it appears that the plaintiff was bound to pay 40*l.*, as the balance of the purchase money, which he has not paid, and if the lien did not exceed that sum, then undoubtedly he could not maintain this action. But it appears that Boast's demand was 150*l.*; and though there were sundry payments, yet he had a right to apply them to the demand for Polecat, as he had parted with Polecat, and had no lien upon him. It appears that there was a balance of 82*l.* for which Blister might be detained. In point of law and in point of justice also, the defendant ought to have cleared away that claim; and, not having done so, he is liable to the plaintiff for such proportion as was due in the month of September, at which time the horse should have been delivered. And as the horse was not delivered then, I think the plaintiff is entitled to some part of the demand for the subsequent time; but not the whole of it; because, if the horse had been delivered at the proper time, he would have been obliged to bear the expense of keeping it.

Verdict for the plaintiff.

Wilde, Serjt., and *R. V. Richards*, for the plaintiff.

Jones, Serjt., for the defendant.

[Attornies—*Burdillon*, and *Norris & Co.*]

(*a*) *Yorke v. Grenough*, 2 Lord Raym. 866.

(*b*) *Wallace v. Woodgate*, 1 Carr. & P. 575.

*524] *ADJOURNED SITTINGS AT WESTMINSTER, AFTER
TRINITY TERM, 1828.

BEFORE LORD CHIEF JUSTICE BEST.

EDWARDS *v.* FAREBROTHER et al. June 28.

Whether a woman who has cohabited with a man for several years, and passed herself off as his wife, can recover in trespass for the taking, under an execution against the man, of her goods, being in the house in which the cohabitation took place—*Quære*. But in such a case, it may be left to the Jury to say, whether they think, that, under the circumstances, the property was given up by the woman to the man, and if they do, they may find a verdict against her.

TRESPASS against the Sheriff of Middlesex and several other persons, one of them being a judgment creditor of a person named Salmon. The plaintiff was a Mrs. Edwards, who lived with Salmon as his wife, and the action was brought for the breaking and entering of the house in which they lived, and the seizure

of the goods that were in it. It appeared that Salmon and the plaintiff had cohabited together for several years, and that the plaintiff had, during that time, answered to the name of Mrs. Salmon, when addressed by persons who called at the house; and it also appeared, that when a child of theirs was christened, it was entered in the register as "Emma, daughter of Thomas and Sarah Mary Salmon" (Sarah Mary being the Christian names of the plaintiff). The house was rented in the name of Salmon till a short time before the execution, when it was altered to the name of Edwards, by the landlord's agent, in consequence of a false representation made to him by Salmon, that the landlord had consented to the alteration. Proof was given of the possession of two vans of goods by the plaintiff, and of the purchase for her by a broker, about ten years previous to the action, of others to the value of 22*l.*; but the evidence was very imperfect as to how many of them were in the house at the time of the seizure. The plaintiff also complained of the loss of lodgers in consequence of the trespass.

Wille, Serjt., for the defendants. A woman who has *lived with a man, and passed herself off as his wife, cannot recover in trespass [*525 for the taking of her goods, which were in the house in which they cohabited, because she, by her conduct, has induced the public to suppose that they were the goods of the man with whom she lived, and has given him a credit in consequence with the world. The case of *Mace v. Cadell (a)*, is an authority on this subject; and although it was a case of bankruptcy, yet the decision was not confined to that, but proceeded also upon the broad ground of cohabitation. It was an action of trover, brought by a woman to recover goods which had been taken by the assignees of a man named Penrice. The plaintiff, who kept a public-house, represented herself at the excise office as married to Penrice, but afterwards denied the marriage, and asserted that the goods were her own sole property. The Court said, "that after a solemn declaration by the plaintiff that she was married to Penrice, and that these were the goods of Penrice in her right, she shall never be allowed to say that she was not married to him, and that the goods were her sole property." But, in this trading country, it does not require cases to support such a doctrine as that for which I contend.

Taddy, Serjt., for the plaintiff. The facts relied on by the defendants are wholly irrelevant. The question is, whose property were the goods, and who was the tenant of the house at the time of the seizure? I admit that, in many cases, if a man live with a woman as his wife, and she obtain credit in consequence, and the tradesman sue him, it is no defence for him to say, that they were living in a state of concubinage. But it is very different as against the Sheriff. He comes and seizes the goods as belonging to a particular person, and he must show that he has taken the goods of the person against whom the *execution is. And this he must do at his peril. I allow that the risk [*526 is considerable, but the profits of the office more than counterbalance it. The ground of the rule in bankruptcy is, that a false credit is given, but the rule is confined to cases of bankruptcy; and it was because the inconvenience was felt so strongly in bankruptcy, that the statute of James was passed. If the law had been as contended for by the other side, then the statute of James would have been unnecessary. The question for the Jury will be, whether Mrs. Edwards, the plaintiff, was the lawful wife of Salmon; for, if so, the goods were his and not hers, but not otherwise. The mode in which the entry is made in the register, only shows that she did not wish to injure her own character. The property was not Salmon's, and she is entitled to recover, though she may have held out that she was Mrs. Salmon in every possible way. There may be a remedy against Salmon; but if the goods are the property of the plaintiff, there is no defence to the present action. As to the injury to trade, which has been alluded to, the tradesman has the security of the woman, if she is not married.

BEST, C. J. The plaintiff complains of a trespass in the house, and the loss of lodgers in consequence; but it is for you to say whether there is any doubt that the house did not belong to her. With respect to the goods, there is proof that she had two vans full; and also that some were purchased for her about ten years ago, by a broker, to the amount of 22*l.*; and it is proved that some of these were in the house, but it does not appear to what extent in value. A case has been cited from Cowper's Reports, which, it has been said, is confined to cases of bankruptcy. But I do not think that it applies to cases of bankruptcy only. I think the latter part of the decision applies to a case like the present. For the Court there said, "In the consideration of this general question another point appeared, upon which we are equally clear, *namely, *527] that after a solemn declaration by the plaintiff, that she was married to Penrice, and that these were the goods of Penrice, in her right, she shall never be allowed to say that she was not married to him, and that the goods were her sole property." I think that this is a good moral rule, and I consider that no law is good, which has not for its basis the immutable rules of good morals. Under this impression, I should have nonsuited the plaintiff, taking your opinion on the fact of her holding herself out as married; but I find, from the case of *Edwards v. Bridges*, reported in 2 Starkie, 396 (a), that a different opinion was entertained by Lord Tenterden, then Mr. Justice Abbott; and out of respect to that noble and learned Judge, I shall desire you, though I do not at present agree with the doctrine which he has laid down, to give your verdict for the plaintiff, unless you find against her upon other grounds. If you think the property contained in the house was Mrs. Edwards's, and was not given up to Salmon during the continuance of the connection between them, you will in that case find your verdict for the plaintiff; but if you think that it was not hers at the time of the seizure, but had been given up to Salmon, under the circumstances of the connection, then I see no reason why you should not find your verdict generally for the defendants. If you find for the plaintiff, I will thank you to tell me, whether you think the house was hers or Salmon's, and what portion of the property you consider to have belonged to her.

The Jury found for the defendants.

*528] * *Taddy*, Serjt., and *Platt*, for the plaintiff.
Wilde, Serjt., *Milner*, and *W. Wilde*, for the defendants.

[Attornies—*Clutton & Co.*, and *Rodgers*.]

In the ensuing *Michaelmas* Term, *Taddy*, Serjt., moved for a new trial, but the Court, without giving any opinion on the effect of the cohabitation, considered the verdict sustainable on the other ground, and therefore they

Refused a rule.

(a) That was an action by the same plaintiff against the Sheriff of Middlesex, in 1818, and the opinion there expressed was, "that in point of law, the circumstance of the plaintiff's having lived with Salmon, as his wife, and having answered to his name, did not render" the goods "liable to an execution against him, and therefore that the only question was, as to the value," &c.

HANDAYSIDE et al. v. WILSON et al. July 14.

If a vessel at sea is going close hauled to the wind, and another meeting her is going free, the rule of the sea is, for the latter vessel to go to leeward; and although such vessel may either go to leeward or windward as she best can, yet she ought, as a general rule, to suppose that the vessel going to windward will keep her position.

THE first count of the declaration stated, that the plaintiffs were possessed of a certain ship or vessel called the Juno, &c. which said ship or vessel, at the time of committing the grievance, &c., was navigating and sailing on the high seas, near to the coast of Whitby, in the county of York; and that the defendants were the owners of a certain other ship or vessel, which, a little before, and at the time, &c., was also navigating and sailing on the high seas aforesaid, near to the said ship or vessel of the said plaintiffs, and was then and there under the care, direction, and management of the said defendants, and certain servants of theirs; yet the said defendants, not regarding, &c., then and there by themselves and their said servants, so incautiously, negligently, unskillfully, and improperly managed, conducted, navigated, steered, and directed their said ship or vessel, that it, through the mere default, negligence, &c., of the said defendants, and their said servants, did then and there, with great force and violence, *run foul of, and struck upon and against* the said ship or vessel of and belonging to the said plaintiffs, and then and there broke, strained, &c., the same, by means **whereof* the said ship or vessel, &c., *[529* then and there sunk in deep water, &c., and was thereby damaged, destroyed, and wholly lost, &c.

The second count stated that the ship of the defendants was under the management, &c., of certain servants of theirs, on their behalf, and that such persons, not regarding their duty, &c. &c. Plea—Not Guilty.

From the evidence, it appeared, that about 5 o'clock in the morning of a day in September, the weather being very cloudy, the plaintiffs' vessel the Juno was on the Yorkshire coast, when she was met by the defendants' vessel the Alert. The Juno was coming to windward, and the injury seemed to have happened in consequence of the crew of the Juno supposing that the Alert would go to windward, going themselves to leeward instead of keeping to windward. The plaintiffs' witnesses said that they called to the crew of the Alert, to go to windward, and that they ought to have done so, as it was the rule of the sea for the ship which was light to give way to that which was laden. They all, except one, said, on cross-examination, that they did not know of any general rule which required that a vessel having the wind should go to leeward, when meeting one that was beating up against it.

On the part of the defendants, among other witnesses, Dr. Gwynne, a lieutenant in the navy, astronomical examiner to the East India Company, and a teacher of the art of navigation, stated the rule, on his examination in chief, as follows:—"If a vessel is going close hauled to the wind, and another meeting her is going free, the rule at sea is, for the vessel meeting her to go to leeward; and the reason of it is, that otherwise the vessel going to windward would lose her position, and could not get in again, without another tack, and it would be an inconvenience to her, and not to the vessel going free."

On his cross-examination the witness said, that the vessel having the wind may either go to leeward or windward, as she best can; but that she ought to suppose, as **a* general rule, that the vessel going to windward would keep *[530* her position.

Jones, Serjt., for the plaintiffs. I apprehend the rule to be this, that the ship which has the wind is so to use it as to avoid the other, and is to take that which, under the circumstances, is the most prudent and the safest course. There is no law, either of the sea, or the road, by which a person is justified in adhering to a particular course when it will be productive of mischief.

BEST, C. J., in summing up, said—The material question in this case is, not which of the vessels first struck the other, but whose negligence it was by which the injury was caused. If it was the result of accident, owing to the darkness of the night, the plaintiffs must look to their underwriters, and cannot recover in this action. So, also, if both parties were in the wrong, the plaintiffs must fail in this action. I agree with one observation made by my brother *Jones*, that although there may be a rule of the sea, yet a man who has the management of one ship is not to be allowed to follow that rule to the injury of the vessel of another, when he could avoid the injury by pursuing a different course. But if the matter comes into any doubt, as, for instance, in the case of a dark night, then we ought to look to the practice, as that which is to regulate the parties. The plaintiff examined as to the practice of that part of the coast on which the accident happened, and several of his witnesses swore, that the practice was, for the ship which was light to give way to that which was heavy. They said they had not heard of such a practice as that which has been proved by the defendants. But it seems to me difficult to conceive how, in a dark night, they can tell a light ship from a heavy one. The plaintiff says he called to them to go to windward, and they ought to have done so; but the defendants' witnesses say, that the ship coming to leeward must keep to *531] *leeward; and supposing two vessels to meet each other direct end to end, according to the rule which they speak to, it is for the vessel which is going with the wind to bear away, and not the vessel which is close hauled to the wind. As it appears to me this cause will depend upon these two points—if you think the defendants' ship was to leeward, I think you will find that they did right in keeping to leeward—if you find that the vessels were end and end, then you will ask, if there is such a practice as that spoken of by the witnesses for the defendants. It seems to me, on the first point, that the balance of evidence is, that the defendants' ship was going to leeward. The custom proved is, that the ship which has the wind at large may go either to leeward or to windward, but that, as a general rule, she ought to expect that the ship which is close hauled will keep to windward, and therefore she ought to go to leeward, unless it is quite clear that she can go to windward with safety. I agree with my brother *Jones* that it is not material to the issue to consider which ship struck the other, but I think, in point of fact, it is clear that the injury must have resulted from the *Juno* striking the *Alert*; but it is material when we are considering the rule of the sea. It is said, that if the vessel close hauled to windward went any further to windward she would miss stays; but she is not required to go any further, she is only required to keep her course. It seems it was dark when the injury happened; and if so, it was the more necessary that the rule of the sea should be adhered to. The question is, whether the *Alert* could see what tack the *Juno* was going on, and whether in the dark she ought not to conclude that the *Juno* would act according to the practice of the sea. I agree with my brother *Jones*, that if the captain of the *Alert* saw the *Juno* going one way, it was his duty to go the other; but the question is, whether, in this dark night, he had the opportunity of seeing. If he had not the opportunity of seeing, then he could trust only to the practice of the sea. I think it must be taken *532] *from the evidence, that neither of the crews heard the other's hailing.

His Lordship then left the questions to the Jury, requesting them to say what, in their opinion, was the rule of the sea under the circumstances of the case.

The Jury gave a verdict for the defendants, and found the rule to be, that the ship which is going to windward is to keep to windward, and the ship that has the wind free is to bear away.

Jones and *Stephen*, Serjts., and *Parke*, for the plaintiffs.

Wilde, Serjt., *Brodrick*, and *Nichols*, for the defendants.

HOOD et al., Assignees of CHARLES GREEN, a Bankrupt, v. REEVE and another. July 15.

A clerk in a merchant's counting house may be called as a witness to explain the meaning of a particular entry in the books of the office made by a fellow clerk, since deceased. If a person, on being applied to on a particular subject, writes in answer, mentioning another person, and saying on one occasion, "He is in possession of my sentiments," and on another, "I have written to him, and I refer you to him thereon:" such letters are sufficient to constitute the party referred to agent in the business; and what he said at a meeting on the subject may be given in evidence against the principal.

ASSUMPSIT, for work and labour by the bankrupt, in effecting insurances, and for premiums of insurance paid by him. The defendant Reeve pleaded the general issue and the statute of limitations, and the other defendant (who was the father of the bankrupt) suffered judgment by default.

In the course of the plaintiffs' proof some of the books of the defendants were put in, and a witness, who was a clerk in their office, was asked to explain the meaning of a particular entry made by a fellow clerk, who had since died.

**Taddy*, Serjt., objected, that it was for the Jury to say what was the meaning of the entry from the books themselves. [*533]

BEST, C. J. I think that the question may be put. No doubt the gentlemen of the Jury will well understand the entry; but, as I am not a merchant, I think I am entitled to the explanation of the witness, and I think that he is competent to give it. Looking at the entry itself, it does not appear to be intelligible; and I consider that where there is an ambiguity on the face of an account produced, a person, who was a clerk in the office in which the account was kept, and who is conversant with the mode in which the business was conducted, may be permitted to explain the meaning of a particular item.

It appeared that an arbitration had been entered into respecting the bankrupt's account, and two letters were put in, signed by the defendant Reeve, and addressed to the bankrupt, in which he mentioned a person named Hancock, and in one of them said: "He is in possession of my sentiments, and will attend;" and in the other, "I have now to inform you that I have written to my friend Mr. Hancock on the same subject, and I refer you to him thereon."

A witness was asked whether, on the investigation of the account before the arbitrator (which account was *the subject* referred to in the letters), Hancock had said: "I must confess I cannot shake this."

Taddy, Serjt., for the defendant, objected. They must call Hancock, to show under what circumstances he said it.

BEST, C. J. I think this gentleman has made Mr. Hancock his agent for the purpose of explaining.

Spankie, Serjt. The words are, "He is in possession *of my sentiments," and that does not give him any authority to speculate and deliver an opinion of his own. [*534]

BEST, C. J. I think that is too narrow a construction; I consider that any thing he says about the account is admissible in evidence. The defendant by these two letters says in effect: "Go to Hancock and he will tell you." It is for you afterwards to call Hancock to explain.

Wille and *Adams*, Serjts., and *Perring*, for the plaintiffs.

Taddy and *Spankie*, Serjts., and *R. V. Richards*, for the defendants.

[Attornies—*Freeman & Co.* for the plaintiffs, and *Oliverson & D. and Sheppard & Co.* for the respective defendants.]

RICE v. HALLET. July 17.

Seemle, that a regulation in the seaman's articles of a merchant ship, that "every seaman committed to custody for the preservation of good order, shall forfeit his wages, together with every thing belonging to him on board the ship," is in point of law a good and proper regulation.

DETINUE for a chest of tools and some wearing apparel. From the evidence for the plaintiff, it appeared that he was a carpenter on board the *Georgiana*, an East India ship, of which the defendant was the captain, and that on a voyage from Calcutta to England, the plaintiff was ordered into confinement by the defendant for insubordination, and the tools were taken out of his chest, and distributed to such men as could use them. When the ship arrived in the docks, the plaintiff demanded his tool chest and some wearing apparel, which he had on board, but they were both refused him by the defendant's orders.

Wilde, Serjt., for the defendant, opened, that he should prove that the ship's articles contained a stipulation, that every seaman committed to custody for the preservation of good order should forfeit his wages, together with every thing *535] belonging to him on board the ship; and he *contended, that, under this stipulation, as the plaintiff had been confined for misconduct, the defendant was justified in detaining the articles in question.

BEST, C. J. Is this one of the regulations authorized by the statute 2 Geo. 2, c. 36?

Wilde, Serjt. No, my Lord, it is not. That statute only provides for the forfeiture of wages, and not the forfeiture of the things on board; but it requires that the seamen shall obey all commands; and the commands in the present case have this penalty of forfeiture attached to the breach of them.

The subscribing witness to the execution of the articles was called, but did not appear.

BEST, C. J. (in summing up), said—As these articles are not proved, you must find your verdict for the plaintiff. If they had been produced, probably your verdict would have been the other way. I think the regulation alluded to is a very proper regulation in articles of this description; for the commerce of the country cannot be properly carried on, if insubordination on board a ship is not prevented, by the adoption of strong measures.

Verdict for the plaintiff.

Jones, Serjt., and *Platt*, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attornies—*F. M. Wegener*, and *Davis & Co.*]

*536]

*PROCTOR v. BRAIN. Oct. 31.

Whether, in an action against a broker by his principal for charging an increased price in addition to his commission, it is competent to the broker to show that in some of the transactions he acted as a principal, it being contrary to the duty and oath of a broker so to act—*Quare*.

To prove the averment of actual payment by the principal of the overcharges, it is sufficient to show a running unsettled account between the parties, by which it appears, that, as far as the particular transactions in question are concerned, the principal has paid more than the amount of the overcharges, though, on the whole account, continuing to a period long subsequent, the balance is in favour of the broker to more than their amount also.

THE first count of the declaration stated, that in consideration that the plaintiff, at the request of the defendant, would retain and employ him as a

broker, to purchase for him divers large quantities of wine and spirits for certain reasonable commissions and reward, he (the defendant) undertook to charge the plaintiff the *cost price* of all such wines and spirits as he should from time to time purchase for him, and that the plaintiff did employ the defendant; but although the defendant did purchase on account of the plaintiff divers large quantities of wine and spirits, to wit, &c.; and although the cost price of the said wines and spirits amounted to a certain large sum of money, to wit, &c.; yet the defendant, not regarding, &c.; but contriving, &c.; did not nor would charge the *cost price*, but on the contrary charged a much greater price, &c.; which greater price, it alleged, the plaintiff had actually paid. The second count stated the defendant's undertaking to be, that he would charge the plaintiff for such wines as he purchased on his account, *as cheap a price as he himself from time to time should pay for them*. Money counts. Plea—General issue.

On the part of the plaintiff, the bond given by the defendant for the due performance of his office was proved. It contained the substance of the regulations made with respect to brokers by the Court of Aldermen, in pursuance of the statute 6 Ann. c. 16. They are, among others, "That no broker shall make out or take any bill of parcels in his own name, or receive or take any bill of parcels or invoice on account of his principal, made out in his the broker's name, nor shall demand, receive, or take any larger sum of money than the amount of the usual brokerage or commission." "That every broker shall and do enter every bargain or contract he shall make in a book, to be kept in his office or counting house, and to be entitled * 'The Broker's Book,' on the day of making every such bargain or contract, with the Christian and surname [*537 at full length of both the buyer and the seller, the quantity and quality of the articles sold or bought, and the price of the same, and the terms of credit agreed upon, and deliver a contract note to both buyer and seller, or either of them, upon being requested so to do, within twenty-four hours after such request respectively, containing therein a true copy of such entry."

It appeared also that the defendant took the oath administered to brokers on their admission, which is, that they will truly and indifferently execute their office without fraud or favour between party and party, according to the best of their skill and ability.

The complaint against the defendant was for having charged a larger price than he paid for the articles, in addition to his broker's commission. The items of overcharge were in the year 1825, and the month of January, 1826.

There was a running account between the plaintiff and defendant, extending to the year 1827. The balance at the end of the year 1825 was against the plaintiff, to the amount of 785*l.*; but in the course of the year 1826 he paid in sums amounting to 2000*l.*, but the balance on the whole account appeared, after those payments, to be still against him.

Taddy, Serjt., for the defendant, contended, that the plaintiff must be nonsuited. He avers in his declaration, that he employed the defendant to buy for commission, and that the defendant promised to supply him at the cost price, but charged a greater price than the cost price, and that he had paid the defendant the overcharges. Now there is no evidence of any such payment.

Wilde, Serjt., for the plaintiff, put in a book containing a running account; and from the entries it appeared, that, at the close of the year 1825, [*538 there was a balance against the plaintiff of 785*l.*, but in the course of the year 1826 payments were made by the plaintiff to the amount of 2000*l.* (a sum considerably exceeding the amount of the overcharges); but, in December, 1826, the balance was still against the plaintiff to the extent of 300*l.*

Taddy, Serjt., and C. Cresswell, for the defendant, contended, that this did not support the allegation, inasmuch as the defendant not having claimed of the plaintiff the balance which was due upon the whole account, the plaintiff could not be said to have overpaid on the previous items. He might deduct the amount

from the balance if the defendant claimed it of him, and he therefore could not be said to have paid it.

Wilde, Serjt. The question is, Whether the balance of 785*l.*, owing by the plaintiff in December, 1825, has not been extinguished for every legal purpose. There were payments in 1826 to the amount of 2000*l.*, and the rule of law is, that the payments extinguish the items which are earliest in point of date. The defendant cannot contend that the old balance has not been paid.

BEST, C. J. I shall not nonsuit the plaintiff upon this objection.

Taddy, Serjt., then further objected, that the allegation was not proved, that the defendant promised to charge only the cost price, as it was clear that he was to charge commission in addition. Nor was the second count proved, which spoke of as cheap a price as the goods could be obtained for. The averment ought to have been, that he was to charge the cheapest price over and above the commission.

BEST, C. J., still declined to nonsuit, and—

*539] *Taddy*, Serjt., then addressed the Jury, and called a witness named Binyon, for the purpose of proving that the dealings between the plaintiff and defendant were sales between principals, and not purchases on commission.

Wilde, Serjt., objected to the evidence. The defendant enters into an obligation not to act as a principal. He delivers contracts signed as a broker, and holds himself out to the public as a broker, and he is precluded from setting up as a defence that he was not acting as a broker, but as a principal. He cannot be heard in a Court of justice to dispute the documents which he has executed, and the public character which he has assumed. They are conclusive against him. The bond is given for public objects, and it is contrary to public policy to allow him to give the evidence proposed.

Bompas, Serjt., on the same side. The question is, whether a man, in defending an action, shall be allowed to show that he has been guilty of perjury; and that, taking the oath into consideration, will be the case if this evidence is allowed to be given.

Platt. It is clear that a broker who acts as a principal acts illegally, and he cannot be permitted to take advantage of his own wrong.

Taddy, Serjt., in reply. This is not a question with any person having a right to sue upon the instruments alluded to; but the question here is, whether the plaintiff has not so misconducted himself that he cannot take advantage of the misconduct of the defendant.

BEST, C. J. If this had been an action by your client for goods sold, I should have nonsuited him long ago. But there is the difficulty of the plaintiff's being a party to the illegal transactions. I think the best way, as the point *540] is new, will be to receive the evidence, and let the cause go to its end. Whichever way it is ultimately decided, this cause is one of the most important that have been tried at Guildhall. I hope it will lead to some arrangement, that will put an end to the mode by which the merchants and traders of this city are plundered by persons who profess to act as brokers, and in whom they place their confidence as such. I hope that the Court of Aldermen, who possess the power, will think it their duty to enforce their regulations.

Taddy, Serjt., said, that, after his Lordship's observations, he would rather withdraw the proposed evidence.

Wilde, Serjt., replied.

BEST, C. J. (in summing up), said—A man who is a sworn broker cannot be a principal, and this is so for the wisest reasons. I was much surprised to find the defendant's partner come forward to make the avowal, that the defendant, who had sworn not to act as a principal, had been acting as such for a period of two or three years. I am satisfied that no body of men will rejoice more in seeing the regulations enforced than the brokers themselves. If I employ a broker I pay him for his assistance, and I suppose that I have the benefit of his

judgment. I suppose that he is acting honestly, but what security have I if a man is to shift his character at pleasure from that of principal to broker, and from that of broker to principal? With respect to the objection, as to the allegation of payment, it appears that, at the end of the year 1825, 700*l.* was due by the plaintiff, but he afterwards, in the course of dealing, paid to the amount of 2000*l.* I am of opinion that this may be applied in liquidation of the particular items relied on by the plaintiff. If the defendant thinks that this will work any injustice, he may apply to the Court of Chancery, or to the Court of Common Pleas, to stay *execution until it is ascertained what the real [*541 balance is. For, if no proceedings could be had till the final settlement of the account, the plaintiff would be in a dreadful situation, and the defendant would escape punishment.

Verdict for the plaintiff—119*l.*

The defendant had leave to move the Court on the objection as to the effect of the running account with regard to the allegation of payment.

Wilde and *Bompas*, Serjts., and *Platt*, for the plaintiff.

Taddy, Serjt., and *C. Cresswell*, for the defendant.

[Attornies—*Dicas*, and *Mitchell*.]

In the ensuing Michaelmas Term, *Taddy*, Serjt., moved, pursuant to the leave given.

BEST, C. J. A broker engages that he will buy as cheap as he can, and charge no more than his commission. If he fails in either of these, a cause of action arises immediately. That was the way in which it was put to the Jury, and they have found a verdict, which I think there is no pretence for disturbing, either at law or in equity.

PARK, J. My brother *Taddy's* motion proceeds on the ground, that this is a fair account between the parties; whereas, in point of fact, it is no such thing.

Rule refused.

*FIRST SITTING AT WESTMINSTER, IN MICHAELMAS [*542 TERM, 1828.

BEFORE LORD CHIEF JUSTICE BEST.

WRIGHT v. MELVILLE. Nov. 7.

Where a carriage is hired for a certain time, and sent back before the expiration of it, if the party of whom it was hired sell it within the time he cannot recover his charge for the hire.

ASSUMPSIT.—The plaintiff was a coachmaker; and it appeared that the defendant went to the plaintiff's premises to hire a low phaeton for five weeks; he selected one, and said he would give five guineas a week. It was sent to him, and after keeping it two or three days he sent it back. He afterwards called and said it was too heavy for his pony, and he would take another, but he did not take any other, and refused to pay for the five weeks' hire.

It was suggested, on the part of the defendant, that the plaintiff had sold the phaeton within the five weeks, but this was denied by the plaintiff's witnesses.

BEST, C. J., told the Jury, that if the carriage had been sold within the five weeks that would have been a rescinding of the contract, and the plaintiff would not have been entitled to the sum claimed; but as that did not appear to be the case, he was entitled to a verdict for the five guineas a week.

Verdict accordingly.

Andrews, Serjt., and —, for the plaintiff.

V. Lawes, Serjt., for the defendant.

[Attornies—*Young & Co.*, and *R. Thomas*.]

*543] *SECOND SITTING IN LONDON, IN MICHAELMAS
TERM, 1828.

BEFORE LORD CHIEF JUSTICE BEST.

TAYLOR *v.* LAWSON. Nov. 14.

Semble, that it would be a good practice, in the administration of justice, to keep all the witnesses out of Court at Nisi Prius, except the person under examination.

LIBEL. Pleas—Not guilty, and three justifications.

On the first witness being called for the defendant—

Andrews, Serjt., for the plaintiff, made application to his Lordship to give directions for the rest of the witnesses to go out of Court.

BEST, C. J. I confess that for one I wish the same rule prevailed here as prevails in the Houses of Lords and Commons, where no witnesses are allowed to be present except the person who is under examination. I will grant the application.

Verdict for the defendant, on one of the special pleas.—Jury discharged from giving a verdict on the others.

Andrews, Serjt., and *Busby*, for the plaintiff.

Wilde, Serjt., and *Platt*, for the defendant.

*544] *ADJOURNED SITTINGS AT WESTMINSTER, AFTER
MICHAELMAS TERM, 1828.

WIGGINS and another *v.* BODDINGTON, Esq. Dec. 6.

A Dock Company having a swing bridge on a public highway are bound, in the passing of vessels, to use all reasonable means (both as to the number of men employed and the number of ships passed at a time) to prevent unnecessary delay; and if they do not do all which can be expected of reasonable men, and any one is obstructed in consequence, such obstruction will make them liable in damages for the injury sustained.

THE first count of the declaration stated in substance, that the plaintiffs, by their servants, were driving carts, laden with sand, along a certain public highway called Wapping High Street, leading to St. Catherine's Docks, and that the London Dock Company, on the 1st of November, 1827, and on other days between that time and the 31st of March, 1828, obstructed and straitened the street, by keeping open a certain swing bridge during unreasonable spaces of time.

There was another count for general obstruction of the way, and it was alleged that the plaintiffs (to enable them to perform a contract into which they had entered) had been obliged, on account of the obstruction, to take another wharf, and provide more carts than they would otherwise have required. Plea—Not Guilty.

The plaintiffs were wharfingers and carmen, who had contracted to carry bricks and sand from their wharf to St. Catherine's Docks, and in their way there had to pass over a swing bridge at the London Docks, called the Navigation Bridge; and the complaint in the cause was, that their carts, which were in number ten, and went backwards and forwards twelve times a day, were so delayed in their passage by the keeping open, for unreasonable spaces of time, of the swing bridge, for the letting in and out of ships, that they were obliged, after a time, to provide two additional carts, and also to obtain another wharf in a different situation.

For the plaintiffs, several of their carmen were called, who spoke to being detained sometimes a quarter of an hour, sometimes twenty minutes, and on one occasion half an hour, and they stated that they had seen [*545 two ships go in and one come out without the bridge being closed. They also said that there was another bridge, called the Hermitage Bridge, on the same line, but that it was not used for the passage of ships. One witness mentioned an instance in which, after the bridge had been open for twenty-five minutes, only light carts were allowed to go over, and as he was proceeding with a loaded cart to make the attempt, the bridge was forced against the horse and hurt it. This witness also said, that the dock-men used to go with the ships down to the river before they attended to the shutting of the bridge, in consequence of which the carmen were often obliged to shut it themselves. On their cross-examination, these witnesses were not able to give dates, or to speak either to the state of the weather or the tide at the periods to which they alluded.

The dock-master of St. Catherine's Dock stated, that the London Dock Company had generally but one set of men to attend to the vessels passing and the bridge, though, on an emergency, they employed an additional number. He however said, that, during the time he had observed, there was no unnecessary delay, and that much depended on the state of the weather. He considered five minutes as the average time in good weather for passing a vessel.

The bridge-master of the West India Docks stated, that they, at their dock, employed two sets of men, fourteen to attend to the vessels and eight to attend to the bridge, and that twenty minutes was the longest time ever occupied in passing a vessel. He admitted that they had ships of greater burthen than the London Docks, but said that they employed all their men, whatever the size of the vessel; and added, that it was not their practice to pass more than one vessel without closing the bridge. No complaint was made to the London Dock Company, of which the defendant was the treasurer, till the month of February, 1828.

**Basanquet*, Serjt., for the defendant. The company was established [*546 for the express purpose of improving the navigation of the port of London, and, among other things taken into consideration, was the state of the ways, and, among other ways, this of Wapping High Street. The legislature thought, notwithstanding the inconvenience to the proprietors of wharfs, that there would be an obstruction. The bridge is stated on the record to have been erected in pursuance of the acts of Parliament. There is no doubt that this company are bound to discharge their duty with a due regard to the traffic of the public,

but their primary object is, to see that ships are not delayed. They are not to turn back any vessels presenting themselves to go in or out. There are only certain times at which vessels can be docked, and every advantage is to be taken of those times, to let in as many ships as possible. Much also depends upon the state of the tide. If a vessel is delayed, and bilged in consequence, an action will lie against the Dock Company, and the same if it falls back and injures another. The delay of a cart for half an hour cannot be compared with the demurrage of a ship for a tide. The docks have been open ever since 1806. These plaintiffs were only there for a temporary purpose, and the business of the company has been conducted in the usual way; and the complaint is, that they have not altered their mode, and increased their number of men, on account of this temporary purpose. There is no proof of any obstruction in March, about which time the notice was given. The plaintiffs ought to have been prepared with evidence to show what the state of the weather was, for their own witness has proved that all depends upon it. They have not specified the times, so as to enable us to meet their evidence. It appears, that on the occasion most particularly relied on, the light carts were allowed to go over, as they could pass quickly, and the heavy ones were only prevented, because they would have occasioned delay, which, as a ship was coming, would have been very serious.

*547] On the part of the defendant, the dock-master of the London Docks was called (having been released after objection on the part of the plaintiff), and stated, that their number of men was ten, and that they only passed more than one vessel at a time, when, from the state of the tide, they would not otherwise be able to get them out in time. In answer to questions from his Lordship, the witness said, that they had no men whose particular duty it was to attend to the swinging of the bridge, and admitted, that if they had the public might get over more quickly. The surveyor of the pavements at Wapping was also called, and said, that in his opinion the bridge was managed with due diligence, and that it might make about three minutes difference if there were an additional number of men. A tradesman, who lived near the bridge, said, that he thought it was not kept open unnecessarily. He had complained of the stoppage as an inconvenience, but he did not consider it to have arisen from any want of diligence.

Russell, Serjt., in reply. It is said, on the part of the defendant, that it is a question between the ships and the carts, as to which are to be duly attended to; but I contend, that the Dock Company may act rightly as to both. There was an express clause in the 39 & 40 Geo. 3, c. 47, which required that they should make two bridges. [*Bosanquet*, Serjt. That clause has been since repealed.] The company contrived to get it repealed afterwards, and they must have done that by persuading the legislature that they would so use the one bridge as not to inconvenience the public. But there is the Hermitage entrance which they might have used, and which would have benefited the public. I contend, that the ships are not to be the primary object of the company's attention. The land traffic has much increased lately. My proposition is, that there has been unnecessary delay, and that part of my case has not been answered; because there are not in the winter any men to attend peculiarly to the bridge. It is

*548] said that the time is short during which vessels can come in and out; but that is a reason why a double set of men should be kept, and the most thus made of the time. The liability of the company to an action for demurrage is another reason. It seems, that since March (when our notice was given) they had not passed three ships at a time as they did before, and this shows that they have found that other docks manage better, and have discovered that which is the legal course for them. At the West India Docks they never pass two ships without shutting the bridge, if carts are waiting. They attend to the interests of both parties, and why should not the London Dock Company do the same? The dock-master, in his evidence, admitted that there are many

instances in which men go so far as the river before they close the bridge. Is this the way in which the public are to be treated, with many carriages waiting? He admits, that if they had more men, people might pass sooner. This is the whole of the case:—this is what I rely on. They ought to have another set of men for the bridge; and in not having them there has been culpable negligence; and for this the plaintiffs are entitled to recover.

BEST, C. J. (to the Jury.) In order to support this action the plaintiffs must show that the bridge was kept open longer than was necessary for the purpose for which it was made. If they have done that, they are entitled to a verdict. I should have liked the plaintiffs' case better, if complaint had been made earlier to the Dock Company. I should have liked it better also if the plaintiffs had fixed, by evidence, on some specific day, that the state of the weather might have been considered. The vagueness of the plaintiffs' evidence has prevented the defendant from meeting the case as he otherwise might. The plaintiffs have proved that their business has been very much injured. The defendant's witnesses also admit that they have been interrupted, but they add, that they do not consider the delay as unnecessary. The fact of delay is clear [*549 beyond all dispute; but the plaintiffs must make out that the delay was unnecessary. I agree with the observation of the defendant's counsel, that the Dock Company is extremely beneficial to the public; if not, the legislature would not have suffered the interruption of the public highway. I cannot better put you in possession of the principle on which you are to act, than by referring you to the acts of Parliament, which originally provided that there should be two bridges, so that when one was shut the other might be open. It appears that afterwards this was considered not to be an advantage to the public, and therefore the provision was repealed; but under what circumstances does not appear. What arguments were addressed to the legislature to induce them to repeal it, we do not know; they might have been that both could not be used well, and that the one should be so managed as not to inconvenience the public. The question is, whether the defendants have done all that they ought to do. It seems that as long as the dock-master of St. Catherine's had an opportunity of observing, there was no unnecessary delay. If five minutes is the time for carrying a ship through, then it is the duty of the London Dock Company to provide a sufficient number of men to do it in that time. The witness from the West India Docks says that the delay of twenty minutes occurs about once a week. It is said that the West India Dock ships are generally larger than those of the London; but it seems that they have there twenty-two men in attendance, both for large and small. If that is necessary for the West India Dock Company, then it is for you to say whether it is not necessary for the London Dock Company also. One of the witnesses says, that an increase in the number of men would make about three minutes difference. This appears to be a very small space of time, but it is for you to say whether, if occurring to several ships, it might not be a convenience to the public. The dock-master himself says, that if he had more men there would be a saving of time. It is for you to [*550 decide whether the delay which has occurred has been unnecessary. Several most respectable witnesses have said, that in their opinion there was no unnecessary delay; but on the other hand it has been proved that the plaintiffs have sustained much inconvenience. It is for the Company to avail themselves of all reasonable means to enable them to accomplish their duty and perform their contract with the public; and if they have not done so, and delay has been thereby occasioned to the plaintiffs, it is such a delay as will sustain the present action. If the Dock Company have done all that could be expected of reasonable men, availing themselves of such means as they ought, then the defendant will be entitled to your verdict; but if they have not, then you will find for the plaintiffs.

Verdict for the plaintiffs.—Damages 5*l*.

Russell, Serjt., Erle, and Holroyd, for the plaintiffs.
Bosanquet, Wilde, and Spunkie, Serjts., for the defendant.

[Attornies—*Woodward & S., and Lowdham & Co.*]

In the course of the cause, the cases of *Rex v. Densnap*, 16 East, 196; and *Rex v. Kerrison*, 1 M. & S. 435, and 3 M. & S. 526, were referred to.

*551] *ADJOURNED SITTINGS AT GUILDHALL, AFTER
 MICHAELMAS TERM, 1828.

MALLALIEU v. LAUGHER and another. Dec. 15.

Seemle, that the attaching by process from the Sheriff's Court in London, of property in the hands of the garnishee, is not such a conversion as will enable the owner to maintain trover.

TROVER for two trunks, containing wearing apparel, &c. Plea—Not guilty. The plaintiff, who lived at Manchester, deposited the trunks in question at the warehouse of a Mr. Smith in Cheapside. The defendant Laughher, who was a merchant in London, and agent to Messrs. Knight and Fossett, of Birmingham, instituted proceedings in the Sheriff's Court; in consequence of which, on the 31st of March, 1828, the other defendant, who was named Page, and was an officer of the Sheriff's Court, accompanied by other persons, went to the warehouse of Smith, and delivered to him a paper, containing a notice of attachment, at the suit of Laughher; and having done this, he laid his hand on the trunks, and said, "I attach these, as the property of Knight and Fossett." He afterwards put his seal upon them. On the 7th of April, Mallalieu's attorney gave a notice to the defendant Laughher, requiring him forthwith to withdraw the attachment, and pay the expenses which had been incurred, and threatening an action in the event of a refusal. On the 15th of April, the attorney, in the presence of Page, opened the trunks, when it appeared that they did not contain any Birmingham goods. He immediately went to the defendant Laughher, and told him what had been done, and whose the goods were. He said he was satisfied with the information, and should act as he was advised. The attachment was withdrawn on the 28th of April.

Wilde, Serjt., for the defendant. The plaintiff must be called. The attachment does not take the goods out of the hands of the garnishee; it does not *552] alter the possession; and *therefore it is no conversion. The garnishee is under no obligation to hold any goods but those of the debtor. He may plead that he has no goods of the debtor's in his hands. What the officer said, was only a declaration, that the particular articles are the goods of the debtor. It is no more than a notice. This is not an action on the case, for preventing the taking by the plaintiff; the garnishee might deliver at his discretion. There can be no conversion without the party has possession or control. The plaintiff did not demand the goods of Smith, and there is no evidence that he wanted them.

BEST, C. J. I have great difficulty in saying that trover is maintainable here.

Tuddy, Serjt., for the plaintiff. It is quite sufficient cause of action in trover, that there has been a seizure in consequence of process from a Court of local

jurisdiction, as the owner could not take the goods without subjecting himself to the powers of that Court. In the case of *M'Combie v. Davies* (a) there is a *dictum* of Lord *Ellenborough*, where he refers to a case of *Balthin v. Cole* (b), in which it was held, that the taking an assignment of property is a conversion, although the assignment was not valid to pass the property. It is the meddling or interfering with the property which constitutes the conversion. This is not an attachment generally of any property of Knight and Fossett's which Smith might have, but of the specific articles. Any intermeddling is sufficient. Lord *Ellenborough* says, "certainly a man is guilty of a conversion, who takes my property by assignment from another, who has no authority to dispose of it, for what is that but assisting that other in carrying his wrongful act into effect?" The act of seizure in its natural effect produces a detention, which is an inconvenience to the owner.

**Best*, C. J. I am no great friend to the action of trover, nor to any action which keeps parties so much in the dark as those forms which are founded upon fiction. I cannot find any instance similar to the present, and I am unwilling to extend the operation of such actions. I think my Lord *Ellenborough* went to the extreme verge of the law in the case reported in 6 East. As far as that, I should go myself, and agree with the decision of my Lord *Holt*. In the case decided by my Lord *Ellenborough*, the state of the property was changed, because there was a transfer in the dock books, which, it is well known, is as much a transfer for the purposes of trade, as an actual removal from one warehouse to another. There was in that case the exercise of dominion over the goods. But, in the present case, the man does not remove the goods, he leaves them still where they were, in the possession of Smith; and I do not think that is enough to support an action of trover. I think it better, in all these cases, that we should not allow this nonsensical form of losing and finding to be extended any further than it has at present gone. Where the law has been settled we ought not to unsettle it; but, where it has not, we should take care that this absurd jargon is not carried any further, particularly when there are forms of action which give the party the advantage of knowing the nature of the case against him. I think it right that the plain tiff should be called; but I will give my brother *Taddy*, leave to move the Court to enter a verdict for nominal damages.

Non suit.

Taddy, Serjt., and *Steer*, for the plaintiff.

Wilde and *Andrews*, Serjts., for the defendants.

[Attornies—*Robinson*, and *Platt*.]

A *rule nisi* was obtained in Hilary Term, 1829, which *stood over till Easter Term; and an arrangement was then made between the parties: in consequence of which, no opinion was given by the Court upon the point.

(a) 6 East, 538.

(b) 6 Mod. 212. Opinion of Lord *Holt*.

CHAPLIN v. HAWES et al. Dec. 15.

Though the rule of the road is not to be adhered to, if, by departing from it, an injury can be avoided, yet in cases where parties meet *on the sudden*, and an injury results, the party on the wrong side should be held answerable, unless it appear clearly that the party on the right had ample means and opportunity to prevent it.

ACTION for an injury done to a horse which the plaintiff's servant was riding, by a cart which the servant of the defendant was driving. It appeared that the cart was advancing towards a turnpike having two gates, one for carriages going one way, and one for carriages going the opposite way. A chariot was stopping at the proper gate through which the cart should have gone, and this induced the driver to turn off to the other gate, when at the distance of about six yards. The plaintiff's servant was riding through that gate when the injury happened. He was called as a witness, and, on his cross-examination, stated, that he was three or four yards from the gate, when he saw the cart coming towards it, and could have pulled up, but did not, because he thought the driver would wait for him, as it was not the gate through which the cart had a right to pass.

Wilde, Serjt., for the defendant. If the plaintiff's man was pertinaciously insisting on his right of coming through the gate, when he might have avoided the injury, either by waiting or turning aside, the plaintiff cannot recover. His being on his right side will not justify him in persisting so as to produce the injury, when it might have been prevented by his pursuing a different line of conduct.

Spankie, Serjt., for the plaintiff. It is desirable to adhere to the law of the road, in order not to mislead the opposite party; and, unless there is a clear *555] mode of escape, the party who is on the proper side should not attempt any departure from the ordinary course, as he will make such an attempt at his own peril.

BEST, C. J. If the plaintiff's servant had such clear space that he might easily have got away, then I think he would have been so much to blame as to prevent the plaintiff's recovering. But, on the sudden, a man may not be sufficiently self-possessed to know in what way to decide; and in such a case I think the wrong-doer is the party who is to be answerable for the mischief, though it might have been prevented by the other party's acting differently.

Verdict for the plaintiff—31*l.* 10*s.*

Spankie, Serjt., and *Steer*, for the plaintiff.

Wilde and *Adams*, Serjts., for the defendants.

[Attornies—*Hunt*, and *King*.]

See the case of *Handyside v. Wilson*, ante, p. 522.

KAY, Bart., et al. v. BROOKMAN et al. Dec. 17.

To dispense with the necessity of calling the subscribing witness to a deed, it is sufficient to show that he expressed an intention of leaving the country, that he had reason for doing so to avoid a criminal charge, and that his relations have not seen him since he expressed his intention of going.

It is not necessary, in the absence of the subscribing witness, to prove the handwriting of the party executing the deed, it is enough to prove the handwriting of the witness.

ASSUMPSIT for money paid to the use of the defendants, as share-holders in a mining company. To show that the defendants were members of the company.

the deed by which it was constituted was put in. The subscribing witness to the execution of it by one of the defendants was not produced, but his brother was called, who stated, that he told him some time before, that he was going out of the country, and that he had not seen him since, and believed that he went away to avoid a charge of embezzlement made by a gas-company, to which he had been collector.

**Tudly*, Serjt., submitted, that this was not sufficient to dispense with the necessity of calling the subscribing witness. There is no evidence [*556 of his having been heard of from abroad. It is usual to go further.

Best, C. J. I think it will do. There is sufficient to satisfy me that the witness does not keep away to avoid giving evidence in this cause. I am of opinion that enough has been shown. There was abundant reason for his leaving the country; and it seems that he has not been heard of since he expressed his intention of going.

The handwriting of the subscribing witness was then proved, and the deed was read.

It was afterwards proposed to read a power of attorney, the execution of which was attested by the same person, proof having been given of his handwriting.

Spankie, Serjt., for one of the defendants, objected that the handwriting of the party executing the deed should be proved.

Best, C. J., intimated, that he thought it was not necessary.

Campbell, for another defendant. It is *vezata questio*. Mr. Justice *Bayley* holds, that the handwriting of the party executing ought to be proved; and Lord *Tenterden* holds, that it need not. But Mr. Justice *Bayley's* practice appears to me to have the better reason in its favour, because, if the subscribing witness is not produced, it will stand as if there was no subscribing witness, and then the handwriting of the party executing should be proved.

Best, C. J. I have a great respect for the opinion of my brother *Bayley*, but I think I am bound in such a case to act as my predecessors have done. It has been the *uniform practice only to prove the handwriting of the [*557 attesting witness, and I am of opinion that it is the most convenient course. I consider that mode as most desirable which tends to diminish the number of witnesses (a).

Verdict for the plaintiffs.

Wilde, and *E. Lawes*, Serjts., and *Kelly*, for the plaintiffs.

Tudly, Serjt., for one defendant;

Campbell, and *Mereweather*, Serjt., and *Comyn*, for another;

Spankie, Serjt., for three others; and

Bompas, Serjt., for another.

[Attornies—*Stevens & Co.*, for the plaintiffs; and *Kirkman, Golding, Saunders & Co.*, *Healing, Knight*, for the respective defendants.]

(a) It may perhaps be asked how, if the subscribing witness be not called, is the identity of the party executing to be proved, unless by calling somebody who knows his handwriting? But to this it may be replied, that it is not to be presumed that the subscribing witness would have attested the execution of any other person than the person described in the deed; and this will be an answer to the argument relied on, that, in the absence of the subscribing witness, it will stand as it would if there were none.

BARKER v. BARKER and another. *Jan. 20.*

A landlord has no right to enter his tenant's premises to repair them, without some stipulation to that effect.

TRESPASS for entering the plaintiff's apartments and injuring his goods. **Pleas**—Not guilty, and leave and license.

One of the defendants was the plaintiff's landlord, and the other a tradesman employed by him. The defence was, that they entered to repair. There was no stipulation at the time of the letting for such entry.

*558] **BEST**, C. J., told the Jury that a landlord had no right to enter to repair without some stipulation to that effect; and as there was no such stipulation in the present case, however absurd it might be in the tenant to object, unless he had assented to the landlord's coming in to do the repairs, he would be entitled to some damages. But if they should think that he had assented, then the defendants' plea was proved, and they would be entitled to a verdict.

Verdict for the plaintiff.—**Damages** 20*l*.

Wilde and *Bompas*, Serjts., and *Culridge*, for the plaintiff.

Cross and *E. Lawes*, Serjts., for the defendants.

[Attornies—*Gibbins*, and *Turner*.]

PEDLEY v. WELLESLEY, Esq. *Jan. 21.*

The wife of the defendant in a suit cannot be examined as a witness for the plaintiff without the defendant's consent, although it appear that he married her after she was actually subpoenaed to give her evidence in the cause.

ASSUMPT for work and labour and divers jounries and attendances. **Plea**—General issue.

The defendant had appealed to the House of Lords against a decree of Lord Chancellor Eldon, on the subject of the custody of his children, and the plaintiff was employed to go abroad for the purpose of obtaining witnesses to be examined in the matter. To establish his case (among other witnesses), the plaintiff's counsel called Mrs. Helen Bligh; she appeared; but her father, being asked, stated, that she was married to the defendant in November, 1827. This, it appeared, was after she had been subpoenaed to give evidence in the cause.

Wilde, Serjt., for the defendant, objected to her being examined.

*559] *Cross*, Serjt., for the plaintiff, submitted, that a party to a suit could not, by marrying his adversary's witness, deprive him of the benefit of the evidence of such witness, and more particularly where (as in the present case) the action had been commenced, and the party actually subpoenaed, before the marriage took place.

Brodrick, on the same side. The point has not been decided in the case of a married woman, but the principle has been established in the case of an underwriter; and that principle is, that a party to a suit cannot by any act of his deprive his adversary of the testimony of his witness, whether that act be laudable or otherwise.

BEST, C. J. I cannot see any analogy between the cases of a married woman and an underwriter. I will allow the witness to be examined if the defendant consents, but not without. Lord Mansfield once permitted a plaintiff to be

examined with his own consent. Some of the Judges doubted the propriety of that permission, but I think that it was right.

Wilde, Serjt., for the defendant, refused to consent; and the witness was not examined.

Nonsuit.

Cross, Serjt., and *Brodrick*, for the plaintiff.

Wilde, Serjt., and *Platt*, for the defendant.

[Attornies—*R. Hill*, and *Whitelock*.]

*MEMORANDUM.

[*559]

In Hilary Term, 1829, *Edward Goulburn*, Esq., was called to the degree of Serjeant-at-law.

COURT OF KING'S BENCH.

SECOND SITTINGS AT WESTMINSTER, IN HILARY TERM, 1829.

BEFORE LORD TENTERDEN, C. J.

BAILEY v. HOLE. Feb. 4.

1st, at a trial, it be discovered that a witness for the defence is one of the bail, and therefore incompetent, the Judge at the trial will, on the defendant's depositing a sufficient sum with the associate, make an order for striking the witness's name out of the bail-piece, so as to render him a competent witness. The amount to be deposited must be the sum sworn to, and a further sum for costs.

MONEY lent. Plea—General issue. The defence was, that the sums of money which had passed from the plaintiff to the defendant were payments and not loans. This was proved by a witness, who, on his cross-examination, admitted that he was one of the defendant's bail.

LORD TENTERDEN, C. J. I must strike out his evidence.

Campbell, for the defendant, offered to deposit a sum of money; and stated, that, in a case in the Court of Common Pleas, Lord Chief Justice *Best* had said that he would make an order to strike out the name of a bail from the bail-piece, so as to make him a competent witness, if a sum of money were deposited by the defendant in the hands of the associate.

LORD TENTERDEN, C. J. If you will deposit a sufficient sum of money, I will immediately make an order for striking this witness's name out of the bail-piece.

**Brougham*, for the plaintiff. What sum must they deposit?

LORD TENTERDEN, C. J. The sum sworn to, and a further sum for costs. [*561]

The sum sworn to was 40*l.*, and *Campbell* offered to deposit that and 50*l.* more for costs. These sums were paid into the hands of Mr. Bellamy (the associate), and his Lordship signed an order for striking the witness's name out of the bail piece.

The cross-examination of the witness was proceeded in, and the Jury, on his evidence, found a—

Verdict for the defendant.

Brougham, and *Platt*, for the plaintiff.

Campbell, and *Godson*, for the defendant.

[Attornies—*Bright*, and *Woodward*.]

ADJOURNED SITTINGS IN LONDON, AFTER HILARY TERM, 1829.

BEFORE LORD TENTERDEN, C. J.

PLATTS, Administratrix of MANTLE, v. LEAN, Executor of SUTHERLAND. Feb. 26.

A. was indebted to B. in a sum of 868*l.*, for which he was arrested. C., who was clerk to B.'s attorney, directed him to be discharged on paying 700*l.* only. B. threatened to complain to C.'s employers, to prevent which C. advanced 100*l.*, B. agreeing that it should be repaid whenever the balance of 168*l.* should be recovered from A. After the death of B. and C. the balance was recovered: Held, that the representatives of C. might recover the 100*l.* from the representatives of B., on a count for money had and received to their use, and that there was no necessity to declare specially.

MONEY had and received by the defendant, as executor, to the use of the plaintiff, as administratrix.

This action was brought to recover a sum of 100*l.* From the evidence of a *562] witness for the plaintiff the following facts *appeared:—In the year 1806 the intestate, Mr. Mantle, was the principal clerk of Messrs. Shawe and Le Blanc, who were attorneys for the defendant's testator, Mr. Sutherland. At that time General Gillespie was indebted to Mr. Sutherland in the sum of 868*l.* Messrs. Shawe and Le Blanc were employed to cause the General to be arrested for this debt, and General Gillespie was accordingly arrested, but was discharged out of custody by the direction of Mr. Mantle, on payment of 700*l.* only. A few days after this Mr. Judd, who was the agent of Mr. Sutherland, and had the management of almost all his affairs, called on Mr. Mantle at the office of Messrs. Shawe and Le Blanc, and threatened to complain to his employers of his having directed General Gillespie's discharge, on his paying no more than 700*l.* of the debt. To prevent this complaint Mr. Mantle paid to Mr. Judd the sum of 100*l.* out of his own pocket, it being agreed between them that this sum was to be repaid to Mr. Mantle whenever the remaining sum of 168*l.*, due from General Gillespie to Mr. Sutherland, should be recovered from the General.

In the year 1811, General Gillespie was killed at the siege of Kalumji, in the East Indies; and, after his decease, the representatives of Mr. Sutherland made a claim on the General's representatives for the balance then due, with interest, which balance included the sum of 168*l.* above mentioned.

It was proved by Mr. Hadden, one of the defendant's attornies, that the whole of the balance and the interest thereon, due from General Gillespie's estate to Mr. Sutherland's estate, was paid to him as attorney for the defendant in the month of July, 1828.

F. Pollock, for the defendant. I submit that the plaintiff cannot recover in this action. This is a special contract to pay 100*l.* to Mr. Mantle on a certain event, and that can only be recovered on a declaration stating that special contract, and not on a count for money had and received.

*Lord TENTERDEN, C. J. I am clearly of opinion that the plaintiff may recover on this declaration, framed as it is. When this balance of 168*l.* was received from the estate of General Gillespie, one hundred pounds of it belonged to Mr. Mantle's representative, and it then became money had and received by the defendant to the use of the plaintiff as administratrix. The plaintiff is entitled to a verdict for 100*l.* [*563]

Verdict for the plaintiff.—Damages 100*l.*

Denman, and *Carrington*, for the plaintiff.

F. Pollock, for the defendant.

[Attornies—*Ewington & Chilcote*, and *Gattie, Hadden, & G.*]

ANSELL v. ANSELL. March 7.

It has frequently been held at *Nisi Prius*, that the 1st sect of the 9th Geo. 4, c. 14, applies to parol acknowledgments made before its provisions came into operation: and *semble*, that from its wording such construction is the right one.

ASSUMPSIT. Pleas—The general issue, and the statute of limitations. The only evidence given to take the case out of the statute was a parol acknowledgment.

Gurney, for the defendant, submitted, that since the act of the 9th Geo. 4, c. 14 (a), such an acknowledgment was not sufficient.

Sir *J. Scarlett*, for the plaintiff, stated, that the action was commenced before the 1st of January, 1829, when that act came into operation; and contended that, therefore, its provisions did not apply.

*Lord TENTERDEN, C. J., was of opinion, that the words *of the new statute had relation to the time of the trial, and therefore that the parol promise was not sufficient evidence to take the case out of the operation of the statute of limitations (b). [*564]

A Juror was afterwards withdrawn.

Sir *J. Scarlett*, and *D. Pollock*, for the plaintiff.

Gurney, and *Chitty*, for the defendant.

(a) Entitled, "An act for rendering a written memorandum necessary to the validity of certain promises and engagements." See *ante*, pp. 298 *et seq.*, where its provisions are set out at length.

(b) The question whether the first section of the 9 Geo. 4, c. 14, has a retrospective operation, and applies to parol acknowledgments made before its provisions came into effect, has been frequently considered. Mr. Justice *Bayley*, and Mr. Baron *Hullock*, on the Northern Circuit, and Mr. Justice *Gaselee* on the Western, have all decided at *Nisi Prius* in accordance with the opinion expressed by Lord *Tenterden*. Lord Chief Justice *Best*, also, on being applied to at *Nisi Prius*, to take out of its turn a case in which the statute of limitations had been pleaded, assented to the application, in order that it might be tried before the 1st of January. In the Court of Common Pleas, in Banc, a rule *nisi* for changing the venue from London to Leicester was discharged, on the ground, that, if it were granted, the case, which was one to which the statute applied, would be delayed till the Assizes, which would be held after the new act came

into operation. And thus the matter stood, till Easter Term, 1829, when Mr. Serjt. *Mere-weather*, in a case of *Fowler v. Chatterton*, argued against the construction previously put upon the act, and contended, that it ought not to be considered as having a retrospective operation, as well on account of its wording as the manifest injustice which such a construction would work. The Court of Common Pleas seemed to be of opinion that the previous decisions were correct, but took time to consider and consult with the Judges of the King's Bench on the subject; but finding, on inquiry, that a case was pending in that Court upon the point, they directed the matter to stand over till that case should have been argued.

*565] *ADJOURNED SITTINGS AT WESTMINSTER, AFTER
HILARY TERM, 1829.

BEFORE LORD TENTERDEN, C. J.

DOE, on the demise of HOGG, *v.* TINDALE and LAMBERT. *April 23.*

in an ejectment a landlord and tenant defend by different attornies and have different counsel, but it appear that the tenant claims no title but what he derives from the landlord, the Judge at the trial will only allow one counsel to address the Jury for the defence, but the party's counsel who does not address the Jury will be at liberty to cross-examine, and also to call witnesses.

EJECTMENT for certain copyhold premises situate in the parish of St. Anne, Limehouse. The defendant Tindale defended as landlord, the other defendant Lambert being his tenant, who claimed no title except such as he derived from his landlord. The two defendants appeared by separate attornies, and had separate counsel.

Cumppell, having addressed the Jury for the defendant Tindale—

F. Pollock, wished to address the Jury on the behalf of the other defendant, Lambert.

LORD TENTERDEN, C. J. Mr. *Pollock*, I do not think I ought to hear you. If your client had any separate title to set up, of course I must hear you upon that; but, as you and Mr. *Cumppell* both appear to support exactly the same title, I think I can hear only one of you.

F. Pollock. I submit that I ought to be heard, because there may be observations that I may make for the tenant, which may not have been made by the counsel for the landlord; and, if I am not allowed to address the Jury, my client is not at all benefited by my appearing here.

LORD TENTERDEN, C. J. Yes he is, you have had the opportunity of cross-examining all the witnesses who have been called for the lessor of the plaintiff; *566] and if you have any evidence to lay before the Jury, you will be at liberty to do so; but I cannot hear two counsel address the Jury in support of exactly the same title. No one is more willing to hear counsel than I am, but still, for the sake of precedent, I think I cannot hear you; more especially as I happen to know, that, on account of the office that I hold, the other Judges very much adopt the same course of practice that is observed on trials before me.

F. Pollock did not address the Jury.

Verdict for the plaintiff.

Sir *J. Scarlett*, and *Platt*, for the lessor of the plaintiff.

Cumppell, and *Hutchinson*, for the defendant Tindale.

F. Pollock, and *Chun*, for the defendant Lambert.

[Attornies—*J. Tebbutt*, and *Holmes & G.*]

HEUDEBOURCK v. LANGTON and LANGLEY. April 25.

an action on the stat. 13 Geo. 3, c. 78, s. 48, against surveyors of highways, to recover double the amount of a sum not paid over by them to their successors, a notice of action was given, stating that an action would be brought against them, for that they had in their hands a balance of 353*l.* 19*s.* 4*d.* At the trial, it appeared that only 60*l.* 3*s.* 3*d.* was in their hands: Held, that this notice was not sufficient, and that the plaintiff could not recover the double amount.

Whether a succeeding surveyor of the highways can recover a balance in the hands of the two surveyors who preceded him, in an action for money had and received to his use—*Quære*: but held, that, if, in that form of action against both, it be shown that the money came to the hands of one only, the plaintiff must be nonsuited, although it be also shown that the defendants were jointly surveyors.

If several parishioners in vestry sign a resolution in the Vestry minute-book, stating that they approve of an action brought by the surveyor of the highways against A., and that they do thereby guarantee to him all legal expenses that are or may be incurred by him in prosecuting that suit; this binds them personally, and will render each person signing it incompetent to be a witness on the trial of that action.

DEBT.—The first count of the declaration stated, that the defendants, “heretofore, and within one calendar month before the commencement of this suit, to wit, on the 17th of October, 1828, at Westminster, in the county of Middlesex, were indebted to the plaintiff in the sum of 707*l.* 19*s.* 8*d.*, of lawful money of Great Britain, being forfeited by *an act passed in the 13th year of his [567 late Majesty King George the Third, entitled [here it set forth the title of the general highway act, 13 Geo. 3, c. 78], whereby an action had accrued to the said plaintiff,” &c (a). There was a count for money had and received, and a count upon an account stated. Plea—General issue.

This was an action of debt, against the defendants, as late surveyors of the highways of the Hamlet of Mile End, Old Town, for not paying over a sum of money to the plaintiffs, who were their successors in office, that sum having been disallowed by the Justices in passing their accounts. By this action it was sought to recover double the sum retained (b).

*It was proved, that the defendants were appointed surveyors of the highways of the hamlet of Mile End, Old Town, for the year ending [568 October, 1828; and it was also proved, that, ten days before the commencement of this action, the defendants were served with the following notice of action:—

(a) By sect. 75 of the same stat. it is enacted, “that every prosecutor or informer may, at his election, sue for and recover any forfeiture or penalty imposed by this act, which shall amount to the sum of forty shillings or upwards (the manner of recovery thereof not being particularly directed by this act), either in the manner hereinbefore directed, or by action at law, to be brought by such informer or prosecutor, in any of his Majesty’s courts of record, in manner following: that is to say, where any person shall be liable to any such pecuniary penalty, it shall and may be lawful to sue for and recover the same by action of debt, in which it shall be sufficient to declare that the defendant is indebted to the plaintiff in the sum of —, being forfeited by an act passed in the thirteenth year of the reign of his present Majesty, intituled, *An act to explain, amend, and reduce into one Act of Parliament the statutes now in being for the amendment and preservation of the public highways within that part of Great Britain called England, and for other purposes*: and the plaintiff, if he recovers in any such action, shall have double costs.”

And by sect. 76, it is provided, “that there shall not be more than one recovery for the same offence; and that ten days’ notice in writing be given to the party offending, previous to the commencement of such action: and that the same be brought and commenced within one calendar month after the offence for which such action is brought shall have been committed.”

(b) By the general highway act, 13 Geo. 3, c. 78, s. 48, it is enacted, “that the surveyor of the highways for every parish, township, or place, shall keep one or more books, in which he shall enter a just, true, and fair account of all such money as shall have come to his hands.” The stat. then goes on to provide, that he shall produce his account at the Vestry, and that, after that, he shall take his account to a justice of the peace, who may either allow it, or postpone it until a special Sessions; “and in case any articles contained in such accounts shall not be explained and proved to the satisfaction of such justices, they may disallow the same.” The stat. then proceeds to direct the surveyor to deliver over all sums of money which shall remain in his hands, to the succeeding surveyor; and it is enacted, that “in case he shall make default in the payment, or accounting for the money so remaining in his hands, within the time and according to the directions” of this act, “he shall forfeit double the value of the money which shall be adjudged by the said justices to be in his hands.”

Sirs,—I, William Heudebourck, surveyor of the highways in and for the hamlet of Mile End, Old Town, in the county of Middlesex, do hereby, according to the statute in such case made and provided, give you and each of you notice that I shall, at or soon after the expiration of ten days from the time of your being served with this notice, cause a precept, called a bill of Middlesex, to be sued out of his Majesty's Court of King's Bench, at Westminster, against you, at my suit, and proceed thereupon according to law. For that you being surveyor or surveyors of the above named highways, in and for the year ending on the 3d day of October, 1828, were, upon the examining and passing of your account before his Majesty's justices of the peace in and for the said county, in petty Sessions, on the 3d day of October instant, found and declared to be indebted in the sum of 353*l.* 19*s.* 4*d.*, for monies had and received by you as such surveyor or surveyors, to the use of the said hamlet, in consequence of the charges, disbursements, and expenditure, to the amount *of 60*l.* *569] 3*s.* 6*d.*, alleged and stated in your said account to have been paid and made by you, being disallowed by the said justices; and also for that you were then and there adjudged by the said justices to have in your hands, of the proper monies of said hamlet, the said sum of 353*l.* 19*s.* 4*d.*; and, you and each of you having wholly made default in the paying and accounting for the said last mentioned sum of money so found to be in your hands as aforesaid, either to me, being such surveyor as first aforesaid, or to any other person or persons lawfully authorized to receive the same for or on account of the said hamlet, although, on the 17th day of October instant, I duly demanded and required you to pay the said sum of 353*l.* 19*s.* 4*d.* to me; and thereby, by force of such default, forfeited and became liable to pay double the value of the said last-mentioned sum of money, which was so found by the said justices to be in your hands as aforesaid; and the said action will be so commenced and prosecuted for double the value of the said money so received by you as aforesaid. And I further give you notice, that, in case you do not pay the said monies before the expiration of the time aforesaid, you will also be indicted for your misdemeanor according to law. Dated this 18th day of October, 1828. Yours, &c.

WM. HEUDEBOURCK.

"To Robert Langton, and Thomas Langley, and each of them, late surveyors of the highways for the hamlet of Mile End, Old Town."

It appeared that when the defendants went before the justices to have their accounts allowed, the justices disallowed an item of 60*l.* 3*s.* 3*d.*, which had been paid to collectors as poundage for collecting the highway rate; and that no greater amount was disallowed by the justices.

*570] The defendant's counsel objected that this notice was *insufficient; as a notice of action should, in a case of this kind, state specifically what sum the plaintiff claimed to recover. The declaration gave no information to the party, and it would be quite impossible for him to defend himself, if the notice of action was not precise in stating what sum it was that the plaintiff charged the surveyors with not having paid over. The notice of action was for a sum of 353*l.* 19*s.* 4*d.*, and the evidence, at most, only went to an item of 60*l.* 3*s.* 3*d.*

Lord TENTERDEN, C. J. (having conferred with *Bayley*, *Littledale*, and *Parke*, Js.) I have consulted the other Judges, and they agree with me that the double sum cannot be recovered, as this notice is not such as is required by the act of Parliament. As to the count for money had and received, I need only say that the Judges think the case ought to go on.

Sir *J. Scarlett*. There is a decision of the Court of Exchequer, in the case of *Underhill v. Ellicombe* (a), which goes to show that the surveyors of high-

(a) *M'Clell. & Y.* 450. That case decided, that the surveyors of highways could not maintain an action of debt against the rector of the parish for the amount of composition money, duly

ways cannot recover in an action of debt. Indeed, if the present plaintiff was to recover on this count, he would not be liable to account to the parish, because he recovered in his own right.

LORD TENTERDEN, C. J. I do not think that case is analogous to the present. I think the case must proceed.

*On the part of the plaintiff a witness named Cuthbert was called. He stated on the *voire dire* that he had signed a resolution of the vestry of Mile End, Old Town, to guarantee the plaintiff his legal expenses in this action; but he added, that he considered himself as signing this only as a parishioner in vestry, and not in his individual capacity. This resolution was read from the vestry minute-book, and it was in the following form:—

“At a vestry meeting held,” &c., “It was moved by Mr. Hall, and seconded by Mr. Sadler senr., that this meeting do approve highly of the disallowance by the magistrates of the various charges in the surveyors’ accounts objected to by the inhabitants on the 2d of October last, and also the proceedings taken by the present surveyor, Mr. William Heudebourck, for the recovery of the money due to the hamlet from Messrs. Stayner & Langton, and Messrs. Langton & Langley; and do hereby guarantee to him all legal expenses that are or may be hereafter incurred by him in prosecuting the said suit.” Signed by Mr. Cuthbert and twenty-three other persons.

LORD TENTERDEN, C. J. I think that this is a personal liability. This witness cannot be examined.

The witness was not examined.

Several witnesses were called, from whose evidence it appeared that all monies collected for highway-rates, &c. were paid over to the defendant Langton; but that none of the money ever came to the hands of the other defendant.

LORD TENTERDEN, C. J. This evidence will not support an action against the two for money had and received by them jointly.

Brougham. Both are surveyors, and though one be *the most active, [*572 yet the money is, legally speaking, received by both.

LORD TENTERDEN, C. J. To maintain an action for money had and received against two, you must give distinct evidence of something done by each touching the receipt of the money. If you mean to charge them as joint-surveyors, you must proceed under the act of Parliament.

Nonsuit.

Brougham, Denman, and Chitty, for the plaintiff.

Sir J. Scarlett, Campbell, J. L. Adolphus, and Kelly, for the defendants.

[Attornies—*D. Richardson, and Evitt, P. & L.*]

In the ensuing Term, *Brougham* moved for a new trial, but the Court refused a rule.

assessed in lieu of statute-duty; and the Court there said that that was a claim given by statute, and that the same statute which created it prescribed a particular remedy for its enforcement.

In the same case it is also laid down, that, “if a statute prohibits the doing of a thing under a penalty, without saying to whom it shall be paid, and does not prescribe any mode of recovering, an action of debt may be maintained by the party grieved.”

REX v. BROWNE. April 28.

An indictment for perjury, tried before the Lord Chief Justice, at Westminster, charged the perjury to have been committed on a trial at *Nisi Prius*, at the King's Bench Sittings. The prosecutor, to prove the trial at *Nisi Prius*, put in the *nisi prius* record, with the minute of the verdict indorsed on it by the associate. There was no *postea* drawn up, and the associate stated that none could be drawn up, as a rule for a new trial was pending: Held, to be sufficient proof of the trial at *Nisi Prius*.

INDICTMENT for perjury, on the trial at *Nisi Prius* of a cause of *Carpenter v. Jones*, which was tried before Lord Tenterden, C. J., at the sittings at Westminster.

To prove the trial of the cause of *Carpenter v. Jones*, the *nisi prius* record was put in, but there was no *postea* indorsed upon it; and the only evidence of that cause having been actually tried was the minute of the verdict indorsed on *573] the *nisi prius* record, in the handwriting of the associate. It was, however, stated by the associate, that the *postea* could not be indorsed on it, as a motion for a new trial was pending.

Denman, C. S., for the defendant, objected, that without the *postea* there was no sufficient evidence that there was a trial.

Sir J. Scarlett, Campbell, and Platt, *contra*, argued, that, under the circumstances of the present case, the minute of the associate indorsed on the *nisi prius* record was sufficient evidence of a trial.

LORD TENTERDEN, C. J., having retired and consulted with the other learned Judges, said, that in their opinion the evidence was sufficient.

The case proceeded, and the defendant was acquitted upon the facts.

Sir J. Scarlett, Campbell, and Platt, for the prosecution.

Denman, C. S., and Patteson, for the defendant.

[Attornies—Fisher, and J. & H. Laws.]

In the case of *Rex v. Smith*, 8 B. & C. 341, and Carr. Suppl. 189, which was an indictment for a conspiracy to prevent a witness from attending to give evidence in a case of felony, the indictment alleged, "that, at the General Quarter Sessions of the peace, holden at Ux, in and for the county of Monmouth, on Monday the 10th day of July, 1826, before certain of his Majesty's justices of the peace assigned, &c., a certain bill of indictment against the said H. S. was duly preferred and found." And to prove this allegation, an examined copy of the indictment (without any caption) was produced; and the deputy clerk of the peace produced the minute-book of the Quarter Sessions, to prove the holding of the Sessions: but this proof was held to be insufficient.

In the case of *Rex v. Horne Tooke*, for high treason, 25 St. Tr. 446, the minutes of the Court were received to prove the acquittal of Mr. Hardy. But in the case of *Rex v. Smith*, above *574] cited, Lord Tenterden said, that the case of *Rex v. Tooke* was distinguishable; because there the matter proved by the minutes occurred before the same Court, sitting under the same commission.

As to the minute-books of inferior Courts, see the cases of *Rex v. Haine*, Comb. 337; and *Fisher v. Lane*, 2 W. Bl. 834.

COURT OF COMMON PLEAS.

SITTINGS IN LONDON, AFTER HILARY TERM, 1829.

BEFORE LORD CHIEF JUSTICE BEST.

BREEDON v. MURPHY. Feb. 14.

The 136th section of the 5 Geo. 3, c. xxix, requiring twenty-one days' notice of action, applies to the case of an action brought against a contractor for the removal of dust, &c., appointed by the Commissioners of Sewers for the city of London, for an alleged trespass, in seizing a car supposed to contain dust, and assaulting and imprisoning the driver.

THE *first* count was for seizing, distraining, and impounding certain cattle, goods, and chattels, of the plaintiff, and detaining them for five days. The *second* count was for beating a horse of the plaintiff. The *third* count was for seizing a horse, cart, and harness; and alleged that the defendant converted and disposed of them to his own use. The *fourth* count was for assaulting and imprisoning one James Fisher, a servant of the plaintiff. Plea—Not Guilty (*a*).

The defendant was one of the scavengers appointed by the Commissioners of Sewers for the city of London. It appeared that, on the 1st of October, 1828, the plaintiff was employed to remove some rubbish by a bricklayer, who was repairing a drain within the district for which the defendant was scavenger (*b*). The defendant, *considering that the plaintiff's cart contained cinders and dust, insisted on taking it to the green-yard. He also sent the car- [575] man to the Compter, and the case was heard at the Mansion-house on the following day. The cart was detained at the green-yard for four days, and the plaintiff had to pay fourteen shillings to get it released. The plaintiff's witnesses swore to an assault upon Fisher, and also that the defendant beat the horse, and dragged him from side to side of the road (*c*).

Andrews, Serjt., for the defendant, submitted, that the plaintiff must be non-suited, as he had not given twenty-one days' notice of action, pursuant to the 57 Geo. 3, c. xxix, s. 136 (*d*).

(a) The stat. 57 Geo. 3, c. xxix, under which the defendant contended that he was justified in making the seizure, &c., complained of, allows the giving in evidence, under the general issue, of the special matter relied on as a defence.

(b) He was appointed under the 59th section of the 57 Geo. 3, c. xxix, above mentioned.

(c) By the 60th section of the above-mentioned act, it is enacted in substance, that, if any person other than the properly appointed scavengers, shall go about collecting dust, &c., any justice of the peace may, upon complaint, issue his warrant, to bring the offender before him; and also, that any person seeing the offence committed may seize the offender, together with the cart, horses, &c., and, without any warrant, convey the offender before a justice, &c.

(d) That section is as follows: "And be it further enacted, that no action or suit shall be commenced against any person or persons for any thing done in execution or pursuance of any local act or acts of Parliament relating, either exclusively, or jointly with any other objects or purposes, to the pavement of any parochial or other district within the jurisdiction of this act, until after twenty-one days' notice in writing, signed by the person or persons intending to bring such action or suit, and specifying his or their real residence, and his or their trade or profession, shall be thereof given to the clerk or clerks to the said commissioners or trustees, or other persons having the control of the pavements in any parochial or other district within the jurisdiction of this act, wherein any fact may be committed, or for which such action or suit may be brought, nor after sufficient satisfaction shall be made or tendered, nor after three calendar months next after the fact may be committed, for which such action or suit shall be so brought; and all such actions or suits shall be laid and tried in the county of Middlesex, or city of London, and not in any other county, city, or place; and that the defendant or defendants in such action or actions, suit and suits, and every of them, may plead the general issue, and give any local act or acts of Parliament relating to any such parochial or other district, or this act, and the special matter, in evidence, at any trial or trials which shall be had thereupon, and that the matter or thing for or on which such action or suit shall be brought, was done in pursuance and by the

**Wilde*, Serjt., and *Thesiger*, *contra*, contended, that the section referred to only applied to matters affecting the pavements, and also that it could not apply to a case like the present, because the notice was required to be given to the clerk of the trustees or commissioners, and not to any other person.

BEST, C. J., was of opinion that the notice was required, looking at the whole of the section, which not only mentioned any thing done in pursuance of local acts, but also any thing done in pursuance and by the authority of that act. His Lordship thought that the section was obscurely worded; but taking it altogether it appeared to him to be applicable to the case.

Wilde, Serjt. The injury to the horse can hardly be considered as coming within the act.

*577] BEST, C. J. I think it is within the act, because the *party might tender amends for any excess. I think that the act embraces the whole, and that the plaintiff must therefore be called.

Nonsuit (a).

Wilde, Serjt., and *Thesiger*, for the plaintiff.

Andrews, Serjt., *Comyn*, and *Payne*, for the defendant.

[Attornies—*Willoughby*, and *Loxley, Fry, & Thorn.*]

authority of any such local act or acts, or of this act. And if the said matter or thing shall appear to have been so done, or if it shall appear that such action or suit was brought before twenty-one days' notice was given as before directed, or that sufficient satisfaction was made or tendered or paid into Court as aforesaid, or if any such action or suit shall not be commenced within the time before for that purpose limited, or shall be laid in any other county, city, or place than as aforesaid, then the jury shall find for the defendant or defendants therein; and if a verdict shall be found for such defendant or defendants, or if the plaintiff or plaintiffs in such action or suit shall become nonsuited, or suffer a discontinuance of such action or suit, or if upon a demurrer or demurrers in such action or suit, or upon a verdict, or otherwise, judgment shall be given for the defendant or defendants therein, then, and in either of the cases aforesaid, such defendant or defendants shall have treble costs, and shall have such remedies for recovering the same as any defendant may have for the recovery of costs in other cases by law."

(a) The case was not moved. The following case has occurred lately on the same act of Parliament. Kingston Spring Assizes, 1829. *Burns v. Carter*.—Trespass against the clerk of the commissioners of pavements for the liberty of the Clink within the borough of Southwark. The defence was under a local act, relating to the paving, lighting, &c., of the clink only; which act requires that all actions for any thing done under it should be brought within six months. The present action was in point of fact commenced rather more than three months after the trespass complained of. And *Gurney*, for the defendant, objected that it was not in time, under the 136th section of the 57 Geo. 3, c. xxix. *Andrews*, Serjt., for the plaintiff, replied, that the 57 Geo. 3, did not apply, as the act complained of was done under the local act, and could not have been justified under that act; and he referred to the 138th section of the 57th Geo. 3, which saves all clauses in local acts not specifically repealed. *Alexander*, C. B., was clearly of opinion, that the words in the 136th section of the 57 Geo. 3 were sufficient to comprehend the case, and therefore directed the plaintiff to be called.

Andrews, Serjt., and *Hutchinson*, for the plaintiff.

Gurney, and *Platt*, for the defendant.

In the ensuing Easter Term, *Andrews*, Serjt., moved the Court of Common Pleas to set aside the nonsuit; but they were clearly of opinion against him, and therefore refused a rule.

*ADJOURNED SITTINGS AT WESTMINSTER, AFTER
HILARY TERM, 1829.

BEFORE LORD CHIEF JUSTICE BEST.

FISH v. TRAVERS. Feb. 16.

In trespass, where there are special pleas of justification, but no plea of the general issue, the defendant is entitled to begin, although the declaration alleges special damage.

TRESPASS for shooting a dog. The general issue was not pleaded, but there were special pleas justifying on the ground of the dog's being accustomed to bite mankind. The declaration alleged that the plaintiff was put to certain specific expenses by reason of the shooting of his dog.

Spankie, Serjt., submitted, that the defendant was entitled to begin, as the issues were upon him.

Wilde, Serjt., for the plaintiff, contended, that he was not, because there was an allegation in the declaration, that the plaintiff was put to certain expenses, which allegation, he submitted, entitled the plaintiff to begin.

Spankie, Serjt., replied that that would make no difference, and referred to *Cooper v. Wakley (a)* and *Cotton v. James (b)*.

Wilde, Serjt. The allegation of special damage distinguishes those cases from the present. In those cases there was no special damage, the damage was merely consequential, and the plaintiff could have no evidence to give upon the subject.

BEST, C. J. I cannot see any distinction between the *two kinds of [*579 damages; and therefore I think that the defendant ought to begin.

Nonsuit.

Wilde, Serjt., and *Thesiger*, for the plaintiff.

Spankie, and *Russell*, Serjts., for the defendant.

[Attornies—*Clift & F.*, and *Amory & Co.*]

(a) *Ante*, p. 474.

(b) *Ante*, p. 505.

SULLIVAN v. JONES and another. Feb. 21.

*The putting up of a board for the purpose of letting houses by a person who built them and agreed to become tenant of them from a certain time, is sufficient to enable the person for whom they were erected to recover rent on a count for use and occupation.

ASSUMPSIT.—The *first* count in the declaration was on an agreement, by which the defendants undertook to build for the plaintiff four houses, in Bedford-place, Kensington, for a sum of 2,000*l.*, to be paid by instalments—400*l.* when the foundations were laid and part of the walls built—400*l.* when the walls were built to the basement of the upper story—400*l.* when the houses were roofed and slated—and the remaining 800*l.* when they were completely finished, which they were to be by the 24th of June, 1828. The defendants also agreed to take

the houses of the plaintiff for the term of three years certain from the said 24th of June, at the clear net yearly rent of 42*l.* for each house, to be paid quarterly. There was a stipulation that it should not invalidate the agreement in case the plaintiff should pay any of the instalments before or after the time specified and agreed on. The count averred a tender and offer by the plaintiff to the defendants to let them the houses on the terms specified, and their refusal to take them. The *second* and *third* counts were for use and occupation, and the rest, the usual money counts. Plea—*non assumpsit*.

It appeared that the houses were not finished till the latter end of September, 1828, being about three months after the time in the agreement; and that, on *580] the 30th of *that month, a receipt was signed by the defendants in the following form:—

“Received, September 30th, 1828, of Mr. Danie Sullivan, 200*l.*, being the balance, in full of all claims, dues, and demands, for building four houses in Bedford-place, in the parish of Kensington, and for all party-walls and other appurtenances whatsoever.

WM. JONES, senr.

WM. JONES, junr.”

The plaintiff, instead of paying the whole 200*l.*, deducted 42*l.*, being the amount of the first quarter's rent from Midsummer to Michaelmas, 1828. The defendants took the balance, but objected to the deduction; and one of them said, I will have nothing more to do with it, and left the keys on a chair in the plaintiff's house; but the plaintiff refused to accept them. It appeared, that, after the commencement of the quarter from Michaelmas to Christmas, a board was put up at the houses, containing the words “To let, inquire within, or at Mr. Jones's, 48, High Street, Kensington.”

Bompas, Serjt., for the defendants, contended, that, as there was no evidence of any offer to let, the plaintiff could not recover upon the special count. He also contended, that the putting up of the board was not sufficient evidence of use and occupation of the houses, so as to make the defendants liable on the other counts; and that, even if it were, the plaintiff had received all he was entitled to, as, in consequence of the contract money not having been paid at Midsummer, the rent ought only to commence from the subsequent quarter-day.

Bessr, C. J. I am of opinion that the plaintiff is entitled to recover on the counts for use and occupation, as the putting up of the board was the assertion of a right of possession. I think that the plaintiff's not having paid the *581] *money at Midsummer can make no difference in the case, because he was to pay when the houses were finished, and, as they were not finished till September, he was not obliged to pay before then. But the defendants were liable for rent from Midsummer, because they had agreed, at all events, to become tenants from that time.

Verdict for the plaintiff, for 42*l.*, on the counts for use and occupation, and for the defendants on the other counts.

Wildc., Serjt., and *Payne*, for the plaintiff.

Bompas, Serjt., for the defendants.

[Attornies—*S. Robinson*, and *Bromley & Co.*]

TOWNE v. Lady GRESLEY. Feb. 21.

An apothecary may either charge for his attendances or for the medicines he sends, but he cannot be allowed to charge for both.

ASSUMPSIT for work and labour as an apothecary, and for medicines furnished. The plaintiff lived near Waterloo Bridge, and the defendant, in Conduit Street. The plaintiff had charged both for medicines and attendance.

Wilde, Serjt., submitted that the charge for attendances must be taken off, as an apothecary had no right to make any such charge.

Best, C. J. I am inclined to think that there is something in some of the acts of Parliament upon the subject of attendances; but if there is not any express provision, yet the practice is so inveterate that I cannot allow the plaintiff to charge in both ways. An apothecary may charge for attendances if he pleases, and then the Jury will say what is reasonable for those attendances, or he may charge for the medicine he sends, but he cannot be permitted to make a charge for both. I shall recommend *the Jury, in the present case, to strike off the charges for attendance and make an allowance for the medicines only. [*582]

Verdict for the plaintiff.—Damages 20*l*.

Jones, Serjt., and *Hutchinson*, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attornies—*W. H. King*, and *Sheriff*.]

This is the first case which has decided that an apothecary may charge for his attendances, provided he makes no charge for the medicine he furnishes. There has long existed in the profession a vague and undefined notion that an apothecary cannot charge for attendances. This may have arisen from the fact that an apothecary originally was only a compounder of medicines prescribed by a physician. There does not appear to be any express provision in any of the acts of Parliament upon the subject of attendances, and there is no doubt that the rule laid down by the learned Chief Justice, is, in the present state of the medical profession, the most reasonable and the best that could be adopted, both for the practitioner and the patient. There are many cases which require both skill and attendance, but which do not require the administering of much medicine; and it is well known, in point of fact, that, when attendances are not charged for, much more medicine is often sent than the case actually requires, and also that the charge for medicines generally bears no proportion to the cost price of the drugs. By giving the apothecary the option of charging for medicines or attendances, according to the nature of the case, one of those inconveniences will be removed, and the other considerably diminished.

*ADJOURNED SITTINGS IN LONDON, AFTER
HILARY TERM, 1829.

[*583]

WRIGHT v. GIBON. March 6.

The staying out by an apprentice on a Sunday evening beyond the time allowed him, is not such an unlawful absenting of himself as will enable his master to maintain an action of covenant against a person who became bound for the due performance of the indenture. If an apprentice absent himself from his master, and his master take him back, and an action be afterwards brought for such absenting, the taking back, to constitute a defence, must be specially pleaded.

COVENANT, on articles of apprenticeship, by the master against the uncle of the apprentice, who had become bound for the due performance of the articles

by his nephew. The declaration alleged, that the apprentice did not nor would faithfully and diligently serve the plaintiff as his apprentice during the term, according to the tenor and effect, true intent, and meaning, of the articles of agreement in that behalf, but wholly neglected so to do, and, on the contrary thereof, during the said term, to wit, on, &c., did *unlawfully absent himself from the service of his master, &c.* The defendant pleaded, that the apprentice did faithfully and diligently serve, and *did not unlawfully absent himself, &c.*

From the evidence, it appeared that the apprentice, having received permission to be absent, stayed away on one occasion three or four days, and, on another, a week beyond the time allowed; but after this, on the application of his friends, the plaintiff received him back, but stipulated that he should be always in on a Sunday evening by eight o'clock. Notwithstanding this, on one Sunday evening, having been to see a friend, he did not return till twenty minutes past ten.

Jones, Serjt., for the defendant. Within the meaning of a covenant of this description, and particularly as against a *surety*, it is not every little occasional absence (though they may be the subject of reprehension) that will constitute an *unlawful absents*.

Best, C. J. Perhaps the being away on a Sunday may *not be an unlawful absents; but it appears that the apprentice was absent for three or four days on one occasion, and for a week on another. I think you cannot get over that.

Jones, Serjt. But with respect to those instances, the master's conduct afterwards is a condonation of the offence.

Taddy, Serjt. There is no plea to that effect.

Best, C. J., was of opinion that the condonation must be pleaded specially, and, in his summing up, told the Jury, that an absence for half an hour beyond the proper time on a Sunday evening would not, in his opinion, be an unlawful absents within the meaning of the covenant, as against the defendant, who was a surety, because the words had reference to an absents from business.

Verdict for the plaintiff.

Taddy, Serjt., and *Busby*, for the plaintiff.

Jones, Serjt., and *Chitty*, for the defendant.

[Attornies—*Watson & B.*, and *Patten & Son.*]

OXFORD SPRING CIRCUIT.

[*583]

1829.

BEFORE MR. JUSTICE PARK AND MR. JUSTICE J. PARKE.

BERKSHIRE ASSIZES.

BEFORE MR. JUSTICE J. PARKE.

REX v. WHEELER, TURNER, and DAVIS. *March 6.*

Sacrilege.—If a church tower be built higher than the church, and have a separate roof, but have no outer door, and be only accessible from the body of the church, from which it is not separated by any partition, this tower is a part of the church within the meaning of the stat. 7 & 8 Geo. 4, c. 29, s. 10.

SACRILEGE.—The prisoners were charged with breaking into the parish church of Purley, and stealing two surplices and a scarf. It appeared that the surplices and scarf were stolen from a box kept in the church tower. This tower was built higher than the church, and had a separate roof, but it had no outer door, the only way of going into it being through the body of the church, from which the tower was not separated by a door or partition of any kind.

The prisoners' counsel objected, that the stealing of articles deposited in the church tower was not sacrilege within the meaning of the 10th section of the statute 7 & 8 Geo. 4, c. 29, under which, to constitute the crime of sacrilege, it was necessary that the party should not only break into or out of a church or chapel; but should steal *therein* some chattel.

Mr. Justice J. PARKE. I am of opinion that a church tower, circumstanced as this tower is, must be taken to be *part of the church; and I shall hold, that the stealing of these articles in this tower is a stealing in the church, within the meaning of this act. [*586]

Verdict—Guilty (a).

Shepherd, and *Stone*, for the prosecution.

Justice, *Carrington*, and *Tyrwhitt*, for the respective prisoners.

[Attornies—*Blandy & Andrews*, for the prosecution; *Moggridge*, *Frankum*, *Compigné*, & *D.*, for the prisoners.]

(a) By the stat. 7 & 8 Geo. 4, c. 29, s. 10, it is enacted, "That if any person shall break and enter any church or chapel, and steal therein any chattel, or, having stolen any chattel in any church or chapel, shall break out of the same, every such offender, being convicted thereof, shall suffer death as a felon."

In the case of *Rex v. Rourke*, Russ. & R. C. C. R. 386, it was held, that to constitute the crime of sacrilege it was not essential that the articles stolen should be goods used for divine service. That case was decided on the stat. 1 Edw. 6, c. 12, s. 10 (now repealed), but it seems to be equally applicable to the provisions of the stat. 7 & 8 Geo. 4, c. 29, s. 10.

(Civil Side.)

BEFORE MR. JUSTICE PARK.

LYONS v. GOLDING. *March 3.*

A party cannot maintain trover against a constable for a wrongful taking of goods under a justice's warrant, without joining the justice as a defendant, if perusal and copy of the warrant have been given under the stat. 24 Geo. 2, c. 44, s. 6.

TROVER for pocket-handkerchiefs. Plea—General issue. It appeared that the plaintiff was a fruit salesman, and that the defendant, who was a constable, had entered the plaintiff's house, situate at Reading, under a warrant to search for stolen goods, and had taken away the articles in question; and that, after this, *587] the plaintiff was *examined before the mayor of Reading, as to the way in which he became possessed of these articles.

For the defence, a search warrant, under the hand and seal of the mayor of Reading, directing the defendant to search the plaintiff's house for stolen goods, was put in; and it was shown, that, under this warrant, the defendant had taken the articles in question. There had been a demand of perusal and copy of the warrant, which had been granted by the defendant.

Talfourd, for the defendant, contended, that, as the defendant acted under the warrant of a justice of the peace, and had given perusal and copy of the warrant under the statute 24 Geo. 2, c. 44, s. 6,—there must be a verdict for the defendant, as the justice had not been joined in the action.

Taunton and *Curwood*, *contra*, argued, that that statute only applied to cases where a plaintiff sought to recover uncertain damages for a supposed injury, and not to cases where the party went merely to recover back the exact amount or value of money or property which had come to the constable's hands; and they contended, that, as it had been held that a party might recover in replevin or in an action for money had and received, without any demand of perusal and copy of the warrant; so he might likewise recover in trover, as in that form of action he would only obtain a verdict for the value of his goods.

Mr. Justice PARK. Trover is an action in tort, for the recovery of damages; and I think that, to entitle a plaintiff to maintain such an action against a constable acting under a justice's warrant, he must demand perusal and copy of the warrant, under the stat. 24 Geo. 2, c. 44; and if perusal and copy be given, he cannot recover, unless he join the justice as a defendant.

Verdict for the defendant.

*588] **Taunton*, and *Curwood*, for the plaintiff.
Talfourd, for the defendant.

[Attornies—*E. Isaacs*, and *Blandy & A.*]

IN the ensuing Term, *Taunton* moved to set aside the verdict; but the Court refused a rule.

By the stat. 24 Geo. 2, c. 44, s. 6, it is enacted, "that no action shall be brought against any constable, headborough, or other officer, or against any person or persons acting by his order and in his aid, for any thing done in obedience to any warrant under the hand or seal of any Justice of the peace, until demand hath been made or left at the usual place of his abode, by the party or parties intending to bring such action, or by his, her, or their attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and

the same hath been refused or neglected for the space of six days after such demand; and in case after such demand and compliance therewith, by showing the said warrant to, and permitting a copy to be taken thereof by the party demanding the same, any action shall be brought against such constable, headborough, or other officer, or against such person or persons acting in his aid for any such cause as aforesaid, without making the Justice or Justices who signed or sealed the said warrant defendant or defendants, that on producing and proving such warrant at the trial of such action, the Jury shall give their verdict for the defendant or defendants, notwithstanding any defect of jurisdiction in such Justice or Justices; and if such action be brought jointly against such Justice or Justices, and also against such constable, headborough, or other officer, or person or persons acting in his or their aid, as aforesaid, then, on proof of such warrant, the Jury shall find for such constable, headborough, or other officer, and for such person and persons so acting as aforesaid, notwithstanding such defect of jurisdiction as aforesaid; and if the verdict shall be given against the Justice or Justices, that in such case the plaintiff or plaintiffs shall recover his, her, or their costs against him or them, to be taxed in such manner by the proper officer, as to include such costs as such plaintiff or plaintiffs are liable to pay to such defendant or defendants for whom such verdict shall be found as aforesaid."

In B. N. P. 24, Mr. Justice *Buller* says, "This act only extends to actions of tort, and therefore, where an action for money had and received was brought against an officer who had levied money, on a conviction by a justice of the peace, the conviction having been quashed, [589] it was held, that a demand of a copy of the warrant was not necessary;" and in the case of *Fletcher v. Wilkins*, 6 Ea. 283, it was determined, that *replevin* was not an action within the meaning of the stat. 24 Geo. 2, c. 44.

OXFORD ASSIZES.

BEFORE MR. JUSTICE PARK.

REX v. JAMES BARKER. *March 6.*

On the trial of an indictment for a rape, it was held that the prisoner's counsel might ask the prosecutrix the following questions, with a view to contradict her—"Were you not on—[since the time of the alleged offence] walking in the High Street, at Oxford, to look out for men?" "Were you not on—[since the time of the alleged offence] walking in High Street, with a woman reputed to be a common prostitute?" Held also, that evidence might be adduced by the prisoner to show the general light character of the prosecutrix, and that general evidence might be given of her being a street walker; but *semble*, that evidence of specific acts of criminality by her would not be admissible.

The prisoner was indicted for having, on the 2d day of December, 1828, committed a rape upon Mary Anne Saunders.

Curwood, for the prisoner, wished to ask the prosecutrix whether, since the time of the alleged rape, she had not walked the High Street at Oxford.

Mr. Justice PARK. I have some doubt whether this would be evidence. In actions for criminal conversation, the conduct of the wife before the alleged adultery is no doubt highly material, and is clearly admissible, but not her conduct afterwards, because that may have been caused by the conduct of the party himself.

Curwood. I submit that there is a distinction between the two cases. An action for criminal conversation is brought for the purpose of ascertaining the injury that the husband has received, but, in the present case, the only use of the question is to try the credit of the woman.

Mr. Justice PARK. I have great doubt whether, since *the case of [590] *Rex v. Hodgson* (a), I can admit you to prove particular acts of crimi-

(a) In the case of *Rex v. Hodgson*, Russ. & R. C. C. R. 211, which was an indictment for a rape, the prisoner's counsel put these questions to the prosecutrix,—Whether she had not before had connection with other persons? and whether she had not had connection with a particular

nality in the prosecutrix, though you may certainly give evidence of general lightness of character, and general evidence of her being a street walker.

Curwood, for the prisoner, wished to put the following questions with a view to contradict the prosecutrix. "Were you not, on Friday last, walking the High Street of Oxford, to look out for men?" and, "Were you not, on Friday last, walking in the High Street with a woman reputed to be a common prostitute?"

Mr. Justice PARK. I will write down these questions, and ask my learned brother whether he thinks they can be put.

*591] *The questions were submitted to Mr. Justice J. Parke, and after they had been so, Mr. Justice PARK said,—As my learned brother thinks they are legal questions, I shall allow them to be put.

The questions were put, and both were answered in the negative.

The witness called to contradict the prosecutrix did not answer.

Verdict—Guilty (a).

Justice, for the prosecution.

Curwood, for the prisoner.

[Attorneys—*Walsh*, and ———.]

person named *Wood*, B., held that she was not bound to answer these questions. The prisoner's counsel then offered to call a witness, to prove that the prosecutrix had been caught in bed with a young man, about a year before this charge, and offered to call the young man to prove that he had had connection with her. But the learned Baron held that all this was not admissible, as it was evidence of particular facts not connected with the present charge. The twelve Judges confirmed this opinion of *Wood*, B., as to all the points. In the case of *Rees v. Clarke*, 2 Stark. N. P. C. 241, it was held, that, where on an indictment for an assault with intent to commit a rape, the prosecutrix has been cross-examined as to crimes committed by her several years before the alleged offence, witnesses might be called to show that her character had since been good; and in that case, *Holroyd*, J., observed, "In the case of an indictment for a rape, evidence that the woman had a bad character previous to the supposed commission of the offence, is admissible, but the defendant cannot go into evidence of particular facts. This is the law upon an indictment for a rape, and I am of opinion that the same principles apply to the case of an indictment for an assault with intent to commit a rape."

(a) The prisoner was left for execution, but was afterwards pardoned, as it was discovered that the imputations made on the character of the prosecutrix were founded in truth.

WORCESTER ASSIZES.

BEFORE MR. JUSTICE PARK.

REX v. JOHN HUNTER. March 10.

If on an indictment for forgery being presented to the Grand Jury, it appear that the forged instrument cannot be produced, either from its being in the hands of the prisoner, or from any other sufficient cause, the Grand Jury may receive secondary evidence of its contents.

An indictment for forgery being presented to the Grand Jury, a witness declined to produce certain deeds before them: Held, that, if the deeds form a part of the evidence of the witness's title to his own estate, he is not compellable to produce them, but that, if they do not, the Grand Jury may compel their production.

If the trial of an indictment for felony is postponed at the instance of the prisoner, on account of the illness of a witness, the prisoner is never required to pay the costs of the prosecutor. Where the trial of a case of felony is postponed, the Court will not make any order for the expenses, till after the trial has actually taken place.

A BILL of indictment was presented to the Grand Jury, against Mr. Hunter, charging him with having uttered a forged deed of demise. The forgery

imputed was by an alteration of the deed after it was executed. In several of *the counts of the indictment, the deed was set out verbatim, and in others the deed was described, and only that part set out in which the [*592 alleged forgery was committed (a).

After the bill was presented to the Grand Jury, Lord Viscount Deerhurst, and the rest of the Grand Jurors, came into Court; and Lord Deerhurst stated, that a lady named Parratt, who was a witness on this indictment, had refused to produce certain deeds, which it was material for the Grand Jury to see; neither of these deeds being the deed alleged to be forged: and his Lordship further stated, that the Grand Jury wished to know whether they could compel the production of these deeds.

Mr. Justice PARK. I will confer with my learned brother on this point.

Mr. Justice PARK (having conferred with Mr. Justice J. Parke), said,—My learned brother and myself are of opinion, that, if these deeds form a part of the evidence of this lady's title to any part of her own estate, you cannot compel her to produce them; but, if it should appear that they do not relate to the title of any part of her estate, she is bound to produce them before you.

Lord Deerhurst. There is another question that the Grand Jury wish to be informed upon, which is this: the deed alleged to be forged, it appears, cannot be produced before us, it being in the possession of the party accused (b); and the Grand Jury wish to know, whether they can return a true bill for forgery, without the instrument alleged to be forged being produced before them.

*Mr. Justice PARK. If it appears to you, that the instrument alleged to be forged, either from its being in the possession of the prisoner, or [*593 for any other sufficient cause, cannot be produced before you, I am of opinion, that you may receive secondary evidence of its contents.

The Grand Jury retired, and soon after returned into Court with a true bill against Mr. Hunter, for forgery.

March 11. Mr. Hunter having surrendered, his counsel applied to put off the trial, on affidavits stating the absence of a material witness. This application was not opposed, but—

Campbell, for the prosecution, stated that several witnesses in support of the charge had come from a great distance; and asked that the trial should be postponed on payment of costs by the prisoner, which he stated to be the constant practice in cases of assaults and other misdemeanours.

Mr. Justice PARK. I never knew an instance of a prisoner charged with a felony being put upon the terms of paying costs. It is never done.

Campbell then applied for the usual order for the prosecutor's expenses, under the stat. 7 Geo. 4, c. 64, s. 22.

Mr. Justice PARK. When a trial for felony is postponed, the practice is, not to allow the prosecutor his expenses, till the subsequent assize at which the trial comes on.

The trial was postponed and Mr. Hunter was admitted to bail (c).

*Campbell, Ludlow, Serjt., Curwood, and Godson, for the prosecution. [*594
Taunton, Russell, Serjt., and C. Phillips, for the prisoner.

[Attornies—E. W. & C. Oldaker, and Freeman.]

(a) These counts were in the same form as the indictment in *Japhet Crook's case*. That case is reported in 3 Str. 901, and the form of the indictment will be found in Cro. Cir. Comp. 335, and 2 Stark. C. L. 506.

(b) Previously to the commencement of the Assizes, the attorney for the prosecution had given Mr. Hunter notice to produce this deed before the Grand Jury, and also, in case a true bill should be found, to produce it at the trial.

(c) Mr. Hunter had been on bail previous to the finding of the bill, and his counsel wished to have the recognizances of his bail enlarged till the next Assizes; but Mr. Justice Park said, that it could not be done, as this would be to increase the responsibility of the bail, without their consent. All that the bail undertook for was, the appearance of the party at a given time, and, if he appeared at that time, their responsibility was at an end, unless they chose to enter into fresh recognizances. The bail therefore entered into new recognizances for the appearance * principal at the ensuing Assizes.

STAFFORD ASSIZES.

BEFORE MR. JUSTICE PARK.

RYDER v. MALBON. *March 15.*

In replevin, the defendant in his avowry stated that the distress was for rent arrear, and that the plaintiff held the lands on certain terms; however, on the plaintiff's lease being put in, it appeared that he held on other and different terms: Held, that this variance was not amendable under the stat. 9 Geo. 4, c. 15.

Held, also, that that act only applies to cases where some particular written instrument is professed to be set out or recited in the pleading.

REPLEVIN.—There were eighteen avowries for rent arrear. Pleas in bar, *non tenuit*, and *riens in arrear*.

The plaintiff held under a lease, granted to him by William Malbon, to whom the plaintiff claimed to be heir. This lease, when produced, showed that the terms of the plaintiff's holding were different from those stated in any of the eighteen avowries.

Peake, Serjt., applied to the learned Judge for leave to amend the record, contending that this was a variance caused by the mis-recital of a written instrument, and therefore amendable under the stat. 9 Geo. 4, c. 15.

Mr. Justice PARK. This is not a case contemplated by *that act. *595] There is no recital of any particular deed, it is a statement of the tenancy, which is really the whole case. If I were to suffer you to amend your avowries, they must be let in to plead *de novo*. All that cannot be done here

Peake, Serjt., and *R. V. Richards*, for the defendant. Before the stat. 11 Geo. 2, c. 19, s. 22 (a), we must have recited the lease in our avowries, and then any mis-recital would have been clearly amendable. Now it would be a great hardship on the defendant, if he is not allowed to amend, merely because he uses the short form of pleading given by that statute, instead of reciting the entire deed in his plea.

Mr. Justice PARK. I am most clearly of opinion that this case does not fall within either the spirit or the letter of this act of Parliament. I cannot allow you to amend.

Verdict for the plaintiff.

Mr. Justice PARK. I am of opinion, that this act of Parliament only applies to cases where some particular written instrument is professed to be set out or recited in the pleading.

Campbell, and *J. Jervis*, for the plaintiff.

Peake, Serjt., and *R. V. Richards*, for the defendant.

[Attornies—*Read*, and *Hales*.]

(a) The sect. of the stat. 11 Geo. 2, c. 19, after reciting that great difficulties often arise in making avowries or conusance upon distresses for rent, proceeds to enact, "that it shall and may be lawful to and for all defendants in replevin to avow or make conusance generally, that the plaintiffs in replevin, or other tenants of the lands and tenements whereon such distress was made, enjoyed the same under a grant or demise at such a certain rent during the time wherein the rent distrained for incurred, which rent was then and still remains due;" "without further setting forth the grant, tenure, demise, or title of such landlord or landlords, lessor or lessors."

*WYNNE v. ANDERSON and five others. *March 16.*

If there be a joint action of trespass against six defendants, and the plaintiff prove a joint trespass committed by all, and then go on to prove another act of trespass by three of them, expecting to connect the other three with this also, but fail in so doing, the latter three are entitled to be acquitted before the defence is opened, as the plaintiff must be taken to have elected to waive the joint trespass, and to have gone on as against those three for the second act of trespass only.

If an action be brought against six, for a single act of trespass, and the plaintiff by his evidence only fix three of them, the Judge will not direct the other three to be acquitted, till all the evidence for the defence is gone through.

TRESPASS, against the six defendants, for breaking and entering the plaintiff's house, and taking his goods, and converting them to their own use. *Plea*—General issue.

The evidence on the part of the plaintiff went to show, that all the six defendants assisted in taking the goods; and the plaintiff's counsel were going on to show that two of the defendants sold them, a third receiving the proceeds of the sale.

Campbell, for the defendants, objected to evidence being given of any act respecting the sale by two of the defendants, and receipt of the money by the third, unless the plaintiff's counsel would abandon the case as to the other three who were proved to have been absent at the time of the sale.

Taunton, *contra*, stated that he expected by other evidence to connect the three remaining defendants with the sale.

The evidence was received, but none of the plaintiff's witnesses proved any thing to connect these three defendants with the sale.

Campbell, at the close of the plaintiff's case, asked to have them acquitted.

Taunton, for the plaintiff. In cases of trespass, where the plaintiff has by his evidence affected only some of the defendants, the practice has always been not to take an acquittal of the others as soon as the plaintiff has closed his case, but to let the whole of the evidence be gone through on both sides, to see whether the remaining *defendants are not affected by the witnesses for the defence. This rule I have heard laid down by Mr. Justice *Le Blanc* in [*597 several cases.

Campbell, for the defendants. If this plaintiff meant to recover against all the six defendants for the joint trespass, he was not at liberty to go into evidence of any thing respecting the sale, as that was the act of three only. By doing that, I submit that he must be taken to have abandoned the case as against the other three.

Mr. Justice **PARK**. I think that this case is very distinguishable from those in which several persons are charged with a single act of trespass, but in which the plaintiff, by his evidence, does not reach the whole number of defendants, because here the plaintiff, having proved one joint trespass against all, abandons that, and goes into evidence of a wrongful sale, in which only three of the parties were in any way concerned. Now, I think that, by doing so, the plaintiff must be taken to have elected to proceed against those three only, and to have abandoned the other three. That being so, I think that those other three defendants have a right to be acquitted before the other defendants go into their case.

Three of the defendants were accordingly acquitted, and

Campbell addressed the Jury, on behalf of the other three.

Verdict for the plaintiff, against the three defendants who were concerned in the sale of the goods.

* *Taunton*, and *C. Phillips*, for the plaintiff.

Campbell, and *Whateley*, for the defendants.

[*599]

[Attornies—*Whalley*, and *Passman*.]

In the case of *Bonser v. Curtis* and others, Sitt. after M. T. 1820, (MS.) *Abbott, C. J.*, observed, that it is a matter of discretion with the Judge, whether the Jury shall, in the middle of the cause, acquit a particular defendant, against whom there is no case made out, to make him a witness for the others.

SHROPSHIRE ASSIZES.

BEFORE MR. JUSTICE PARK.

REX v. JOHN PIKE, and MARY his Wife. *March 21.*

A declaration, *in articulo mortis*, made by a child only four years old, is not admissible in evidence, on the trial of an indictment for the murder of such child, because a child of such tender years could not have had that idea of a future state which is necessary to make such a declaration admissible.

THE two prisoners were indicted for the wilful murder of their niece, Elizabeth Pike, a child aged four years, by beating on the head.

Shortly before her death, the child made a statement to her mother, as to the manner in which she had been treated by the two prisoners.

J. Jervis, for the prosecution, offered to give this declaration in evidence, if the learned Judge should think it admissible as a declaration *in articulo mortis*.

Mr. Justice PARK. We allow the declaration of persons *in articulo mortis* to be given in evidence, if it appear that the person making such declaration was then under the deep impression that he was soon to render an account to his Maker. Now, as this child was but four years old, it is quite impossible that she, however precocious her mind, could have had that idea of a future state which is necessary to make such a declaration admissible. In the deposition of the mother, to whom this declaration was made, I find it stated, that the deceased asked the deponent to lie down by her, which she did, and that, on the child's asking her how long she would lie by *599] her, the *deponent replied that she would lie by her till she got up; and that, upon her saying this, the deceased said that she should never get up any more; and then went on to tell her mother of something that had happened. Now this, though it shows that the deceased thought she was dying, does not show that she had any idea of a future state; indeed I think, that, from her age, we must take it that she could not possibly have had any idea of that kind. I thought, when I read the depositions, that this declaration was not admissible, and I so told the Grand Jury. Since that, I have mentioned the point to my learned brother (Mr. Justice *J. Parke*), and also the ground on which I had formed my opinion, and he quite agrees with the view I have taken of the case.

Verdict—Not Guilty.

J. Jervis, for the prosecution.

In the case of *Res v. Hicks*, 1 Stark. N. P. C. 523, Lord *Ellenborough* says, that, where a declaration has been made by a party *in articulo mortis*, the question whether, under all the surrounding circumstances, such declaration is admissible in evidence, is a question entirely for the consideration of the Court; and his Lordship added that the point had been considered by the Judges on a question proposed to them by the Judges in Ireland, and that this was their unanimous opinion. As to the cases in which declarations *in articulo mortis* are admissible, and as to what are to be considered as declarations *in articulo mortis*, see 1 Phill. Law of Evd. 225 and 85; and Carr. Supp. 232.

*HEREFORD ASSIZES.

BEFORE MR. JUSTICE J. PARKE.

REX v. CHARLES ADAMS. *March 24.*

If the *only evidence* against a prisoner charged with a larceny, be, that stolen property was found in his possession three months after the loss of it, the Judge will direct an acquittal, without calling upon him for his defence.

THE prisoner was indicted for a larceny, in stealing an axe, a saw, and a mattock, the property of Joseph Powell.

The prosecutor proved that he missed the tools on a certain day, and another witness proved that he found them in the possession of the prisoner three months after they were missed.

Mr. Justice J. PARKE directed an acquittal, without calling on the prisoner for his defence, observing, that a possession of stolen property three months after it was lost, was not such a recent possession as to put the prisoner upon showing how he came by it, unless there was evidence of something more than the mere fact of the property being in his possession at that distance of time after the loss of it.

Verdict—Not Guilty.

Vide ante, Vol. 2, p. 452.

MONMOUTH ASSIZES.

BEFORE MR. JUSTICE PARK.

REX v. EDWARD BARNETT. *March 30.*

The Court will direct money found upon a prisoner to be restored to him before trial, if it appear by the depositions that it is in no way material to the charge on which he is to be tried.

THE prisoner had been committed, on the coroner's inquisition, on a charge of murder, and, on the first day of *the Assize, *Curwood*, for the prisoner, [*601 stated, that a sum of 31*l.* 15*s.*, which had been found in the pocket of the prisoner, was in the hands of a constable; and he stated, that this sum of money was in no way material to the charge against the prisoner, nor was it alleged that the money had been stolen from any person; under these circumstances, he applied to the learned Judge to order that it should be returned to the prisoner before the trial, as, without this money, he had not the means of defraying the expenses of his defence.

Mr. Justice PARK. I have read the depositions, and I find that this sum of money is not in any way material as evidence on the charge made against the prisoner. I shall therefore order it to be delivered to him forthwith; and the

constable who has the money must go to the gaol and deliver the amount into the prisoner's own hand.

This was accordingly done.

Russell, Serj., and *Justits*, for the prosecution.

Curwood, and *Carrington*, for the prisoner.

[Attornies—*T. & W. A. Williams*, and *Owen*.]

We are informed that *Barrington*, the celebrated pickpocket, made a similar application, at the Old Bailey, at the time of his arraignment on a charge of larceny from the person; and that *Eyre*, C. B., directed the money found upon him to be forthwith restored, as it did not appear by the depositions that it was in any way material to the charge on which he was to take his trial.

*602]

**REX v. DAVID BOWEN. March 30.*

If the names of the Jurors be not set out in the caption of a coroner's inquisition, and the inquisition be not signed by the Jurors with their names at length, the inquisition is bad. If some of the jurors sign with their marks, such marks ought to be verified by an attestation.

MANSLAUGHTER.—The coroner's inquisition was in the following form:—
 "Monmouthshire, to wit, an inquisition indented, taken for our Sovereign Lord the King, at the house of J. G., in the parish of L., in the county of M., on Monday, the 22d day of September, in the 9 Geo. 4, before E. H. P., gentleman, one of the coroners of our said Lord the King, for the said county, on view of the body of David Lewis, then and there lying dead, upon the oath of the several persons whose names are hereunder written and seals affixed, good and lawful men of the said county, duly chosen, and who, being then and there duly sworn and charged to inquire for our said Lord the King, when, how, and by what means the said David Lewis came to his death, do, upon their oath, say that David Bowen, late of, &c., on, &c., with force and arms, &c., in and upon, &c., did make an assault." The inquisition then went on to charge a death by beating, and was signed with five names at length, besides that of the coroner, and with five signatures, and two marks, in the following form:—

JNO. SAMUEL.

ABM. ROSSER.

SAML. DEAKIN.

EDMD. SMITH.

THOM. GREGORY.

The mark of

+

WILLIAM JAMES.

The mark of

+

RICHARD MORGAN.

Busby, for the prisoner. I submit, that this inquisition must be quashed. The first objection is, that the names of the jurors do not appear in any part of the inquisition, they are not set forth in the body of the inquisition, and the signatures are several of them abbreviated; so that the names of the jurors no where appear at length. There is also another objection, which is this, that two of the
 *603] jurors *are marksmen, and have made their mark; now I submit, that these marks ought to have had an attestation.

Mr. Justice PARK. I see the letters Edmd. put before one of the surnames. How can I say that that must mean Edmund? It may mean Edmead. It often happens that persons are baptised by surnames. With respect to the marks, I certainly think that they ought to have been verified by an attestation. It appears to me that the inquisition is bad upon both points.

Inquisition quashed.

Watson, for the prosecution.

Busby, for the prisoner.

[Attornies—*Gabb*, and *T. & W. A. Williams*.]

GLOUCESTER ASSIZES.

BEFORE MR. JUSTICE J. PARKE.

REX v. THOMAS HIGGINS. *April 6.*

If a prosecutor gives in evidence a declaration made by a prisoner, it becomes evidence for the prisoner, as well as against him, but, like all other evidence, the Jury may give credit to one part of it and not to another.

THE prisoner was charged with a larceny, in stealing two yards of woollen cloth, the property of John Cornock.

It appeared, that the prosecutor was at an inn at Berkeley, and that, having the piece of cloth with him, he left it on a chair in one of the rooms of the inn while he went out, and that on his return he missed the cloth. It was proved, that, in about four hours after the loss of the cloth, the prisoner sold it at a place eight miles distant from Berkeley. The statement of the prisoner, made before the magistrate, was read as evidence on the part of the prosecution. In this the prisoner said, "that the cloth was honestly bought and paid for."

*Mr. Justice J. PARKE (in summing up). In this case the prosecutor has given evidence of what the prisoner said before the magistrate. [*604 Now, what a prisoner says is not evidence, unless the prosecutor chooses to make it so, by using it as a part of his case against the prisoner; however, if the prosecutor makes the prisoner's declaration evidence, it then becomes evidence for the prisoner, as well as against him; but still, like all evidence given in any case, it is for you to say whether you believe it. If you believe that the prisoner really bought and paid for this cloth, as he says he did, you ought to acquit him; but if, from his selling the cloth so very soon after it was lost, and that, too, at a distance of eight miles, you feel satisfied that the statement of his buying it is all false, then you must find him guilty.

Verdict—Guilty.

Carrington, for the prosecution.

[Attornies—*Croome & Smith*.]

1828.

BEFORE LORD TENTERDEN, C. J., AND MR. BARON GARROW.

KENT ASSIZES.

BEFORE MR. BARON GARROW.

REX v. JAMES SCUDDER.

On an indictment for administering a drug to a woman to procure abortion, *she not being quick with child*, if it appear that the woman was not with child at all, the prisoner must be acquitted, although it appear that the prisoner thought that she was with child, and gave her the drug with an intent to destroy such child.

INDICTMENT on the statute 43 Geo. 3, c. 58, s. 2 (a). The *first* count of *606] the indictment charged that the *prisoner did administer (b) to one Susan Clouder a large quantity of a certain drug called oil of savin, with intent to procure a miscarriage, she, the said S. C., at the time, &c., "being with child, but not quick with child." The *second* count charged that it was administered to her, "she, the said S. C., at the time, &c., not being quick with child." There were two other counts, stating it to be "a certain mixture to the jurors aforesaid unknown," instead of stating it to be oil of savin (c).

It appeared in evidence (d) that the prisoner, who had had connection with Susan Clouder, had given her a bottle containing some liquid, which she drank, and that, upon her asking the prisoner why he had given it, he said, "to kill the little one." She however admitted, on cross-examination, that she had never been with child at all.

(a) The stat. 43 Geo. 3, c. 58, is wholly repealed by the stat. 9 Geo. 4, c. 31; however, by sect. 10 of the latter stat. it is enacted, "That if any person, with intent to procure the miscarriage of any woman *not being, or not being proved to be, then quick with child*, unlawfully and maliciously shall administer to her, or cause to be taken by her any medicine, or other thing, or shall use any instrument or other means whatever with the like intent, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment."

Although this decision was under the stat. 43 Geo. 3, c. 58, it is equally applicable to the provisions of the stat. 9 Geo. 4, c. 31, s. 10, as the passage above set forth in italics is *verbatim* the same in both statutes.

(b) In the case of *Rez v. Codman*, Carr. Supp. 237, which was an indictment for administering poison to E. D., with intent to murder her, the proof was, that the prisoner gave her a bit of cake, which contained arsenic and sulphate of copper. She put this into her mouth and spit it out, but did not swallow any part. This was held to be not sufficient; and the twelve Judges decided that it was not an administering unless the poison was taken into the stomach.

(c) The form of the indictment will be found in Arch. C. L. 235.

(d) In the case of *Rez v. Hutchinson*, 2 B. & C. 608, n., it was held, that on an indictment for this offence, the dying declaration of the woman to whom the drug was administered is not admissible in evidence.

Stee, for the prisoner, submitted, that, on this evidence, the prisoner was entitled to be acquitted, as no miscarriage could possibly have been produced.

J. Espinasse, contra, relied on the case of *Rex v. Phillips (a)*, and contended that the offence was complete if *the drug were given with an *intent* to procure abortion; and that here the intention was evident, as the prisoner [*607 said that he had given it "to kill the little one."

GARROW, B., expressed a doubt as to the authority of the case cited, and having conferred with Lord *Tenterden*, C. J., his Lordship left the case to the Jury, who found the prisoner

Guilty.

GARROW, B., then reserved the case for the consideration of the twelve Judges; who held the conviction wrong, and decided, that, to constitute this offence, it was necessary that the woman *should be with child*.

(a) 3 Camp. 76. In that case, where the indictment was similar to that in the present case, *Lawrence, J.*, said, "It is immaterial whether the abrub was savin or not, or whether or not it was capable of procuring abortion, or even whether the woman was actually with child; if the prisoner believed at the time that it would procure abortion, and administered it with that intent, the case is within the statute."

CASES

AT

NISI PRIUS.

COURT OF KING'S BENCH.

THIRD SITTING AT WESTMINSTER, IN EASTER TERM, 1829.

BEFORE LORD TENTERDEN, C. J.

BARWISE v. RUSSELL. May 29.

If, in an action on a bond against a surety, non-payment by the principal, after a notice in writing required by the condition, be averred in the declaration, and the defendant suffer judgment by default, it is not necessary to give evidence of the notice, because the allegations of the declaration are not put in issue. If the breach be assigned under the statute on the record after judgment—*Semle*, that it will be otherwise.

THE plaintiff declared against the defendant as administratrix *de bonis non* of William Weston, deceased. The declaration was upon a bond entered into by one William Strickland, and the said William Weston, whereby they became bound in the sum of 2000*l.*, to the said W. S. to the full extent of that sum, the said W. W. to the extent of, but not exceeding 600*l.* The declaration then stated the condition, which (after reciting that W. S. was indebted to Weston Barwise, deceased, and the said plaintiff, for money lent, &c.) was, that, if the said W. S. should, within three calendar months after he should be required in writing so to do, pay the said sum of 600*l.*, then the bond should be void. There was a proviso that the said W. W. should not be liable to pay in his lifetime, nor his executors till six months after his death; and also that he should not be liable to pay any interest. The declaration then averred, that *notice in writing was given to the said William Strickland, but that he did not, within three* *609] *calendar months after he was required so to do, pay the said *sum of* 600*l.*; and that six months had elapsed since the death of the said W. W., whereby an action had accrued, &c.

The defendant suffered judgment by default, and the cause came before Lord TENTERDEN, C. J., upon a writ of inquiry.

The bond was produced in Court and read. The cause was not defended, and his Lordship, after some consideration, was of opinion that the evidence given was all that was required. His Lordship observed, that, if it had been a case in which breaches had been suggested under the statute upon the record

after judgment, he should have thought it necessary to prove the notice to Strickland; but, as the breach was assigned in the declaration, the averments of which the defendant had not put in issue, it was unnecessary to enter into such proof.

The damages were accordingly assessed at 600*l*.

T. Peake, for the plaintiff.

[Attornies—T. Wany, and Person.]

In the case of *Hodgkinson v. Marsden*, 2 Camp. 121, there was a suggestion of the condition of a bond entered on the roll after judgment on demurrer, and it was successfully contended by the defendant's counsel that it was necessary, in addition to the production of the bond, to show that it was the same bond as that upon which the judgment was obtained, because the defendant, upon that state of the record, had had no opportunity of controverting the facts stated in the suggestion. It was admitted, that it would have been otherwise if the condition of the bond had been set out in the declaration.

*SITTINGS AT WESTMINSTER, AFTER EASTER
TERM, 1829.

[*610

BEFORE LORD TENTERDEN, C. J.

DOE, on the demise of HUGHES, v. DYBALL. June 3.

If, in an ejectment, it be proved that the lessor of the plaintiff let the *locus in quo* to a tenant, who held peaceable possession for about a year: this is sufficient evidence of title as against a party who came in the night and forcibly turned such tenant out of possession.

EJECTMENT, to recover part of a house, situate in the parish of St. Luke, Middlesex. The lessor of the plaintiff sought to recover a room, which was a part of the Boot public-house, in Grub Street, of which the defendant had obtained possession. On the part of the lessor of the plaintiff, a release, dated the 13th day of November, 1818, was put in. By this, Lord Reay and others joined in conveying the Boot public-house to the lessor of the plaintiff, and a witness was called, who stated, that he had been a tenant of the lessor of the plaintiff; and that, in the year 1826, the lessor of the plaintiff let the Boot public-house to him, and that he received the key of this room, which had a separate outer-door; and he further stated, that he held peaceable possession of this room with the rest of the premises, till some day in the month of November, 1827, when the defendant and a number of other persons, came at about three o'clock in the morning, and broke into it, taking forcible possession.

Chitty, for the defendant, objected that this was no evidence of a possession under the deed of conveyance, as that was dated in the year 1818, and this tenant did not come in till 1826.

LORD TENTERDEN, C. J. Suppose there had been no deed at all put in. We find that, in 1826, a tenant of the lessor of the plaintiff had the key delivered to him, when he went in, and that he had peaceable possession of this room, till the defendant came in November, 1827. That *is sufficient proof of title as against a man who comes and takes forcible possession at three o'clock in the morning. The plaintiff is entitled to a verdict.

Verdict for the plaintiff.

Gurney, and *Busby*, for the lessor of the plaintiff.
Chitty, for the defendant.

[Attornies—*H. Hughes*, and *Richardson*.]

FELTON *v.* GREAVES and another. *June 6.*

A patent was granted for a machine to sharpen knives and scissors, and, in the specification, this was directed to be done, by passing their edges backward and forward in an angle formed by the intersection of two circular files; and in the specification it was also stated, that other materials might be used according to the delicacy of the edge. It was proved that, for scissors, there ought to be one circular file, and a smooth surface, but that two Turkey stones might also succeed: Held, that the specification was bad, as it neither directed the machines for scissors to be made with Turkey stones nor to be made with one circular file and a smooth surface.

CASE for the infringement of a patent, for "a machine for an expeditious and correct mode of giving a fine edge to knives, razors, scissors, and other cutting instruments." Plea—General issue. The patent and specification were put in, and the latter described a machine for sharpening cutting instruments, by passing their edges backward and forward in an angle formed by the intersection of two circular files. The specification also stated that other materials besides steel might be employed, according to the delicacy of the edge required.

One of the machines was produced; it contained two steel rollers about four inches long, formed with bosses and recesses; the bosses or elevated parts of one roller, passing into the recesses of the other, and by those means forming an acute angle between them. The bosses of *both* rollers were files, and the recesses smooth.

This machine was proved to be useful in the sharpening of knives, but it appeared that if both rollers were files, it would not do for scissors, and that for scissors, one of the rollers should be quite smooth; however, the witnesses *612] stated, that if Turkey stones were used for both the *rollers, instead of steel, it would be possible to sharpen scissors with a machine so constructed.

J. Williams, for the defendant. According to this specification, both rollers should be of equal roughness, but, as it appears that one class of the instruments, namely the scissors, require that the two rollers should be different, which is a thing not stated in the specification, I have to submit that the specification is not good.

Lord TENTERDEN, C. J. I am of opinion, that this objection must prevail. The specification describes both the rollers as files, and, on reading it with attention, I cannot find that the scissor sharpener is described as having the two rollers different. It appears to me, therefore, that the specification is insufficient, as it no where states that the rollers for scissors must be one rough, and the other not. With respect to constructing the rollers with Turkey stone, I cannot find that it is any where stated in the specification, that Turkey stones used on both sides, will do for scissors. The plaintiff must be called.

Nonsuit.

St: *J. Scarlett*, A. G., *Brougham*, and *Rotch*, for the plaintiff.
J. Williams, and *Milner*, for the defendants.

[Attornies—*F. Jeyes*, and *Rodgers*.]

*DOE, on the demise of WHEELDON, v. PAUL. *June 6.*

In ejectment to recover demised premises for non-payment of rent, under the usual proviso of re-entry on non-payment for twenty-one days, it appeared that the rent was payable quarterly, and that a demand of more than one quarter's rent was made on the 21st day o'clock: Held that *only one quarter's rent* should have been demanded, and that at *any* A lease purported to have been signed by the mark of the party; a person proved the writing of the subscribing witness, and that he had gone abroad, and another person proved that the defendant had spoken of the term that he had under the lease: Held, that this sufficient proof of the execution of the lease by the defendant.

EJECTMENT for a house, in the parish of St. George, Hanover Square. Ejectment was brought upon a clause of re-entry, contained in a lease, which it was provided, that, if the rent, which amounted to 75*l.* per annum payable quarterly, should be in arrear for twenty-one days, the lessor should have a right to re-enter.

To dispense with proof of the execution of the lease by the subscribing witness, a person was called, who proved his handwriting, and stated that the subscribing witness went abroad about two years before, but that he did not know what had become of him since. The lease purported to be signed by the mark of the defendant. In addition to this proof, another witness was called, who stated, that the defendant had spoken of having sixteen years to come of the term granted by the lease.

LORD TENTERDEN, C. J., held, that, on this evidence, the lessor of the plaintiff was entitled to have the lease read.

The plaintiff's attorney proved, that, on the 25th of March (the quarter-day), he accompanied the lessor of the plaintiff to the premises, when the lessor of the plaintiff asked for the rent, but was not paid; and he further stated, that they went again on the 15th of April (which was the last of the twenty-one days given by the lease for payment after the rent became due), and that they again demanded the rent of the defendant, who did not pay them. In his cross-examination he said, that the sum demanded was 193*l.* 10*s.*, and that the demand on the 15th of April was made at about one o'clock in the day.

STEER, for the defendant. I submit that the demand proved is not sufficient to support the plaintiff's case. At *common law, a tenant who has to pay rent, has till sunset of the day on which it is demandable; and unless [*614 the demand be made at the last hour of the day, it is insufficient.

LORD TENTERDEN, C. J. (stopping STEER for the defendant.) There are two objections in this case—*First*, that the plaintiff has demanded a larger sum than he ought if the non-payment was to work a forfeiture. The rent is 75*l.* a year, payable quarterly; and the demand should have been of a *quarter's* rent only; whereas the lessor of the plaintiff demanded 193*l.* 10*s.* *Secondly*, the demand ought to have been made at the last hour of the day, at sunset; for the tenant has till then to make payment; and the demand, to work a forfeiture, should be made at the time when the tenant is bound to pay. I speak with perhaps more confidence on this subject, because I remember that very early in my professional life, I had occasion to consider this question, and I wrote a much more elaborate opinion than I should think of delivering now, and it so happened that that opinion came before a gentleman very eminent at the bar (Mr. Erskine), who was pleased to compliment me upon it. I mention this circumstance, to show in what manner this subject has been impressed on my mind.

Nonsuit.

Denman, and Follett, for the lessor of the plaintiff.

STEER, for the defendant.

[Attornies—Hurley, and Burgess.]

the ensuing Term, *Dexman* moved to set aside the nonsuit; but the Court sed a rule.

The authorities on this subject will be found collected in 1 Wms. Saund. 287, n. 16.

5] *ADJOURNED SITTINGS IN LONDON, AFTER EASTER
TERM, 1829.

The Right Honourable Sir L. SHADWELL, Knight, v. HUTCHINSON.
June 11.

The custom of London, which allows a man to build to any height upon ancient foundations, although he may darken his neighbour's lights thereby, must be confined to cases where all the four walls of the building belong to the party, and will not justify him in raising an obstruction by means of three walls of his, so as to darken the lights in a fourth wall belonging to his neighbour.

THE first count of the declaration stated, that the plaintiff, on the 22d day of November, 1822, demised a certain messuage and premises in the parish of Saint Alphage, London, to one John Daniel Gower, for a certain term of years not yet expired, the reversion thereof, after the expiration of the said term, belonging to the said plaintiff. It then went on to aver, that, also, before and at the time, &c., there was and now is, and of right ought to be, in the said messuage, a certain ancient window, through which the light and air for and during all that time ought to have entered and come, and still of right ought to enter and come, from a certain open and uncovered place or space situate and being in London aforesaid, and next and adjoining to the said messuage, into a certain room or apartment in and parcel of the said messuage, for the convenient and wholesome use, occupation, and enjoyment thereof; yet the defendant, well knowing the premises, but contriving, &c., to injure, prejudice, and aggrieve the said plaintiff in his reversionary estate, &c., during the continuance of the said term, and whilst the said plaintiff was interested, &c., to wit, on the 1st of January, 1824, and on divers other days and times between that day and the exhibiting of the bill, &c., wrongfully and unjustly, without the leave or license, and against the will, of the said plaintiff, put, fixed, and placed, and caused, &c., to be put, &c., close and next adjoining to the said messuage, *a certain roof or cover above and over the said open and uncovered place* or space, and higher up than the said window, and thereby *roofed in and covered over* the said place or space higher up than the said window, and wrongfully, &c., kept the said *616] roof *or cover so put, &c., and the said place or space so roofed, &c., for a long space of time, &c. By means whereof the said room or apartment, &c., was, and still is, greatly darkened, &c., and thereby the said room hath been rendered close, uncomfortable, unwholesome, and unfit for habitation, &c. The concluding averment stated, that the plaintiff, by means of the said several premises, was greatly injured, prejudiced, and aggrieved in his reversionary estate, &c.

There were other counts, stating the complaint in a different manner, and one which charged the defendant with having cut, broken, and made divers large holes and apertures in one of the walls, and put pieces of timber and wood

in them, whereby the house was damaged and the plaintiff injured in his reversionary interest (a).

Plea—The general issue.

The plaintiff sued as a trustee. To prove the antiquity of the window, a witness was called who was sixty-seven years of age, and he proved that he served his apprenticeship in the house in question; that the window was very high up in the wall of the room, and had a table under it, at which they worked, and that the window then had the appearance of being very old. The obstruction was occasioned by a skylight roof in a yard between the house in question and that occupied by the defendant. There had been a similar skylight before, but it was then so placed in a slanting position as to be below the window in question, and therefore not to darken it. The skylight complained of rested on two side partitions crossing the yard, one of which had been raised so as to bring the skylight across the window in question, and to obstruct about half of it. The plaintiff's witnesses said, that the support of the former skylight was by a partition of wood, and that the brick wall was a new erection. They, however, *admitted, on their cross-examination, that the obstruction might easily [*617 be removed in the course of two or three days.

J. Williams and *Curwood*, for the defendant, first contended, that the injury was not such as to entitle the reversioner to maintain an action.

Lord Tenterden, C. J. I have no doubt that this is a case in which the reversioner may maintain an action, because it is an injury to *the right* that he complains of; and the effect of letting the obstruction stand might be, that, from the death of witnesses, evidence of its erection might be lost, and so the injury would become permanent (b).

J. Williams then opened, that he should be able to prove, that, in the yard in question, there was originally a brick wall, having every appearance of being ancient, upon which the original skylight rested, and that the defendant had only raised that wall, and consequently the skylight, as he might legally do within the city, according to the custom of London, which allows a man to build to any height upon ancient foundations, even though he should *darken [*618 his neighbour's lights thereby. He referred to *Bohun's Privilegia Londini*, p. 54, title, "Concerning building on old foundations, and stopping of lights, in the city of London (c)."

(a) It was stated to be a matter of dispute, whether the holdfasts in the wall of the plaintiff's house were ancient or not; but, from the turn which the cause took, the consideration of that question became unnecessary.

(b) In the case of *Jesser v. Gifford*, 4 Burr. 2141, which was an action for erecting a wall, whereby the plaintiff's lights were obstructed, the plaintiff, in one of the counts, declared as the reversioner, and a verdict was found for the plaintiff, with general damages.

Mr. Serjeant *Burland* moved in arrest of judgment, on the ground, that the action would not lie by a reversioner, being only an injury to the person in possession. He obtained a rule to show cause, but, when it came on to be argued, Mr. Justice *Aston* mentioned a case of *Tomlinson v. Brown*, decided in Easter Term, 1755. There, in a similar action, it had been argued for the defendant, that a temporary nuisance could not be an injury to the inheritance, as it might be abated before the estate came into possession, and that a contrary construction would render the party liable to a double action. On the other hand, it was contended, that the obstruction would lessen the value of the reversion on a sale. The Court were of opinion that an action might be maintained both by the reversioner and the tenant; and upon the authority of this, the rule of Mr. Serjeant *Burland* was directed to be discharged.

(c) It is there said: "It is warrantable, by the custom of London, to rebuild any house upon the old foundation where the ancient house stood, in height at the pleasure of the party, although, by rebuilding, the lights of his neighbour be stopped up, unless there be some writings to the contrary." The case of *Reginald Hughes* is mentioned as deciding the following points, viz. "That the custom of London will not enable a man to erect a new house upon a void space of ground, whereby the ancient lights of an old house are stopped up;" and also, "that, if the new house be only erected on the ancient foundation, without any enlargement, either in longitude or latitude, howsoever it be made so high that it stoppeth up the lights of the old house, yet be is not subject unto any action, because the law authorizes a man to build as high as he may upon an ancient foundation." The author adds, "and agreeing to this seemeth 4 Ed. 3, 150, to be, where an assize of nuisance was brought for erecting a house so high that the light of the plaintiff, in the next adjoining house, was disturbed by it." Upon this particular custom see also the case of *Plummer v. Bentham*, 1 Burr. 248, where the two following customs were

***LORD TENTERDEN, C. J.** Suppose you prove your case as you have stated it, I do not think that it will be any answer to this action. I am of opinion that the custom must be confined to building on ancient foundations, where all the four walls belong to the party. In this case you come close to the plaintiff's house and raise the skylight against it, which I think you are not entitled to do. I give no decided opinion as to the legality of the custom, but I should think, that, in order to support it, the walls which are raised must be very old, at least as old as the lights which they obstruct. However, I wish not to be considered as deciding that question now. The verdict must be for the plaintiff.

Verdict for the plaintiff.—Damages 1s. (a).

Taunton and Coleridge, for the plaintiff.

J. Williams and Curwood, for the defendant.

[Attornies—*Lake & Co.*, and *Eicke.*]

pleaded : *First*, "That, if any person has a message or house in the city of London adjoining or contiguous to another message or house, or to the ancient foundations of one, in the said city, which former house has ancient lights or windows fronting opposite to or over such other adjoining or contiguous message or house, or ancient foundation of one; such other person, owner of the latter message or house, or ancient foundation of one, may well and lawfully exalt such his message or house, or rebuild, upon the ancient foundations of such his adjacent or contiguous message or house, any new message or house, to any height that he shall please, against and opposite to the said ancient lights and windows of such first mentioned neighbouring message or house, to which his message or house or ancient foundations of a message or house, are so contiguous or adjoining, and thereby darken and obscure such ancient lights and windows of such first mentioned neighbouring house, having such ancient lights and windows, unless there has been some writing, instrument, or record of an agreement or restriction to the contrary." The second custom pleaded was similar to the first, substituting the words *erection or building* for the words *message or house*. On these pleas issue was joined, and writs of *certiorari* were directed to the Mayor and Aldermen to certify whether there were such customs or not : and Sir *William Moreton*, Knight, Recorder of London, certified, *ore tenus*, by command of the Lord Mayor and Aldermen, that there was such a custom as that alleged in the *first* plea, but not such a custom as that alleged in the *second*. The Reporter adds in a note, that "a consultation was had in the city, concerning the sort of gown which it was proper for the Recorder to put on, to make this *ore tenus* return ; in which consultation it was determined, that it ought to be the purple cloth robe, faced with black velvet, and not his scarlet gown, his black silk one, nor the common bar gown."

(a) As to the customs of London generally.—In 1 Rolle's Rep. p. 106, it is said : "If judgment be given in London, and it comes into B. R., we ought to take notice of the custom of London without being alleged." And in *Appleton v. Stoughton*, Cro. Car. 516, the defendant pleaded a custom of London, relating to the trade of a point maker, upon which the plaintiff took issue, and a writ was awarded to the Mayor and Aldermen to certify by the mouth of their Recorder (*ore tenus*), whether there was such a custom, and the Recorder certified that there was not. And after this certificate it was moved, that this was a mis-trial. But, after long deliberation, it was resolved by the Court, that the trial was good. The manner of obtaining such a certificate of a custom of London is set forth in the case of *Plummer v. Bentham*, 1 Burr. 248.

The statute 8 Ann. c. 9, s. 39, making void indentures of apprenticeship, in which the full sum and sums of money received, given, paid, secured, or contracted for, are not truly inserted, does not apply to cases where the sum actually paid is inserted in the indenture, though it is a less sum than that which was originally agreed for, and the reduction was made to diminish the amount of stamp-duty.

COVENANT, on an indenture of apprenticeship, for not instructing, &c., by the apprentice against the master. Pleas—*Non est factum*, and several special pleas : upon which the issues in substance were, *First*, whether the apprentice voluntarily absented himself, and became bound to another person ;—*Secondly*, whether he was dismissed because he was incapable from ill health of attend-

ing to the business ;—and *thirdly*, whether, supposing he had absented himself, he had afterwards tendered himself to serve, and was refused.

From the evidence, it appeared, that the plaintiff, whose father was a waterman, was bound apprentice to the defendant in April, 1826, to learn the business of a book-binder, and continued with him till October, 1827, when the business was parted with to a Mr. Williams; the apprentices, three in number, of whom the plaintiff was the youngest, continuing in it. The plaintiff had been employed chiefly in out-door work before Mr. Williams took the business; and on being put to the in-door work, which was heavy, he became ill, and went home ill twice between the 1st of October, 1827, and the beginning of May, 1828. It appeared that the work began about seven in the morning, and that the plaintiff used to become fatigued and unable to proceed with his business about four in the afternoon. Mr. Williams sent him to his father one Sunday morning, he having then been ill for several days and done no work, and sent a note with him, stating, that his business would not permit him to continue to keep him. In consequence of this, the father called upon Mr. Williams, who, in conversation, told him that he had only business enough for two apprentices, and also, that the plaintiff's state of health was such as to render him unfit for the business of a book-binder. On the 12th of June, 1828, the plaintiff was bound to a waterman, who was a proprietor of one of the Gravesend sailing boats. The father obtained the *indenture from Mr. Williams, saying, [*621 that it was the only evidence of his having paid the premium. He afterwards went to the defendant's son, who managed the defendant's affairs, and he told him that he had settled his father's debts by paying 7s. in the pound. The plaintiff's father said he thought he was entitled to the same. The defendant's son said he could not see that, but gave no reason. The plaintiff's father then made inquiries as to the truth of the statement, and found that it was correct. It appeared further, that 20*l.* was the premium *agreed for*, but that 19*l.* 19*s.* only was paid, and the stamp on the indenture was for the sum paid.

Scarlett, A. G., for the defendant, first submitted, that the indenture was void under the statute 8 Ann. c. 9, s. 39, which enacts, that all indentures of apprenticeship, &c., “wherein shall not be truly inserted and written the full sum and sums of money received, or in any wise, directly or indirectly, given, paid, secured, or contracted for, with or relating to” any apprentice, &c., “shall be void, and not available in any Court or place, or to any purpose whatsoever, any charter, law, or custom to the contrary notwithstanding.”

Lord TENTERDEN, C. J., was of opinion, that, as the sum mentioned in the indenture was the sum actually paid, it was sufficient (a).

Scarlett, A. G., then addressed the Jury, and contended,—*First*, that the plaintiff was not entitled to a verdict, as there was no proof of any tender of his services;—and *Secondly*, that, if he was entitled to a verdict, yet it was a case for nominal damages only, as the business of a waterman was better suited to his health than that of a book-binder; and it would be unfair to give back, in the shape of damages, any portion of the premium, as the plaintiff *had [*622 been supported for two years; and the principle upon which premiums are given, is, that the master may have some recompense for the early part of the time during which the apprentice is of little use in the business.

Hutchison, for the plaintiff, in reply, contended, that there was a sufficient tender of service, and that the state of health was produced by the sudden change from the out-door work to the confinement of the in-door business. He also submitted, that the plaintiff was entitled to damages, inasmuch as the business of a book-binder was more profitable than that of a waterman.

Lord TENTERDEN, C. J. (in summing up), said :—The only question of fact is, whether there was a sufficient offer on the part of the plaintiff to return to

(a) This accords with the opinion of Lord Ellenborough, in the case of *Shepherd v. Hall*, 3 Camp. 180.

the service. It is quite clear that there was no voluntary absents. The letter of Mr. Williams, written at the time when there was no controversy, seems to me better evidence than the parol testimony of what occurred afterwards. But the statements of Williams altogether differ very little from his evidence, for he says, that he had not employment for more than two apprentices, although he mentioned, in addition, the state of the plaintiff's health. The state of health would naturally be a reason for selecting the plaintiff as the one to be sent back under such circumstances. If you take a young lad who has been used to outdoor work, and keep him in a confined room for several days together, it will have the effect of injuring his health. The plaintiff should have been accustomed by degrees to the in-door business. Then was there a sufficient offer to return? It was not necessary to make a tender to the defendant, because his affairs were managed by his son, and his business had been parted with to Williams. The question is, whether the plaintiff's father, when he made all the inquiries into the state of the defendant's affairs, did not intend to say that his son was willing to return. Then, as to the damages, *you find that for

*623] some time past the plaintiff has been in an employment better suited to his health. But the father says it is a worse business. You will give such moderate damages as you think right, under the circumstances.

Verdict for the plaintiff.—Damages 19*l.* 19*s.*, being the amount of the premium.

Hutchinson, and *Chitty*, for the plaintiff.

Scarlett, A. G., and *Payne*, for the defendant.

[*T. Browne*, and *Payne & Leachman*.]

COURT OF COMMON PLEAS.

ADJOURNED SITTINGS AT WESTMINSTER, AFTER EASTER TERM, 1829.

BEFORE LORD CHIEF JUSTICE TINDAL.

KEMBLE v. FARREN. *June 13.*

Where it appeared on the record, that an agreement sued on was made by the plaintiff, on behalf of himself and the other proprietors of a theatre, evidence of the declarations of one of such other proprietors was held admissible on the part of the defendant.

ASSUMPSIT for the breach of an agreement, dated the 6th of June, 1827, stated to be made between the plaintiff, Mr. Charles Kemble, *on behalf of himself and the other proprietors* of Covent Garden Theatre, of the one part, and the defendant of the other part. The principal question in the cause was, whether there had been a change in the management of the theatre so as to justify the defendant in withdrawing from it, under a particular clause in the agreement. The proprietors, in addition to the plaintiff, were Mr. Willett and Captain Forbes. It appeared that certain papers had been signed by the proprietors, giving particular powers to Mr. Fawcett, as stage manager.

*624] **Campbell*, for the defendant, on his cross-examination of Mr Robert-

son, the treasurer of the theatre, who stated that he had seen such papers, asked, if Mr. Willett had not told him that the papers were delivered to Mr. Fawcett.

Wilde, Serjt., objected to evidence of any thing said by Willett, who was not the plaintiff in the cause.

Campbell. It appears that Mr. Willett is a proprietor, and Mr. Kemble makes the agreement on behalf of himself and the other proprietors. This makes Mr. Willett a co-principal. The action is brought for his benefit, and he will be entitled to a portion of the damages. Even if Mr. Kemble were only agent, the evidence would be admissible, on the same principle as, in an action by a broker on a policy of insurance, the declarations of the principal are received.

TINDAL, C. J. I think that, as it appears on the record that the agreement was made by the plaintiff on behalf of himself and the other proprietors, and it is proved that Mr. Willett is one of the proprietors, the better way will be to receive the evidence.

Verdict for the plaintiff.—Damages 750*l.* (a)

Wilde, Serjt., and *Coleridge*, for the plaintiff.

Campbell, Thomson, and *Hill*, for the defendant.

[Attornies—*Lodham & Co.*, and *Reynolds & Co.*]

(a) The plaintiff sought to recover the sum of 1,000*l.*, as liquidated damages, under a particular clause in the agreement; and *Wilde, Serjt.*, on his behalf, referred to *Crisdee v. Bolton*, ante, p. 240, decided by Lord Wynford, then L. C. J. *Best*. *Tindal, C. J.*, acted in the same manner as *Best, C. J.*, had done, leaving it to the Jury to find the actual damage, and reserving the construction of the agreement to be decided on motion to the Court, if the verdict should be for a sum less than the 1,000*l.* And a rule nisi has since been obtained by *Wilde, Serjt.*

As to the other question in the cause, with respect to a change in the management and control of the theatre, a bill of exceptions was tendered by the defendant's counsel, which is now pending.

GOULD v. HULME. June 13.

The office copy of an Insolvent's petition, attested by the officer of the Insolvent Debtors' Court, is sufficient evidence to prove an allegation, that the petition subscribed by the Insolvent was duly filed.

A letter written by an opposing creditor, to the chief commissioner of such court, previous to the hearing of an insolvent's case, is not a privileged communication.

LIBEL.—The first count of the declaration stated, that the plaintiff, before, &c., was lawfully possessed of a certain messuage, with the appurtenances, called or known by the name of the *Camden Arms Tavern*, and of certain goods and chattels therein, and had then and there just before, &c., sold and disposed of his interest of and in the same to the defendant, &c. That the said plaintiff, just before, &c., was an insolvent debtor, in actual custody in prison, and had duly applied by petition to the Court established for the relief of insolvent debtors in England for his discharge from such custody; which petition, subscribed by the said plaintiff as such prisoner, had been duly filed in the said Court, &c., and a certain day appointed for the hearing thereof. It then averred, in substance, that one Henry Revell Reynolds, Esq., was chief commissioner of the said Court, and that the defendant, to prejudice him against the plaintiff, composed and published of and concerning the said sale of the said Tavern, a certain libel, in the form of a letter addressed to the said chief commissioner. There were other counts, and the defendant pleaded—Not Guilty.

The libel, after making some observations on the mode in which the plaintiff had stated his debts, &c., in the schedule, proceeded as follows: "The reason why he was not opposed by more of his creditors was, that they thought there was nothing, and they knew, Gould being such a bad principle fellow, he was up to all manner of tricks, and that they should lose their time and expense to no *626] purpose; but I trust *you can see through his hypocrisy, and will punish him accordingly. *He, Gould, obtained 500l. from me for good-will of the Camden Arms, and 440l. appraisement, making a sum of 940l., last June, under the most fraudulent representations, for this house, that was not doing any business at all, and was worth nothing, for which he and four others now stand indicted for the conspiracy, and will be tried the Sittings after this Term. He has ruined my prospects in life, through his base and fraudulent representations. I trust you will excuse me in thus addressing you, and I beg to remain, &c.*" There was a postscript, stating that he had been told that the plaintiff intended to offer his creditors 1s. 6d. or 2s. in the pound, and keep 400l. or 500l. to set himself up again in business.

To prove the allegation which stated the filing of the petition—

Wilde, Serjt., for the plaintiff, put in an office copy, appearing on the face of it to be attested by the officer of the Court, which he submitted was sufficient evidence under the act of Parliament (a).

Hutchinson, for the defendant, contended, that copies were only made evidence for particular purposes, of which the present was not one, and that, as the averment in the declaration was, that the petition was *subscribed* by the plaintiff, the original ought to be produced, that the fact of his having signed it might be shown.

Wilde, Serjt. The object of the legislature, in making copies evidence, is, to diminish expense, and the office copy in this case is quite sufficient. The act requires that the petition should be signed, and without it the Court would *627] not have jurisdiction. But it appears that there *has been an order of adjudication, and it is to be presumed that the Court would not have proceeded to adjudicate, unless it possessed the proper authority to do so.

TINDAL, C. J. By one section of the act, the petition is directed to be subscribed by the prisoner, and filed in the Court (b), and by another section it is provided, that a copy certified by the officer, or his deputy, to be a true copy, shall at all times be admitted as legal evidence in all courts whatever (c). I think we must presume that what is required by the act to be done has been regularly done, and that this petition was subscribed by the plaintiff.

Hutchinson afterwards contended, that the plaintiff must be nonsuited, because he had not given any proof of the material allegation, that he was possessed of the Camden Arms Tavern.

Wilde, Serjt., and *Curwood*, referred to the libel itself as stating the fact, and submitted that it was not necessary to prove it by evidence *aliunde*.

TINDAL, C. J., was of opinion, that the words of the libel sufficiently admitted the fact, and that the case must therefore proceed.

Hutchinson then addressed the Jury, and argued that, under the circumstances, the letter was a privileged communication. He referred to *Macdougall v. Claridge* (d), *Dunman v. Bigg* (e), and *Fairman v. Ives* (f), from which he contended it appeared, that, if a person had an idea that he was acting *bonâ fide* in advancing his own cause, having an *actual interest* in the subject-matter of the libel, he was not answerable in an action, although he might have been intemperate in the expressions he used.

*TINDAL, C. J., in his summing up, *inter alia*, said, that, although *628] statements made in regular proceedings at law, might be privileged if *bonâ*

(a) 1 Geo. 4, c. 119.

(c) s. 45.

(d) 1 Camp. 269, n.

(b) s. 4.

(e) 1 Camp. 267.

(f) 1 D. & R. 252.

fide, notwithstanding they were untrue, yet in his opinion, such an irregular and improper proceeding as this, of addressing the Judge, could not be considered as at all coming within the line of privileged communications. His Lordship left the case to the Jury, who found a

Verdict for the plaintiff.—Damages 1s.

Wilde, Serjt., and *Curwood*, for the plaintiff.

Hutchinson, for the defendant.

[Attornies—*Goddard*, and *Wigly*.]

PROMOTIONS.

IN the vacation after Easter Term, the Right Honourable Sir WILLIAM DRAKE-BEST, Knt., Lord Chief Justice of the Court of Common Pleas, was created a peer, by the title of Baron WYNDFORD of Wyndford Eagle, in the county of Dorset, and resigned his office of Lord Chief Justice on Friday, the 6th of June.

Sir NICOLAS CONYNGHAM TINDAL, Knt., his Majesty's Solicitor General, was appointed Lord Chief Justice of the Common Pleas, *vice* Lord WYNDFORD, resigned.

Sir James Scarlett, Knt., one of his Majesty's counsel, was re-appointed Attorney-General, *vice* Sir Charles Wetherell, Knt., resigned; and Edward Burtenshaw Sugden, Esq., one of his Majesty's counsel, was appointed Solicitor-General, *vice* Sir Nicolas Conyngham Tindal, Knt.

*OLD BAILEY SESSION, 1829.

[*629]

BEFORE MR. BARON HULLOCK, MR. JUSTICE LITLEDALE, AND MR. SERJEANT ARABIN.

REX v. EDWIN MARTIN VAN BUTCHELL. June 17.

If a person *bona fide* and honestly exercising his best skill to cure a patient, perform an operation which causes the patient's death, he is not guilty of manslaughter, and it makes no difference whether such person be a regular surgeon or not, nor whether he has had a regular medical education or not.

To render a declaration of a deceased person admissible on the trial of an indictment for manslaughter, it must have been made by him under an impression of almost immediate dissolution, and it is not enough that the deceased should have thought that he should ultimately never recover.

Before a declaration of a deceased person is received as a declaration *in articulo mortis*, the Judge will hear all that the deceased said respecting the danger in which he considered himself to be, and it will, upon this, be for his Lordship to decide whether the deceased then had that impression on his mind which would render his declaration admissible.

MANSLAUGHTER.—The indictment charged the death to be by the thrusting of a "round piece of ivory into and up the fundament and against the rectum" of the deceased, William Archer, thereby making "one perforation, laceration,

and wound, of the length, &c., in and through the said rectum of the said William Archer."

Adolphus, for the prosecution, stated that the deceased had laboured under a disease of the rectum, respecting which he went to Mr. Van Butchell, on the 10th May, 1829; when Mr. Van Butchell passed an instrument (a) into his body, giving him some pain; and that on the deceased returning home he took to his bed, from which he never rose, having died on the 17th of May. He then read an extract from Blackstone's Commentaries (b), and an extract from *630] Hale's P. C. (c), and was proceeding to state *that Lord Coke had said, that, if one who is not a regular surgeon, take upon him to cure a man, and the patient die, this is felony (d).

HULLOCK, B. It is so said, in Lord Coke's Institutes, undoubtedly, but there has never been any decision of the kind.

Adolphus. The gentleman now standing at the bar is, as I happen to know, the son of a person of great experience, and he has himself had much practice, for a great many years, which I think you should take as raising a presumption that he has had a regular education; indeed, I have been told that Mr. Van Butchell is a regularly educated surgeon. Whether he is a member of the College of Surgeons, I know not; and I believe you will be told by the Court that that is not essential; and I think you will also be told, that we must not scrutinize too *631] nicely as to how the operation was performed, if it was not performed with such gross ignorance as to show a wanton carelessness of human life.

On the part of the prosecution, it was proposed to give in evidence a declaration of the deceased, *in articulo mortis*. To prove this, Mr. Lloyd, a surgeon, was called, and he stated that he saw the deceased on the evening of the 10th of May, and that the deceased appeared to think that he should never recover.

HULLOCK, B. I must hear all that the deceased said; and I must judge from what he said, whether he had that impression on his mind, which will make his declarations admissible in evidence.

Mr. Lloyd. The deceased said, "I feel that I have had such an injury in the bowel, that I think that I shall never recover." On his saying this, I endeavoured to encourage him, as his symptoms were not then such as to lead me to consider him in danger of dying; but his expression was, that he felt satisfied that he should never recover.

HULLOCK, B. The principle on which declarations *in articulo mortis* are admitted in evidence, is, that they are made under an impression of almost im-

(a) A rectum bougie.

(b) Black. Comm. Book 4, c. 14—"If a physician or surgeon gives his patient a potion or plaister to cure him, which, contrary to expectation, kills him, this is neither murder nor manslaughter, but misadventure, and he shall not be punished criminally, however liable he might formerly have been to a civil action for neglect or ignorance; but it hath been holden that, if it be not a regular physician or surgeon, who administers the medicine, or performs the operation, it is manslaughter, at the least; yet Sir Matthew Hale very justly questions the law of this determination."

(c) 1 H. P. C. 429. If a physician gives a person a potion without any intent of doing him any bodily hurt, but with an intent to cure or prevent a disease, and, contrary to the expectation of the physician, it kills him, this is no homicide; and the like of a chirurgeon. 3 E. 3, Coron. 163. And I hold their opinion to be erroneous that think, if he be no licensed chirurgeon or physician that occasioneth this mischance, that then it is felony, for physic and salves were before licensed physicians and chirurgeons, and therefore if they be not licensed, according to the statute of the 3 H. 8, c. 11, or 14 H. 8, c. 5, they are subject to the penalties in the statutes; but God forbid that any mischance of this kind should make any person not licensed guilty of murder or manslaughter.

(d) 4 Inst. 251. Lord Coke there says, "If one that is of the mystery of a physician take a man in cure, and giveth him such physic as within three days he die thereof, without any felonious intent, and against his will, it is no homicide; but Britton saith, that if one that is not of the mystery of a physician or chirurgeon take upon him the cure of a man, and he dieth of the potion or medicine, this is, (saith he), covert felony." The passage in Britton, is in cap. 5, and it is in the following words: "Et pur ceo que ceste felonie [homicide] purra estre faite per colour de jugement per faux physiciens et per maveys surrigiens et per poyson et in moultes des manieres. Volons nous que trestons ceuz soiet endites per qui tielz covertes felonies ont este faites et ceuz aussi qui fausement pur lower ou en autre manere ont aucun home dampne ou fait dampner a la mort per faux sermentz."

mediate dissolution (a). A man may receive an injury from which he may think that he shall ultimately "never recover," but still that would not be sufficient to dispense with an oath. I must reject the evidence.

It was then proved by Mr. Lloyd, that he opened the body of the deceased, and that he found a portion of the ileum adherent to the rectum, and that on separating this adhesion, he discovered a small hole perforated through the rectum. Mr. Lloyd was cross-examined, with a view of showing that these appearances might have been the result of natural causes; and he stated, that operations *would sometimes fail, notwithstanding that they might be [*632 most skilfully performed; and he added that he himself had operated in extracting an encysted tumour from the breast of a woman, at a time when she was pregnant, and who soon afterwards died; and that he and many other surgeons thought that correct practice, though he admitted that the propriety of the operation was doubted by others.

HULLOCK, B., inquired of *Adolphus*, if he thought he could carry the case further.

Adolphus replied, that he did not think he could.

HULLOCK, B. I am free to confess that this does not even approach to a case of manslaughter. It would be dreadful, if, every time an operation was performed, an individual was liable to have his practice questioned.

Brodrick, for the defence. I am prepared to show that Mr. Van Butchell has had a regular medical education.

HULLOCK, B. I do not think that that is at all material to the case.

Brodrick. I can call a great number of patients whose cases have been most successfully treated by Mr. Van Butchell.

HULLOCK, B. (in summing up.) This is an indictment for manslaughter, and I am really afraid to let the case go on, lest an idea should be entertained that a man's practice may be questioned whenever an operation fails. In this case there is no evidence of the mode in which this operation was performed; and, even assuming for the moment that it caused the death of the deceased, I am not aware of any law which says that this party can be found guilty of manslaughter. It is my opinion, that it makes no difference whether the party be a regular or an irregular *surgeon, indeed, in remote parts of the country, [*633 many persons would be left to die if irregular surgeons were not allowed to practise. There is no doubt that there may be cases where both regular and irregular surgeons might be liable to an indictment, as there might be cases where, from the manner of the operation, even malice might be inferred. All that the law books have said has been read to you, but they do not state any decisions, and their silence in that respect goes to show what the uniform opinion of lawyers has been upon this subject. As to what is said by Lord *Coke*, he merely details an authority, a very old one, without expressing either approbation or disapprobation (b); however, we find that Lord *Hale* has laid down

(a) See the case of *Rex v. Pike*, ante, p. 598, and the authorities there referred to.

(b) All that is stated by Lord *Coke*, on this point, is set forth, ante, p. 630, n. (d). However, in the same page of the 4th Inst. Lord *Coke* says, "Of the College of Physicians, and of their jurisdiction and authority, sufficient hath been said in the 8th book of reports, in Dr. *Bonsam's* case, whereunto we refer the studious reader. Hereunto we will add for the safety of physicians, especially of the King's physicians, a record, worthy of observation, Rot Pat. 32 Hen. 6, m. 17.—'By what warrant physic is to be given to the king.' Rex adversa valetudine laborans de assensu concilii sui assignavit Johannem Arundel, Johannem Saceby, et W. Hatcliffe, medicos; Robertum Warren, et Johannem Marshall, chirurgos; ad libere ministrandum et exequendum in et circa personam suam; imprimis, viz. quod licite valeant moderare sibi dictam suam et quod possint ministrare potiones, syrupos, confectiones, laxativas medicinas, clystera suppositoria, caput purgas, gargarismata lealnen, epithimota, fomentationes, embrocationes, capitis rasuram, unctiones, emplastra, cerera ventos, cum scarificatione vel sine, emorodorum provocaciones, &c. Dantes singulis in mandatis quod in executione premissorum sint intendentes, &c." Upon this Lord *Coke* says, "Four things are to be observed, *First*, that no physic ought to be given to the King, without good warrant. *Second*, that this warrant ought to be made by the advice of his council. *Third*, they ought to minister no other physic than that which is set down in writing. *Fourth*, that they may use the aid of those chirurgers named in the warrant, but of no apothecary; but to prepare and do all things themselves. And the reason

what is the law on this subject. That is copied by Mr. Justice *Blackstone*, and no book in the law goes *any further. It may be that a person not legally *634] qualified to practise as a surgeon may be liable to penalties (a); but surely he cannot be liable to an indictment for felony. It is quite clear, you may recover damages against a medical man for a want of skill; but, as my Lord *Hale* says, "God forbid that any mischance of this kind should make a person guilty of murder or manslaughter." Such is the opinion of one of the greatest Judges that ever adorned the bench of this country; and his proposition amounts to this, that if a person, *bonâ fide* and honestly exercising his best skill to cure a patient, performs an operation which causes the patient's death, he is not guilty of manslaughter. In the present case no evidence has been given respecting the operation itself. It might have been performed with the most proper instrument and in the most proper manner, and yet might have failed. Mr. Lloyd has himself told us that he performed an operation, the propriety of which seems to have been a sort of *vezata questio* among the medical profession; but still it would be most dangerous for it to get abroad, that, if an operation performed either by a licensed or an unlicensed surgeon should fail, that surgeon would be liable to be prosecuted for manslaughter. I think that, in point of law, this prosecution cannot be sustained; and I feel bound to say, that no imputation whatever, ought to be cast upon the gentleman who is now at the bar, in consequence of any thing that has occurred.

Verdict—Not Guilty.

Adolphus, for the prosecution.

Brodrick and *Carrington*, for the defence.

[Attornies—*Harper*, and *Flower*.]

of all this is the precious regard had of the health and safety of the King, which is the head of the commonwealth."

(a) The statutes by which these penalties are imposed, which are all of the reign of King Henry the Eighth, are collected in Com. Dig. tit. Physician, (D), and one of them (the stat. 24 Hen. 8, c. 8) has a preamble prefixed to it, which is any thing but complimentary to the medical profession.

*635] *REX v. JOHN WILLIAMSON, O. B. 1807, cor. LORD ELLENBOROUGH.

A person in the habit of acting as a man-midwife tore away part of the *prolapsed uterus* of one of his patients, supposing it to be a part of the *placenta*, by means of which the patient died: Held, that this person was not indictable for manslaughter, unless he was guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention.

The prisoner was indicted for the murder of Ann Delacroix, at the parish of St. James, Westminster; he was also charged with manslaughter by the coroner's inquisition.

The prisoner was about seventy-five years of age. He was not a regularly educated accoucheur, but was a person who had been in the habit of acting as a man-midwife among the lower classes of people.

From the evidence of Elizabeth Garret, the nurse who waited on Mrs. Delacroix, it appeared that Mrs. D. had been delivered by the prisoner of a male child, on Friday, the 17th day of September, and that, on the Sunday following, an unusual appearance took place, which the medical witnesses stated to be a *prolapsed uteri*. This the prisoner mistook for a remaining part of the *placenta*, which had not been brought away at the time of the delivery; he attempted to bring away the *prolapsed uterus* by force, and in so doing he lacerated the *uterus*, and tore asunder the *mesenteric artery*. This caused the death of the patient, and it appeared from the testimony of a number of medical witnesses that there must have been great want of anatomical knowledge in the prisoner.

The prisoner, in his defence, said, that he had acted according to the best of his judgment.

Fourteen women were called as witnesses for the defence, all of whom had been delivered by the prisoner at different times; but six only were examined, and they spoke to the kindness and attention that the prisoner had displayed, and also to his skill, so far as they were able to judge.

LORD ELLENBOROUGH, C. J. (in summing up).—There has not been a particle of evidence adduced which goes to convict the prisoner of the crime of murder; but still it is for you to con-

sider whether the evidence goes so far as to make out a case of manslaughter. To substantiate that charge, the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention. One or other of these is necessary to make him guilty of that criminal negligence and misconduct, which is essential to make out a case of manslaughter. It does not appear that in this case there was any want of attention on his part; and, from the evidence of the witnesses on his behalf, it appears that he had delivered many women at different times, and from this he must have had some degree of skill. It would seem, that, having placed himself in a dangerous situation, he became shocked and confounded. I think that he could not possibly have committed such mistakes in the exercise of his unclouded faculties; and I own, that it appears to me, that if you find the prisoner guilty of manslaughter, it will tend to encompass a most important and anxious profession with such dangers as would deter reflecting men from entering into it.

Verdict—Not Guilty (a).

(a) The report of this case was revised by one of the learned counsel engaged in it.

AN INDEX

TO THE

PRINCIPAL MATTERS.

Gullaspie

ABATEMENT.

See PRACTICE, 5.

ABORTION.

On an indictment for administering a drug to a woman to procure abortion, she *not being quick with child*, if it appear that the woman was not with child at all, the prisoner must be acquitted, although it appear that the prisoner thought that she was with child, and gave her the drug with an intent to destroy such child. *Ree v. Scudder*.

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ACCEPTANCE.

See BILL OF EXCHANGE, 9.

ACCOUNT STATED.

See AGREEMENT, 4. BANKRUPT, 1.
LEGACY, 1.

A verbal agreement was made for the purchase of some turnips growing in a field. After the purchaser had removed the principal part, the seller said to him, "You owe me 3/," to which he replied, "I will send it before I draw any more turnips." He afterwards drew all the turnips, but did not send the 3/. Held, that it was recoverable on the account stated. *Pinchon v. Chilcott*.

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ADMINISTRATOR.

See AGREEMENT, 2.

ADMISSION.

1. An admission made by a party before an arbitrator, may be used as evidence on the trial of another cause, and is not to be considered as an admission made with a view to a compromise. *Dee dem. Lloyd v. Evans*.

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2. The mere circumstance of a witness being

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too ill to attend the trial, is no sufficient ground for reading his deposition taken in Chancery. *Ibid*.

AGENT.

1. An agent authorized to sell goods has (in the absence of advice to the contrary) an implied authority to receive the proceeds of such sale. *Capel v. Thornton*. 352
2. In an action against a body corporate, for negligently pulling down a house which belonged to them, whereby the plaintiff's house was injured—a letter written to the plaintiff respecting the pulling down of the house by the defendants' surveyor, who had the management of all their buildings, is to be presumed to have been written by him in that capacity, and is therefore evidence against them. *Peyton v. The Governors of St. Thomas's Hospital*. 363
3. If the attorney of a creditor write to A. asking payment of a debt due from B., and A. answer the letter and pay 200/ of the debt; and afterwards the attorney again write to A., asking payment of the residue of the debt, and A. send a letter promising payment, this last letter is evidence in an action against B. *Roberts v. Gresley*. 380
4. If a person, on being applied to on a particular subject, writes in answer, mentioning another person, and saying on one occasion, "He is in possession of my sentiments," and on another, "I have written to him, and I refer you to him thereon;" such letters are sufficient to constitute the party referred to agent in the business; and what he said at a meeting on the subject may be given in evidence against the principal. *Hood, Assignee of Green, v. Reece*. 532

AGREEMENT.

DECLARATION, 1. STAMP, 2, 3, 4.

1. A *net* rent is a sum to be paid to the landlord clear of all deductions; and if one agree to take a lease at a *net* rent, he cannot ob-

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ject that the lease contains a covenant for him to pay the land and sewers-taxes.

What are *usual covenants* is a question of fact for the Jury, and not a question of construction for the Court. *Bennett v. Womack*. 96

2. A document by which A. agrees to grant, and B. to take a lease of certain premises for a certain term, at a certain yearly rent, is to be considered merely as an agreement, not requiring a lease stamp, although no lease be prepared, and B. occupies during the whole of the term under such document, and pays the rent specified in it.

An administrator *cum testamento annexo* cannot declare before administration is granted. *Phillips v. Hartley*. 121

3. Where a party occupies under an agreement for a lease during the whole of the term for which the lease was to be granted, a notice to quit is not necessary at the end of such term, as the agreement is evidence of the expiration of the tenancy, as well as of the other terms of the holding. *Doe dem. Tilt v. Stratton*. 164

4. A. agreed with B. by *parol*, that, if B. would take of him a lease for twenty-one years, of certain premises, he would give 20*l.* towards putting them into repair. B. accepted the lease, and A. refused to pay the money: Held, in an action for it, that an admission by A. that the money was due, entitled B. to recover upon the account stated. *Seagos v. Dean*. 170

5. If the party employed by the consignee of a ship's cargo to sell it, undertake that he will "pay freight and primage, and demurrage, if any be due," and in every respect put himself in the place of the charterer, he will be liable to pay damages for any delay in discharging the cargo beyond the number of days allowed for demurrage in the charter-party. *Benson v. Hoppins*. 186

6. An agreement contained by itself less than 1080 words, but there was in it a stipulation, that a clause in a previous agreement, which was duly stamped, should be taken as part of the new agreement: Held, that, although with the clause referred to, there would be more than 1080 words, a 1*l.* stamp was proper, as that clause ought not to be reckoned. *Attwood v. Small*. 208

7. An agreement by which A. B. agrees "to remain with" C. D. for two years from the date of it, "for the purpose of learning" a particular business, will not support a declaration stating the consideration to be, that C. D. would "receive" A. B. "into his service."—*Seemle*, also, that such an agreement is not available, on the grounds of there being no mutuality, and no consideration appearing on the face of it. *Lees v. Whitcomb*. 289

8. An instrument by which A. agrees to let, and B. to take, certain premises, on the terms that A. shall pay certain specified rents, varying in amount, at the end of every three years, up to a specified date, and which provides, that, from and after that date, "he shall pay the clear annual

rent of 9*l.* till the end of the lease," but does not mention any time at which the lease is to terminate, is good only for the time previous to the date at which the 9*l.* is to commence. *Gwynne v. Mainstons*. 302

9. If one undertake to furnish a new history of a country, this is not performed by his furnishing a book which is a translation of an entire previously existing history, with his own continuations and some additions. *Paton v. Duncan*. 336

10. If A. agrees to make an article of certain materials for a stipulated price, but puts in materials of a better kind, he is not at liberty on that account to charge more than the stipulated price, nor can he require the article to be returned, because the buyer will not pay an increased price on account of the better materials. *Wilmut v. Smith*. 453

ALEHOUSE.

1. A brewer who supplies beer to a public house, cannot charge any person as a primary debtor but the person licensed to keep the house: and if beer be so supplied on the credit of a person not licensed, the brewer cannot recover against such person, on the ground that it is a fraud on the Excise. *Menz and others v. Humphries*. 79

2. A publican cannot recover for beer furnished to third persons by the order of an individual who has previously become intoxicated by drinking in his house. *Brandon v. Old*. 440

ALLEGATION.

See MURDER, 3.

ALTERATION.

See BILL, 13.

AMENDMENT.

See MALICIOUS ARREST, 1. VARIANCE, 4.

ANCIENT LIGHTS.

The custom of London, which allows a man to build to any height upon ancient foundations, although he may darken his neighbour's lights thereby, must be confined to cases where all the four walls of the building belong to the party, and will not justify him in raising an obstruction by means of three walls of his, so as to darken the lights in a fourth wall belonging to his neighbour. *Sir L. Shadwell v. Hutchinson*. 615

ANIMAL VICIOUS, KEEPING.

See KEEPING A VICIOUS ANIMAL, 1.

ANIMUS FURANDI.

See ROBBERY, 2.

ANNUITY.

If, in an action of covenant for arrears of an annuity, the defendant plead a release, lost by time and accident, and, to induce the Jury to presume a release, show that the annuity was not paid for seventeen years, and that the plaintiff borrowed money of the grantor of the annuity, and regularly paid him interest, without setting off the annuity—the Jury ought not to find for the defendant, unless they are satisfied that there is fair ground for supposing, that, at some particular period during the seventeen years, the plaintiff *actually* executed a release of the annuity; and, to rebut the presumption of such a release, the Jury may look at the situation of the parties, and take into their consideration the circumstances of the plaintiff being a near relative of the grantor of the annuity having large expectations from him, and of the grantor being a very old man, peremptory with his relatives, and very attentive to his pecuniary concerns. *Bigg v. Roberts and another, Executors of Rundell.* 43

APOTHECARY.

See SURGEON.

1. If, in an action for an apothecary's bill, it appear that the plaintiff, on and prior to the 1st of August, 1815, was a curer of certain local complaints, but did not keep any shop or make up the prescriptions of physicians, he will not be entitled to recover the amount of his bill. *Thompson v. Lewis.* 483
2. An apothecary may either charge for attendance, or for the medicine he sends, but not for both. *Towns v. Lady Grosley.* 581

APPREHENSION.

See LARCENY, 1.

APPRENTICE.

1. If a lad goes on liking with a view to his being bound an apprentice, his intended master cannot charge for his board and lodging for the first month, nor perhaps for so long time as he conducts himself properly. But if he stays for many months, behaving ill, after complaints to his father of his misconduct; it will be for the Jury to say whether there was any contract, either express or implied, that his father should pay for his board and lodging. *Earratt v. Burghart.* 381
2. The staying out by an apprentice on a Sunday evening beyond the time allowed him, is not such an unlawful absenting of himself as will enable his master to maintain an action of covenant against a person who became bound for the due performance of the indenture. *Wright v. Gihon.* 583
3. If an apprentice absent himself from his master's service, and the master take him back, and an action of covenant be brought

for his thus absenting himself, this condonation must be pleaded specially. *Ibid.*

4. The stat. 8 Ann. c. 9, s. 39, making void indentures of apprenticeship, in which the full sum and sums of money received, given, paid, secured, or contracted for, are not truly inserted, does not apply to cases where the sum actually paid is inserted in the indenture, though it is a less sum than that which was originally agreed for, and the reduction was made to diminish the amount of stamp-duty. *King v. Low.* 620

ARBITRATION.

See PERJURY, 1.

1. A dispute between A. B., a married woman, and C. D., was referred to arbitration. After the reference had proceeded for some time, an additional matter was submitted by the attorneys for the parties. C. D.'s attorney signed the submission in his presence. A. B.'s attorneys signed in the presence of C. D.'s attorney, but without any authority from their client. The award was afterwards set aside; and C. D.'s attorney sued him for the expenses of the arbitration: Held, that he had not been guilty of such negligence in not requiring to see the authority of A. B.'s attorney, as could prevent his recovering the amount of his bill. *Edwards, Gent.; One, &c. v. Cooper.* 277

ARREST.

See ATTORNEY, 2. LARCENY, 1.
MURDER, 1, 2.

1. A sheriff's officer having a warrant from the sheriff to arrest a party for debt, went to the party and read his warrant to him, and then, having taken a fee, proceeded to the party's attorney to let him know it, for bail to be put in. After this, the officer returned that he had taken the party: *Semble*, that this is no arrest. *George v. Radford.* 464

ASSAULT.

See SEARCH WARRANT, 1.

1. A person who has preferred an indictment for an assault, from which he did not suffer any personal injury, and has succeeded in it, and received from the treasury a portion of the fine imposed upon the defendant, is not entitled, in an action against the same defendant, to recover more than nominal damages. And it is the duty of an attorney when applied to to bring such an action, to dissuade the party from persevering in his intention. *Jacks v. Bell.* 316
2. Riding after a person and obliging him to run away into a garden to avoid being beaten, is an assault. *Martin v. Shoppee.* 373

ASSUMPSIT.

See ALIENAGE, 1. BANKRUPT, 1. CONVEYANCE, 1.

1. If a party say to his creditor that he will pay him so much, and put his hand in his pocket to take out the money, but, before he can get his money out, the creditor leaves the room, and the money is in consequence not produced till he is gone—this is no tender. A plea of tender is in practice very seldom successful, and the Lord Chief Justice observed, that he was on that account always sorry to see such a plea on the record. *Leatherdale v. Sweepstone*. 342

2. In an action for money had and received, the defendant, as an answer to the action, put in one part of a deed of covenant, executed by the plaintiffs, whereby the defendant covenanted to pay over all monies received by him on account of the plaintiffs; notice having been given to the plaintiffs to produce the counterpart of this deed: Held, that the defendant's having possession of the plaintiffs' part of the deed, was presumptive evidence that he had executed the counterpart, and that this was equally a ground of nonsuit whether the counterpart had been lost or not. *East India Company v. Lewis*. 358

ATTACHMENT.

Somble, that the attaching by process from the Sheriff's Court in London, of property in the hands of the garnishee, is not such a conversion as will enable the owner to maintain trover. *Mallalieu v. Laugher*. 551

ATTORNEY.

See ARBITRATION, 1. ASSAULT, 1. TENDER, 1. WITNESS, 7.

1. The rule, that all papers relating to the cause must be taken to be put into the hands of the attorney, must be confined to the attornies of persons residing abroad, while the cause is going on in England, and does not apply to cases where the party is resident in England; and in no case does it extend to any but such papers as might be reasonably expected to be put into the hands of the attorney for the purposes of the cause. *Vice v. Dow. Visc. Anson*. 19
2. A. placed money in the hands of his attorney to invest for him, giving the attorney an unlimited discretion to do what was best; the attorney advanced the money to B. on mortgage, but, discovering that the security was bad, the attorney sued out a bailable writ in A.'s name against the borrower for the amount, without A.'s knowledge: Held, that B. could maintain no action against the attorney for arresting him without the authority of A., if the attorney acted *bonâ fide*, and A. afterwards approved of what he had done. *Anderson v. Watson*. 214
3. If an attorney undertake to conduct a cause for the costs out of pocket, it being represented to him by his client, that such client took a certain interest under a deed—the attorney cannot charge more than the costs

out of pocket, though it should turn out that the cause was lost because his client did not take the interest under the deed which he stated that he took, it being the duty of the attorney to see the deed before he brought the action.

If an attorney does business for a client of a nature to make his bill taxable, and other business clearly not so, he is bound to put the whole into one bill, which bill is taxable; and he cannot bring an action in the first instance, and recover for the non-taxable business, but must deliver his whole bill a month, &c. under the statute. *Thwaites v. Mackerson*. 341

4. Though it is not absolutely necessary, yet, in correct practice, an attorney ought, before he commences an action, to take a written direction from his client for so doing. *Owen v. Ord*. 349

AUCTION.

See VENDOR AND VENDEE, 1.

If an auctioneer signs a contract for the sale of a house in his own name, and receives the deposit (his principal being present), and, after the purchaser has left the room, pays over the deposit to such principal—the purchaser may, notwithstanding this, maintain an action against the auctioneer, to recover back his deposit, if a good title cannot be made. *Gray v. Gutteridge*. 40

AUTHORITY (TO DISTRAIN).

See REPLEVIN, 1.

BAIL BOND.

See VARIANCE, 2.

BAIL.

1. Bail to the sheriff have no right to take their principal into custody, nor have bail in the Palace Court. With respect to bail above, it is otherwise. *Rees v. Hughes*. 373
 2. If, at a trial, it be discovered that a witness for the defence is one of the bail, and therefore incompetent, the Judge at the trial will, on the defendant's depositing a sufficient sum with the associate, make an order for striking the witness's name out of the bail-piece, so as to render him a competent witness. *Bailey v. Hole*. 560
- The amount to be deposited must be the sum sworn to and a further sum for costs. *Ibid*.

BANKRUPT.

See BILL OF EXCHANGE, 14. PLEADING, 6, 7.

1. Under the 61st sect. of the bankrupt act, 6 Geo. 4, c. 16, a *bonâ fide* payment made by a bankrupt more than two months before the issuing of the commission, the receiver having no notice of an act of bankruptcy, is

- protected, and the fact of his knowing the bankrupt to be in difficulties makes no difference. An admission by a party in his examination before Commissioners of bankruptcy, that he has received a sum of money belonging to the bankrupt after an act of bankruptcy, is not evidence of an account stated with the assignees; and the most that an examination before the Commissioners does, is to make out a *prima facie* case for the assignees, that the party has so much of the bankrupt's money in his hands, so as to call on him for an explanation; but, if there be no count for money had and received to the use of the assignees, they must be nonsuited. Whether the act of bankruptcy, by lying in prison 21 days, relates to the first of the 21 days, or only to the last of them?—*Quare. Tucker and another, Assignees of Hickman, v. Barrow, Gent., One, &c.* 85
- 2 A. being a trader, before any act of bankruptcy, directed his broker, who had authority to distrain for rents due to him, to pay a certain sum to B. in satisfaction of a debt, and the broker, *bona fide*, agreed with B. to pay him as soon as he received the rents, and after this A. became bankrupt: Held, that the assignees of A. could not recover this sum from the broker, though he did not in fact pay it over to B. till after the commission issued. *Bedford and others, Assignees of Cohan, a bankrupt, v. Perkins.* 90
3. If a person who has numerous dealings with a bankrupt, on being examined before the Commissioners, does not bring his books with him, but, while under examination, consents that the accountant to the commission shall make extracts from them: these extracts cannot be used as evidence against him, without also reading his examination. If one buys goods of a bankrupt under such circumstances as will entitle his assignees to maintain trover for them, such buying is in itself a conversion, and the assignees need not adduce evidence of a demand and refusal. Upon the question under the stat. 46 Geo. 3, c. 135 (repealed from the 1st Sept. 1825, by the stat. 6 Geo. 4, c. 16), whether a party dealing with a trader knew him to be insolvent: the Jury may infer such knowledge from the fact of the party buying goods of the trader to a great extent for a period of near two years, at prices more than thirty *per cent.* under prime cost. *Yates and another, Assignees of Marshall, a bankrupt, v. Carnesew.* 99
4. A carriage finished and paid for before the bankruptcy of the maker, but suffered to remain on his premises at the request of the owner, on account of his being abroad, cannot be taken by the assignees, as in the order or disposition of the bankrupt, although such bankrupt put it in his front shop, and actually sell it to another. In such case, an actual delivery of the carriage at the house of the person for whom it was made is not necessary to constitute him the owner. *Bartram v. Payne.* 175
- 5 *Sembla.*, that, under the provision of the Vol. XIV.—96 3 S *
- new bankrupt act, 6 Geo. 4, c. 16, s. 59, a bankrupt in custody, by insisting on his discharge, previous to proof of a debt, does not estop himself from disputing the validity of the commission against him. *Mott v. Mills.* 197
6. If a person, who is in fact assignee of a bankrupt, be sued in trover, and it appear that he claims the goods as property belonging to the bankrupt; in making out this defence, he need not give evidence of the trading, &c., unless there has been notice of disputing the commission, although he be not, in point of form, *sued as assignee.*
- If an innkeeper borrow a chaise from a coach-maker while he has a new chaise making, and use it in the course of his trade, but does not have his name painted upon it, under the stat. 4 Geo. 4, c. 62, s. 11, this is not such a reputed ownership of the borrowed chaise, as will entitle the assignees of the innkeeper to detain it from the coach-maker. *Newport v. Hollings.* 223
7. A commission of bankruptcy cannot be supported against a person under age. *O'Brien v. Currie.* 283
8. To prove an act of bankruptcy, in a trader who is a member of parliament, by his not paying or securing to a creditor a debt of 100*l.* after the suing out of a writ of summons, &c., it is not absolutely necessary to call the creditor. If a writ of *f. fa.* be sued out against one of several partners, for a debt due from him alone, there is great doubt as to what interest in the partnership property can be sold by the sheriff. *Burton v. Green.* 306
9. In an action by the assignee of a bankrupt, a plea was delivered to the plaintiff's attorney by a clerk of the defendant's attorney, who, through mistake, omitted to deliver with it a notice to dispute the bankruptcy. A few hours after, as soon as the omission was discovered, the plea was fetched away on the pretence that there was some error in it; and, in the course of the same day, a fresh plea was delivered, accompanied by a notice: It was held at *Nisi Prius* that, although the term for pleading had not expired, the notice was not sufficient under the 90th section of the 6 Geo. 4, c. 16; but the Court of Common Pleas, under the circumstances, granted a new trial, on payment by the defendant's attorney of the costs, as between attorney and client. *Lawrence, assignee of Tolson, v. Crowder.* 229
10. The correctness of the bond given to the Lord Chancellor under the 13th section of the Bankrupt Act, cannot be disputed at *Nisi Prius*, in an action to try the validity of the commission, in the case in which it was given. Nor can it be considered there, whether the defendant's attorney has agreed to accept a notice to dispute, which had been delivered after the time mentioned in the act of Parliament. *Folks v. Scudder.* 232
11. If assignees of a bankrupt, suing for a debt due before the bankruptcy, receive

notice of disputing the trading, &c. the Judge will only grant them a certificate for the costs of producing the depositions, and not for the costs of the attorney's attendance, or of witnesses to prove the bankruptcy. *Ralpho v. Davies.* 382

12. The making of bricks for sale, from clay taken from a man's own land, does not constitute him a trader, within the meaning of the bankrupt laws; nor will it be a trading, if such person buy chalk for the purpose of burning with the clay, to improve the bricks, and afterwards sell a portion of the chalk, when converted into lime. *Paul v. Dowling.* 500

13. In trespass for taking goods, the defendant pleaded (without the general issue) a justification under the warrant of commissioners of bankrupt, and averred, that the plaintiff "had become bankrupt within the true intent and meaning of the stat. 6 Geo. 4, c. 16." Replication, denying that the plaintiff became bankrupt: Held, that on these pleadings the defendant had the right to begin.

If a plea contain distinct allegations of a trading and petitioning creditor's debt, and then go on to state, that the plaintiff "became bankrupt," and in the replication the plaintiff protest the trading and petitioning creditor's debt, and deny that the plaintiff "became bankrupt," this morely puts in issue the act of bankruptcy, and the words "became bankrupt," coupled with the other two allegations, will be held to extend to the act of bankruptcy only. *Cotton v. James.* 505

BENEFIT SOCIETIES.

On an indictment against the stewards, &c., of a benefit society, for disobeying an order of two justices, commanding them to re-admit A. B. to be a member of that society, it is no defence, that A. B. was a person, who, by the rules of the society, was ineligible to be a member of it, as that was matter of defence before the justices; and if it be proved that the order was served on one of the defendants, and that the others, when A. B. applied to be re-admitted, said, that they would not admit him, and did not care for the justices' order; that is presumptive evidence of a service of the order upon them. *Rex v. Gilkes and others.* 52

BILL OF EXCHANGE.

See EVIDENCE, 3. PROMISSORY NOTE.

1. In an action on a bill of exchange, if a person called to prove the consideration say that the bill was accepted for value received, but refuse to say of what that value consisted, on the ground that it might render him liable to a *qui tam* action, he cannot be compelled to answer; but if he persist in refusing, it will stand upon the evidence that there was no consideration. *Dandridge v. Corden.* 11

2. If a declaration on a bill of exchange—indorsee against acceptor—state that it was

indorsed to the plaintiffs, as the surviving assignees of A. B. after his bankruptcy—the plaintiffs must prove that the bill was indorsed to them after the bankruptcy, and in their capacity of surviving assignees. *Bernasconi and others, Assignees of Chambers and others, v. The Duke of Argyll.* 29

3. In an action on a note, if it appear on the inspection of the note, that it has been altered, it lies on the plaintiff to show that the alteration took place under such circumstances as will entitle him to recover.

Whether a conversation between the defendant and one of the witnesses is sufficient to entitle the plaintiff to recover on the account stated, is a question for the Court, and not for the jury. *Bishop v. Chambers.* 25

4. If a bill drawn by a banker in the country on a banker in town, in favour of A., payable after sight, be indorsed by A. to the defendants, who indorse to the plaintiffs seven days after the date of the bill, and the plaintiff delay presenting it for acceptance for four days, it will be left to the Jury to say whether the plaintiffs have been guilty of unreasonable delay; and in considering this, the Jury may infer, from the defendant himself having kept the bill so long unaccepted, that it is not the course of business to present such bills for acceptance immediately after the party receives them. *Shute and others v. Robins and others.* 80

5. A bill, which has been paid by the drawer, in default of payment by the acceptor, may afterwards be re-issued by the drawer, and the acceptor will be still liable to pay it.

In such case, if an action be brought against the acceptor by the indorsee of the drawer, the acceptor cannot inquire into the state of the accounts between the indorsee and drawer, nor will the state of such accounts furnish him with any defence. *Hubbard v. Jackson.* 134

6. If, in an action on a bill of exchange given for goods sold, it be proved that the bill was fetched away by the plaintiff's servant from the house of a third person, after the commencement of the action, and only a short time before the trial, such evidence will not make it necessary for the plaintiff to prove that he, at the time of action brought, was the holder of the bill, and entitled to sue upon it. *Burdon v. Halton.* 174

7. In an action by the first indorsee against the acceptor of a bill of exchange, the declaration of the drawer made before indorsement, showing that the acceptor received no value for his acceptance, cannot be admitted in evidence, if the drawer be living at the time of the trial; because in such case he might be called as a witness. *Hodger v. Horton.* 179

8. If several persons, not partners in business, separately indorse, for the accommodation of the drawer, a bill of exchange, which has been previously indorsed by another person, and, on the bill being dishonoured, pay the party who has discounted it, in equal proportions, they may strike out their own indorsements, and bring a joint action against such previous indorser to re-

- cover the amount of the bill. *Low v. Copstake.* 300
9. It is not necessary in an action against the drawer of a bill of exchange, payable *after date*, to aver acceptance or notice of refusal to accept, but proof of presentment for payment is sufficient. If a bill is accepted payable at a particular place, and the acceptor dies before it becomes due, it is sufficient, in an action against the drawer, to prove presentment at the specified place, and it is not necessary to show presentment at the house of the deceased's representative. *Philpott v. Bryant.* 244
10. If a letter, giving notice of the dishonour of a bill, is put into the two-penny post-office, in time to be delivered on the proper day, in the ordinary course of business, but, from some delay in the office, does not reach its destination till afterwards, such delay in the office will not prejudice the party by whom the notice was given.
If there are several indorsers of a bill, and the last indorsee and holder resorts in the first instance to the first of such indorsers, he is not entitled to as many days as there are indorsers to give notice of dishonour in, but must give it within the same time as he would have been obliged to do it in, if he had resorted at first to his own immediate indorser. *Dobree v. Eastwood.* 250
11. A trader in London took a bill of exchange in part payment for goods, of a person representing himself to be a tradesman from the country, and to have been recommended by a customer, and sent the goods, in consequence of an order from the buyer, to a public-house, which was not a booking-office, without making any inquiries except as to the respectability of the acceptor. The bill turned out to have been stolen, and, in an action by the trader against the acceptor, the defendant had a verdict, on the ground that the plaintiff had taken the bill out of the ordinary course of trade, and under circumstances which ought to have excited his suspicion. *Slater and others v. West.* 325
12. If a defendant has entered into a deed of composition with his creditors, containing the usual clause of release, and the plaintiff has executed the deed as a creditor for a certain sum, that is a good defence to an action by the plaintiff as indorsee of a bill to a larger amount, of which the defendant was indorser, and which then lay dishonoured, in the plaintiff's hands. But it is no defence as to two similar bills, also of larger amount, which the plaintiff had paid away, and which were then in the hands of third parties.
If, after a bill is dishonoured, the indorser offer to pay the holder so much in the pound, on the amount: *Semble*, that this dispenses with proof of the notice of dishonour. *Margatson v. Aitken.* 339
13. One having made and signed a promissory note, handed it to a third person, the payee being present; but before it was given to the payee it was altered, by the consent

of all parties: Held, that this giving it to the third person was not an issuing of it, and that it did not require a new stamp. *Sherrington v. Jermyn.* 374

14. A bill given to a creditor to *indure him to sign* a bankrupt's certificate is void, in whosever hands it may be, and whatever the consideration given by the holder; but a bill given to a creditor to keep him from *taking steps to oppose* the certificate, would be good in the hands of a holder for value without notice. *Birch v. Jarvis.* 379

BOARD AND LODGING.

See APPRENTICE, 1.

BOND.

See BANKRUPT, 10. PLEADING, 8.

1. In an action of debt, on a bond to secure the re-payment of money with interest, the plaintiff can only recover to the amount of the penalty, with 1*s.* for the detention of the debt. *Hallen v. Ardley.* 12
2. If in an action on a bond given by the sureties of a collector of taxes, there be breaches assigned, that the collector did not pay over money received, and that he did not duly demand and enforce payment of the taxes, it is not necessary, on the part of the plaintiff, to prove exactly what money he received; for if it be proved that he was to collect a certain sum, and that he paid over a smaller sum, and did not take proper steps to *exonerate himself* from the residue, the plaintiff will be entitled to recover. Omitting a word where the context supplies it, or inserting a wrong word, where the context corrects the mistake, is no variance. Therefore, if, on oyer of a bond, the obligees are described to be Commissioners acting under an act of Parliament for the regulation of the duties on assessed taxes, and in the bond the duties are stated to be duties of assessed taxes, this is no variance. *Loveland v. Knight.* 106

BROKER.

See LANDLORD AND TENANT, 1.

Whether, in an action against a broker by his principal for charging an increased price in addition to his commission, it is competent to the broker to show that in some of the transactions he acted as a principal, it being contrary to the duty and oath of a broker so to act—*Quare.*

To prove the averment of actual payment by the principal of the over-charges, it is sufficient to show a running unsettled account between the parties, by which it appears, that, as far as the particular transactions in question are concerned, the principal has paid more than the amount of the over-charges, though, on the whole account, continuing to a period long subsequent, the balance is in favour of the broker to more than their amount also. *Proctor v. Brain.* 536

BULL-BAITING.*See* CRUELTY TO CATTLE, 1.**BURGLARY.**

On an indictment for burglary, by breaking into a house, in the night-time, and stealing to the value of 5*l.* or more, the prisoner may be convicted of burglary, or of house-breaking under the stat. 7 & 8 Geo. 4, c. 29, s. 12, or of stealing in a dwelling-house to the value of 5*l.* *Re* *x* v. *Compton*. 418

CAUTION, WANT OF DUE.*See* BILL, 11.**CHURCH.***See* SACRILEGE.**COACH-PROPRIETORS, LIABILITY OF.**

A parcel containing two hundred sovereigns inclosed in six pounds of tea, was sent by coach, and paid for as of ordinary value, both the party sending and the owner of the parcel being aware of a notice by the coach proprietors, limiting their responsibility to 5*l.*; the parcel was stolen by one of the porters of the coach, while it was standing in the street at a manufacturing town in the course of its journey: In an action to recover the value from the coach-proprietors, the defendants had a verdict, on the ground, that the loss was occasioned by the improper mode in which the parcel had been committed to their care. *Bradley v. Waterhouse and Briggs*. 318

COIN.

In an indictment for putting off counterfeit money at a lower rate than its denomination imported, it was alleged that the prisoner put off a counterfeit sovereign and three counterfeit shillings, "for the sum of five shillings." The proof was, that the prisoner said he would let the witness have a bad sovereign at 4*s.*, and three bad shillings at 1*s.*; and the witness paid for them with two good half-crowns: Held, that this proof supported the allegation. *Re* *x* v. *Hedges*. 410

COLONIES.

*Sem*ble, that the governor of a British colony has the ecclesiastical power of an ordinary, without that authority being expressly named in his commission.

If a governor of a colony has the authority of the ordinary, he has no power to commit a churchwarden who refuses to account; he ought to proceed upon a citation, and must excommunicate. *Basham v. Lumley*. 489

COMPENSATION.*See* CONDITIONS OF SALE, 1.**COMPETENCY.***See* WITNESS, 1, 3, 8.**CONCUBINAGE.***See* WITNESS, 7.**CONDITIONS OF SALE.**

On a sale of a reversionary interest, with the usual condition, that no error of description, &c., should vitiate the sale, but a compensation be allowed, the reversion was described as absolute, on the death of a person aged sixty-six. In fact, the person was only sixty-four, and the reversion was not absolute, as the property would be divided if he left more children than one: Held, that this sale was void, and that the offer of a compensation would not support it: but if it had been a mere difference of the age, *sem*ble, that it would have been otherwise. *Sherwood v. Robins*. 330

CONFESSION.

If a prosecutor gives in evidence, a declaration made by a prisoner, it becomes evidence for the prisoner, as well as against him; but, like all other evidence, the Jury may give credit to one part of it, and not to another. *Re* *x* v. *Higgins*. 603

CONSTABLE.*See* TROVER, 1.**CONTRIBUTION.**

A. and B. were sureties for C., a collector of taxes, who became a defaulter. The obligees sued A., and recovered: Held, that, in an action for contribution, brought by A. against B., A. could only recover half the amount of the verdict against him, and that he could not recover from B. either the half of the taxed costs of the obligees, or the half of his own costs of defending the action brought by the obligees.

Held, also, that if A., after the verdict in the action against him on the bond, obtain a sum of money from C., he must take that in reduction of the amount of the verdict, and cannot apply it either to pay his own costs, or the taxed costs of the obligees. *Knight v. Hughes*. 467

CONVERSION.

If A. send goods to B. to pack, and B. does not forward them to C. when so desired, but refuses to part with them, and tells C. that he will not give them up unless C. will guaranty a debt due to him: This is evidence of a conversion by B. *Sharp v. Pratt*. 34

CONVEYANCER.

If a certificated conveyancer induce a creditor of a bankrupt to employ him in investigating a bankrupt's affairs, by represent

arg himself to be an attorney and solicitor, he is not entitled to recover any thing for his trouble : and even if he paid fees to counsel in the course of the investigation, he cannot recover them of his employer as money paid, laid out, and expended. *Crammond v. Crouch.* 77

CORONER'S INQUISITION.

1. If the names of the jurors be not set out in the caption of a coroner's inquisition, and the inquisition be not signed by the jurors, with their names at length—the inquisition is bad. *Rex v. Bowen.* 602
2. If some of the jurors sign with their marks, such marks ought to be verified by an attestation. *Ibid.*

COSTS.

See BANKRUPT, 11.

COSTS, BILL OF.

See PROMISSORY NOTE, 3.

COVENANT.

See AGREEMENT, 1. ANNUITY, 1.

CROSS-EXAMINATION.

1. If the plaintiff's counsel call "Captain S.," and Captain *Hugh S.* answer, and is sworn, and the plaintiff's counsel, after asking him a few questions, ascertain that it was Captain *Francis S.* whom they meant to examine, this does not give the other side a right to cross-examine Captain *Hugh S.*, as he was only examined by mistake. *Clifford v. Hunter.* 16
2. On the trial of an indictment for a rape, it was held that the prisoner's counsel might ask the prosecutrix the following questions, with a view to contradict her. "Were you not on — (a day since the time of the alleged offence), walking in the High Street, at O., to look out for men?" "Were you not on — (since the time of the alleged offence), walking in H. Street, with a woman reputed to be a common prostitute?"

Held also, that evidence might be adduced by the prisoner, to show the general light character of the prosecutrix, and that general evidence might be given of her being a street walker; but *semble* that evidence of specific acts of criminality by her, would not be admissible. *Rex v. Barker.* 589

CRUELTY TO CATTLE.

Ball-baiting is not punishable under the stat. 3 Geo. 4, c. 71, for preventing cruelty to cattle, as bulls are not included in that statute. If a writ of *habeas corpus* be granted, on the ground that the party has been illegally committed by a magistrate, the Judge will not make it a part of the rule for issuing the writ, that the party shall not bring an action against the magistrate. *Ex parte Hill.* 225

CUXHAVEN.

See INSURANCE, 1.

DAMAGES LIQUIDATED.

In an agreement for the sale of a public-house, it was stipulated, that the seller should not be concerned in carrying on the business of a publican, within a mile from the house he had parted with, "under the *penal* sum of 500*l.* the same to be recoverable as and for *liquidated damages.*" Notwithstanding this, he opened a public-house, about three-quarters of a mile off. No evidence of actual damage was given by the plaintiff, but for the defendant some witnesses stated that the plaintiff had spoken of the injury as not considerable. It was held at *Nisi Prius*, that the whole sum was recoverable as stipulated damages, but left to the Jury to state what was the actual damage. The Jury found for the whole sum, and the Court of Common Pleas refused to grant a new trial. *Crisdee v. Bolton.* 240

DECLARATIONS.

See EVIDENCE, 4, 8.

DECLARATIONS IN ARTICULO MORTIS.

See DYING DECLARATIONS.

DEMURRAGE.

See AGREEMENT, 5.

DEMURRER TO AN INDICTMENT.

See PRACTICE, 4.

DEPOSIT.

See AUCTION, 1.

The Lord Chief Justice will not try an action for money had and received, to recover back a deposit paid to abide the event of a wrestling match, which did not take place. *Kennedy v. Gad.* 376

DEPOSITIONS.

See ADMISSION, 1.

A witness examined on the trial of an issue out of Chancery, died: a new trial was granted, and on the new trial *parol* evidence was allowed to be given of what this witness had deposed on the former trial, notwithstanding there was the usual order for reading the depositions in equity of such witnesses as had died since the first trial. *Tod v. Earl of Winchelsea.* 387

DETINUE.

If a person who writes an answer to a demand made upon another person of certain things, says, that he has got them, and thereby induces the claimant to bring an action against him, he is liable to such

claimant, in detinue, although it does not appear that he had the general controlling power over the things. *Hall et Uz. v. Whits.* 136

DILAPIDATIONS.

See LANDLORD AND TENANT, 2.

DISCHARGE OF JURY.

See LEGITIMACY, 2.

DISCONTINUANCE.

See PLEADING, 1.

DISTRESS.

See JOINT-TENANT, 1.

DOCK-COMPANY.

A Dock-Company having a swing bridge on a public highway, are bound, in the passing of vessels, to use all reasonable means (both as to the number of men employed and the number of ships passed at a time) to prevent unnecessary delay; and if they do not do all which can be expected of reasonable men, and any one is obstructed in consequence, such obstruction will make them liable in damages for the injury sustained. *Wiggins v. Boddington.* 544

DWELLING-HOUSE.

See BURGLARY, 1. PLEADING, 2.

DYING DECLARATIONS.

1. A declaration in *articulo mortis*, made by a child only four years old, is not admissible in evidence, on the trial of an indictment for the murder of such child; because a child of such tender years could not have had that idea of a future state which is necessary to make such a declaration admissible. *Rez v. Pike.* 598
2. To render the declaration of a deceased person admissible on the trial of an indictment for manslaughter, it must have been made by him under an impression of almost immediate dissolution; and it is not enough that the deceased should have thought that he should ultimately never recover. *Rez v. Van Butchell.* 629
3. Before a declaration of a deceased person is received as a declaration in *articulo mortis*, the Judge will hear all that the deceased said respecting the danger in which he considered himself to be; and it will, upon this, be for his Lordship to decide, whether the deceased then had that impression on his mind, which would render his declarations admissible. *Ibid.*

EJECTMENT.

See LANDLORD AND TENANT, 6.

- * If in an ejectment a landlord and tenant and by different attorneys, and have differ-

ent counsel, but it appear that the tenant claims no title but what he derives from the landlord, the Judge at the trial will only allow one counsel to address the Jury for the defence, but the party's counsel who does not address the Jury will be at liberty to cross-examine, and also to call witnesses. *Doe d. Hogg v. Tindale.* 565

2. If in an ejectment it be proved that the lessor of the plaintiff let the *locus in quo* to a tenant who held peaceable possession for about a year, this is sufficient evidence of title, as against a party who came in the night, and forcibly turned such tenant out of possession. *Doe d. Hughes v. Dyball.* 610

ELECTION.

1. A mercer furnished ribands to a person who was a candidate for the representation of a city in Parliament; the ribands were partly used as presents for voters; the mercer was himself a voter, and received orders for some of the ribands, from the candidate himself, in his committee room, but was not told for what purpose they were wanted: Held, that he was entitled to recover the price of the ribands from the candidate, notwithstanding the provisions of the stat. 7 & 8 W. 3, c. 4. *Richardson v. Webster.* 123
2. At a general election, A. was, after a contest, returned to serve in parliament; A. died before the next meeting of Parliament: Held, that, immediately on his death, the representation of that place "became vacant," within the meaning of the treating act, 7 & 8 W. 3, c. 4; and that if B., who was neither a candidate nor the agent of a candidate, canvassed for C., and ordered beer for the voters, after such vacancy, this was within the act, even though it was not proved that C. either knew of the canvass or of the treating: and it was therefore held, that an innkeeper could not recover against B. for beer supplied to those voters by his order.

The treating act extends to an unsuccessful candidate who did not come to the poll. *Ward v. Nanney.* 399

EMBEZZLEMENT.

1. If a prisoner, indicted for embezzlement, does not know the specific acts of embezzlement intended to be charged against him, he should apply to the prosecutor for a particular of the charges; and if it be refused, the Judge will, on motion, supported by proper affidavits, grant an order for such particular to be given, and postpone the trial, if necessary.

Such particular ought, at least, to state the names of the persons from whom the money is alleged to have been received.

It was the duty of a clerk to receive monies daily at N., to enter all such monies so received in a book, and to remit the amount weekly to L. His entries were all correct, and admitted the receipt of all the monies; but he did not remit them to L.

as was his duty. Held, no embezzlement.
Rez v. Hodgson. 422

ESCAPE.

1. The clerk of the bails of the Mayor's Court of London, in pursuance of a practice in that Court, refused to accept bail for a defendant, who was sued jointly with another person, unless it was also given for such other person: Held, that this refusal was no answer to an action against a Sergeant-at-mace from whose custody that defendant, for whom bail was offered, had escaped. *De Vaux v. Sewell.* 182
2. In an action against the marshal for an escape, the allegation in the record in the original action is *prima facie* evidence that the party was committed to his custody. *Pheney v. Jones.* 333

EVIDENCE.

See ADMISSION. AGENT. ASSUMPSIT, 2. BANKRUPT, 1, 3. BENEFIT SOCIETIES. BILL OF EXCHANGE, 1. BROKER, 1. CONFESSION. CONVERSION, 1. CROSS-EXAMINATION. DETINUE, 1. DYING DECLARATIONS. ESCAPE, 2. FORGERY. INSURANCE, 4. LIBEL, 6. PATENT, 1. PERJURY, 2, 3. PROMISE OF MARRIAGE, 1. TRESPASS, 4, 5. WITNESS.

1. The plaintiff wrote a letter to the defendant, which the defendant did not answer. At the trial, the plaintiff's counsel called for it under a notice to produce, and wished to give evidence of its contents: Held, that such evidence was not admissible: but that if, by the letter, the plaintiff demanded a certain sum, so much only of the copy of it might be read as stated the sum demanded. *Fairlie v. Denton and another, Gents., two, &c.* 103
2. In an action against attorneys for negligence in not making a motion to set aside proceedings for irregularity, if the declaration aver, as the consequence of the neglect, a judgment by default and further proceedings, and final judgment and execution, an examined copy of the record must be given in evidence, to prove both the judgments; and it is not enough to produce entries in the Prothonotary's book, and the inquisition with the Prothonotary's allocatur.

Semble, that, in such a case, the judgments are of the gist of the action, and not merely special damage.

Semble, also, that a writ intended for the father, served upon the son, who answers to the name of the father, that being his own name also, is sufficiently served if it come to the hands of the father before its return. *Godefroy v. Jay.* 192

3. In an action by the indorsee of a bill of exchange, accepted in a foreign country, against a party in London who undertook to negotiate it, for not paying over the proceeds, which is tried after the bill has become due, parol evidence may be given of the particulars of the bill.

Semble, that, if the declaration in such case allege that the proceeds were received, some evidence of the receipt must be given by the plaintiff at the trial; and a letter written by the defendant, a month before action brought, saying that the money would be received in a few days, is not sufficient. *Hunt v. Alwayn.* 284

4. A. sued out a writ of *f. fa.* against the goods of B., and the sheriff executed a bill of sale of certain goods to A. After this, B. remained in possession of the goods, and the sheriff again took them, under another execution against B.: Held, that, in an action brought by A. against the sheriff for taking these goods, the declarations of B. were evidence for the defendant, to show that A.'s execution was merely colourable. *Willies v. Parley.* 395

5. A will of lands *ascended* more than thirty years ago, is admissible in evidence without calling the subscribing witness, although the testator has died within thirty years, and it be proved that one of the subscribing witnesses is still alive. *Doe d. Oldnall v. Deakin.* 402

A. claimed in ejectment as heir-at-law of B. A. traced his pedigree through the youngest son of a common ancestor, who, in the year 1689, had four elder sons, whose descendants (if any) would have had a better title than B.: Held, that the length of time was a sufficient ground to presume their deaths; and that the Court would take it that they all died without issue, unless there was some evidence to induce a presumption that they, or some of them, married and left issue. *Ibid.*

6. No communications made to an attorney are privileged, but such as are made for the purpose of the attorney's either commencing or defending a suit. *Broad v. Pitt.* 518
7. A clerk in a merchant's counting-house may be called as a witness to explain the meaning of a particular entry in the books of the office made by a fellow-clerk, since deceased. *Hood, Assignee of Green, v. Reeves.* 532

8. A lease purported to have been signed by the mark of the party. A person proved the handwriting of the subscribing witness, and that he had gone abroad; and another person proved that the defendant had spoken of the term that he had under the lease. Held, that this was sufficient proof of the execution of the lease by the defendant. *Doe d. Wheeldon v. Paul.* 613

9. Where it appeared on the record, that an agreement sued on was made by the plaintiff on behalf of himself and the other proprietors of a theatre; evidence of the declarations of one of such other proprietors was held admissible on the part of the defendant. *Kemble v. Farran.* 623

10. The office copy of an insolvent's petition, attested by the officer of the Insolvent Debtors' Court, is sufficient evidence to prove an allegation that the petition *subscribed* by the insolvent was duly filed.

A letter written to the chief commissioner of the Insolvent Debtors' Court, by

an opposing creditor, previous to the hearing of an insolvent's case, is not a privileged communication. *Gould v. Hulme*. 525

EXECUTION.

Whether a woman, who has cohabited with a man for several years, and passed herself off as his wife, can recover in trespass for the taking, under an execution against the man, of her goods being in the house in which the cohabitation took place—*Quare*. But in such a case, it may be left to the Jury to say, whether they think, that, under the circumstances, the property was given up by the woman to the man; and if they do, they may find a verdict against her. *Edwards v. Farebrother*. 524

EXECUTORS AND ADMINISTRATORS.

See AGREEMENT, 2.

A plaintiff sued as executor, and in his declaration made *profert* of the letters testamentary in the usual form, which states, "whereby it appears to the Court here that the plaintiff is executor," &c. The defendant did not demand oyer, but pleaded that the plaintiff never was nor is executor "in manner and form" as alleged in the declaration. The plaintiff replied that he was, and continued to be executor in manner and form, &c. : Held, that the plaintiff might recover on this issue, although he had not taken probate till some months after the declaration. *Thompson v. Reynolds*. 123

FACTOR.

Acceptances of a factor for his principal, which are provided for by the principal before they become due, do not constitute such a demand against the principal as to enable the factor, previous to the 1st of October, 1826, when the 2d section of the 6 Geo. 4. c. 94, came into operation, to pledge the warrants for goods belonging to the principal, as a security for advances made to himself. *Blaudy v. Allan*. 447

FALSE PRETENCES.

Indictment for false pretences in passing a note of a bank that had stopped payment as a good note. The prisoner knew that the bank had stopped payment; but it appeared that two only of the partners of the bank had become bankrupt, and that the third had not: Held, that the prisoner must be acquitted. *Rez v. Spencer*. 420

FORFEITURE.

See LANDLORD AND TENANT, 6.

FORGERY.

1. If on an indictment for forgery being presented to the Grand Jury, it appear that the forged instrument cannot be produced, either from its being in the hands of the

prisoner, or from any other sufficient cause—they may receive secondary evidence of its contents. *Rez v. Hunter*. 501

2. An indictment for forgery being presented to the Grand Jury, a witness declined to produce certain deeds before them: Held, that if the deeds form a part of the evidence of the witness's title to his own estate, he is not compellable to produce them, but that, if they do not, the Grand Jury may compel their production. *Ibid*.

GOODS NOT ACCORDING TO ORDER.

If one order a certain machine, e. g. a threshing-machine, which, when sent to him, turns out to be unfit for use, he should either return it immediately, or else give immediate notice to the vendor to fetch it away; for if he keep it a long time without doing either, he will be taken to have waived all objections to its goodness. *Cash v. Giles*. 407

GOODS SOLD.

See AGREEMENT, 9.

1. If one of several partners be concerned in preparing the prospectus of a projected newspaper, which prospectus states, that he and others will act as treasurers and managers, and also that the subscribers are not to be partners, nor to be answerable for more than their subscription; and be also aware that a particular individual is to be sole nominal proprietor; the firm of which such partner is a member (although he has not taken any share in the paper), cannot sue the subscribers who have taken shares for the price of goods furnished for the paper. *Batty v. M'Cundie*. 202

2. If goods be sold on a credit, the vendor cannot, before the credit has expired, maintain *assumpsit* for goods sold, even though he can prove that the goods were not bought in the fair way of trade, but for the fraudulent purpose of being immediately resold at an under price: *Semble*, that trover is his proper remedy. *Ferguson v. Carrington*. 457

GROWING CROPS.

See ACCOUNT STATED, 1.

GUARANTY.

1. A. applied to B. for goods: B. asked for a reference: A. referred him to C.; C., on being applied to, inquired the amount of the order, and on what terms the goods were to be furnished; and on being told, said, "You may send them, and I'll take care that they are paid for at the time." He was afterwards written to, to accept a bill for the amount; to which he replied, that he was not in the habit of accepting bills, but that the money would be paid when due. After this B. the seller wrote to C. about the goods, and spoke of them in his letter as goods which C. has

- "*guaranteed*:" and the attorney of B.'s assignees (when he had become bankrupt) wrote to A. for the money, and threatened process; but this letter was a circular, written in pursuance of a list made out for him by B., and without any knowledge of the circumstances under which the debt was contracted: Held, that on this evidence C. was not primarily liable, but only as a guarantor of the debt of A. *Rains and another, Assignees of Evelyn, v. Storry.* 130
2. A guarantie for goods, addressed to one of two partners, may be declared on, as given to both, if it appear that the partner to whom it was addressed did not carry on any separate business.

A guarantie not addressed to any one, must be declared on as given to the party to whom or for whose use it was delivered. *Walton v. Dodson.* 162

HAMBURGH.

See INSURANCE, 1.

HIRE.

Where a carriage is hired for a certain time, and sent back before the expiration of it, if the party of whom it was hired sell it within the time, he cannot recover his charge for the hire. *Wright v. Melville.* 542

HOUSE-BREAKING.

See BURGLARY, 1.

HUNTING.

See TRESPASS, 1.

HUSBAND AND WIFE.

See WITNESS, 9.

If an action is brought against a husband for the price of goods supplied to his wife, who is living with him, it lies on the husband to show that the goods were furnished under such circumstances, that he is not liable to pay for them. But if the goods be supplied to his wife when she is living *separate and apart* from the husband, it is incumbent on the tradesman to prove that the separation occurred under such circumstances as will make the husband liable. *Clifford v. Latou.* 15

ILLEGITIMATE CHILD, MAINTENANCE OF.

If a person know that his illegitimate daughter, of the age of 16, is boarded and clothed by the plaintiff, and neither expresses dissent, nor takes his daughter away, he is liable to pay the plaintiff for such board and lodging without any express promise to do so. And it lies on the defendant to show that his daughter was boarded and lodged by the plaintiff against his consent, or that he has refused to be at the expense of maintaining her. *Nichols v. Allen.* 36

INDICTMENT.

See BENEFIT SOCIETIES, 1. BURGLARY, 1. COIN, 1. MANSLAUGHTER, 2. VARIANCE, 1.

1. If two bills of indictment be preferred for the same offence, the one charging it capitally, the other as a misdemeanour, and both be found, the Judge will put the party to his election which he will go upon, and direct an acquittal on the other. *Rez v. Smith.* 412
2. If an indictment contain two counts, one charging the offence as a larceny, the other as a receiving, the Judge will put the prosecutor to elect which he will go upon. *Rez v. Flower.* 413

INFANCY.

If proper clothes are supplied to an infant by his father, any others furnished in addition cannot be considered as necessaries; and it is the duty of a tradesman, when applied to by an infant for clothes, to make inquiries of his friends, before he gives him credit. *Cook v. Deaton.* 114

INQUISITION.

See CORONER'S INQUISITION.

INSANITY.

No person can, in defending an action, be allowed to stultify himself: and therefore, a defendant cannot, in an action for work and labour, set up his own insanity as a defence, unless he has been imposed upon by the plaintiff, in consequence of his mental imbecility. *Brown v. Jodrell, Esq.* 30

INSOLVENT.

See EVIDENCE, 9.

The assignment to the provisional assignee of the Insolvent Debtors' Court, is not made void by the death of the insolvent before his petition has been heard; and such provisional assignee may, after such death, assign to the assignee for the creditors; and they may bring actions in respect of the insolvent's property. *Willis and another v. Elliott, Senr.* 117

INSURANCE.

1. If a policy of insurance at and from H. to V., contain the following warranty, "warranted in port on the 19th October, 1825." This warranty applies to the port of H. only, and not to any other port. Cuxhaven is no part of the port of Hamburg. *Colby and others v. Hunter.* 7
2. If a new ship is insured, "on a voyage from Bristol to New York, during her stay there, and back to her port of discharge," and on her passage back from New York to England sustains an injury, which requires her to be repaired, the underwriter is not entitled to deduct one-third new for

old, as the whole is to be considered only one voyage. *Fenwick v. Robinson*. 323

3. If A., being indebted to B., die, and C. agree to pay the debt by instalments, in five years, A. has an insurable interest in the life of C. for those five years. If the assured, at the time of effecting the policy, conceals any thing which is material for the insurer to know, the policy is void; and it makes no difference whether the assured considered it material or not: and what amounts to a misrepresentation, or to a material concealment, is a question for the Jury. The fact, that, on a life policy, as unusually high premium was paid, is quite immaterial, and is therefore not to be taken as proof that the office considered the party to be a bad life. *Von Lindenau v. Desborough*. 353

4. In *assumpsit*, on a policy of insurance, the Jury ought not to allow the plaintiff interest, unless evidence be given that he had applied to the underwriter, to settle the loss, soon after it happened, and notified to him the ground of such application. Lloyd's list is evidence against the assured, if it be shown that the broker had read it, before the policy was effected.—A ship stayed at a particular port, for a period of one hundred and nine days, and whether this was an unreasonable time, was held to be a question of fact for the Jury. *Bain v. Case*. 496

INTEREST.

See INSURANCE, 4. IRISH JUDGMENT.

The Courts have so often decided that interest is not recoverable in an action for money had and received, that the Judge at *Nisi Prius* will not allow the point to be entered into. *Depecke v. Munn and another*. 112

IRISH JUDGMENT.

In an action on an Irish judgment, the question, whether any, and what interest is recoverable, is a question for the Jury, under all the circumstances of the case. And in deciding this question, they will have to consider whether the plaintiff has taken proper steps to find his debtor and follow up his judgment by an execution, or whether he has been guilty of *laches*. *Bann v. Dalsell*. 376

JOINT-TENANT.

One of several joint-tenants may sign a warrant of distress, if the others do not forbid him. If they, when applied to, merely *decline to act*, that will not prevent him from proceeding. *Robinson v. Hoffman*. 234

JURY.

See PRACTICE, 3. LEGITIMACY, 2.

JURY, SPECIAL.

See TAKES, 1.

KEEPING A VICIOUS ANIMAL.

In an action for an injury by a vicious bull, the plaintiff recovered, although it appeared that the bull was attracted by a cow in a particular state, which the plaintiff was driving past the field in which the bull was, and that the plaintiff first struck the bull on the head, to drive him away from the cow.

Semble, that the owner of a vicious animal, after notice of its having done an injury, is bound to secure it at all events, and is liable in damages to a party subsequently injured, if the mode he has adopted to secure it proves to be insufficient. *Blackman v. Simmons*. 139

LANDLORD AND TENANT.

See AGREEMENT, 1, 2, 3, 4, 7. NOTICE, 2.

1. *Semble*, that if a tenant pays taxes, which he alleges ought to have been paid by his landlord, and afterwards pays rent for two years subsequently, without making any deduction, he cannot recover the amount in an action against the landlord. *Semble*, also, that a broker, who, when receiving rent under a distress, deducts a sum purporting to be for land-tax, is not to be considered as *allowing* the land-tax, so as to affect the landlord's right, but as merely, from not knowing how to act, consenting to receive the money, without the sum deducted. *Saunderson v. Hanson, Gent.* 314

2. A party occupied premises, under an agreement for three years, at 45*l.* a year, which expired at Midsummer, 1826; he did not then go out, nor did his landlord take any steps to compel him, but at the Michaelmas following gave him notice to quit, at Lady-day, 1827, or pay the rent of 50*l.* a year. He continued in, but refused to pay more than the 45*l.* rent: Held, that, under the circumstances, he must be taken to have acquiesced with the new proposal, and was bound to pay the rent of 50*l.* *Roberts v. Hayward*. 432

3. A. agreed to take an assignment of a lease of a house, which was out of repair, from B., and by the agreement it was stipulated, that all out-goings should be paid by B. up to April 23d; and, by an assignment indorsed on the lease, (executed by B. but not by A.), B. assigned the residue of the term, subject to the performance of all the covenants of the lease, which, from the 22d day of April, ought to be observed on the part of the tenant. The lease contained a covenant to keep the premises in repair, and so to deliver them up; and, after the assignment, the reversioner sued B. and recovered for dilapidations which occurred before April 22d: Held, that B. could not maintain an action on the case against A. for these dilapidations, even though it could be proved that A. gave a smaller price, because the premises were out of repair: Held, also, that the Judge could not look beyond the written instruments, *viz.* the

written agreement and the assignment.—If B. assign the lease of a house to A. by deed, subject to certain covenants, and A. take possession, whether B.'s remedy for a breach of the covenants is by an action of covenant, though A. never executed the deed—*Quare. Hawkins v. Sherman.* 459

4. A landlord has no right to enter his tenant's premises to repair them, without some stipulation to that effect. *Barker v. Barker.* 557

5. The putting up of a board for the purpose of letting houses by a person who built them and agreed to become tenant of them from a certain time, is sufficient to enable the person for whom they were erected to recover rent on a count for use and occupation. *Sullivan v. Jones.* 579

6. In ejectment to recover demised premises, for non-payment of rent, under the usual proviso for re-entry, on non-payment for twenty-one days; it appeared that the rent was payable quarterly, and that a demand of more than one quarter's rent was made on the 21st day at 1 o'clock: Held, that only one quarter's rent should have been demanded, and that at sunset. *Doe dem. Wheelton v. Paul.* 613

LARCENY.

1. If the servant of the owner of property find a party actually committing an offence against the stat. 7 & 8 Geo. 4, c. 29, (the larceny act) and apprehend him under sect. 63 of that act, and, while taking the party to a magistrate, such party kill him, this will be murder; but if the servant either did not see him in the actual commission of the offence, or be taking him to any other place than before a magistrate, it will not be murder. *Rez v. Curran.* 397

2. If the only evidence against a prisoner charged with a larceny be that stolen property was found in his possession three months after the loss of it, the Judge will direct an acquittal, without calling upon him for his defence. *Rez v. Adams.* 600

LEASE.

See AGREEMENT, 2.

An agreement "between A. B. and C. D.," by which "A. B. agrees to pay C. D. 140*l.* a year, in quarterly payments, for a house, garden, &c., (describing the situation), for the term of seven, fourteen, or twenty-one years, at the option of the tenant, the rent to commence from the 1st January," &c., is a lease, and not merely an agreement for one. *Wright v. Trevozan.* 441

LEGACY.

Where an account of the residuary estate of a testator has been made out by the executors, and signed by the parties interested, under which account all of them have been paid except one, such one may recover his proportion, with interest, in *assumpsit*,

against the executors. *Gregory v. Harman.* 205

LEGITIMACY.

1. Every child, born in wedlock, the husband and wife being in England, and not separated by any sentence of divorce, is presumed to be legitimate; but this presumption may be repelled, by proof of such facts as satisfy the Jury that no sexual intercourse took place between the husband and wife, at a time when the husband could, by possibility, be the father of the child; and the Jury, before they can find against the legitimacy, must be convinced that no such sexual intercourse took place, by irresistible evidence, and not by a mere balance of probabilities. If such intercourse did take place, the adultery of the wife is immaterial; and if there was an opportunity of sexual intercourse between the husband and wife, the law presumes that such intercourse did take place, unless the contrary be satisfactorily proved. *Morris v. Davies.* 215

2. If husband and wife are in such a situation that sexual intercourse might have taken place, the law presumes that it did take place, unless such facts are proved as satisfy the Jury beyond all doubt that no such intercourse did take place; and, therefore, unless such facts are proved, a child born of the wife is legitimate, if the husband and wife were in such a situation that sexual intercourse might have taken place between them, at a time, when by the course of nature, the husband could have been the father of the child.

If, after the trial of an issue out of Chancery, the Jury are locked up for many hours, and are not likely to agree when the Judge is about to leave the town, the Judge will discharge them of his own authority, if the parties decline consenting to their discharge; but if a Jury be under such circumstances in a cause depending between party and party, *semble*, that the Judge would order that the Jury should follow him in a cart. *Morris v. Davies.* 427

LIBEL.

1. Communications made to a member of a dissenting congregation, respecting an individual about to be appointed a minister of that congregation, are privileged communications, and cannot be made the subject of an action by such individual. But if, in consequence of these communications, a printed circular be sent round, containing contradictions of them, and reflecting on the motives of the party who made them, and such party afterwards write a letter, and send it to the writer of the circular, in which, after repeating the communications, he adds other statements, which he acknowledges he cannot prove, such letter is not privileged, but will make him liable in damages, though it be specially found by a Jury that he was not actuated by *express malice*. In such an action, a letter written

- to the defendant, containing a statement of the facts upon which he founded his charges, is receivable in evidence on his behalf, to show the *bona fides* with which he acted. *Blackburn v. Blackburn*. 146
2. A circular letter sent by the secretary to the members of a society for the protection of trade against sharpers and swindlers, furnishing information respecting certain bill transactions, is not a privileged communication. *Semble*, that if such letter state particular facts, it will not be a libel, though some of the persons receiving it believed that it was sent to intimate that the parties mentioned in it were common sharpers and swindlers. Otherwise, if it had contained a *general statement*, such as that the party mentioned in it is considered an improper person to be proposed to be balloted for as a member of the society. At all events, in the former case, it is a question for the Jury, whether the society really and *bona fide* intended to give the *particular information* which the letter contains. *Gotting v. Foss, Gent.* 160
3. In a joint action for a libel by two partners, damages cannot be given for any injury to their private feelings, but only for such injury as they may have sustained in their joint trade or business. *Haythorn v. Lawson*. 196
4. An officer in the navy has no right to make communications upon subjects, with which he becomes acquainted in his professional capacity, except to the Government: and, therefore, a letter written to Lloyd's Coffee-house, about the conduct of the captain of a transport ship, by a lieutenant, who was superintendant on board, is not a privileged communication; nor can evidence of this being the practice for persons so circumstanced to make communications to Lloyd's, be received in an action for libel against such a person, either as furnishing a defence, in conjunction with other circumstances, or in mitigation of the damages to be recovered. *Harwood v. Green*. 141
5. In an action for a libel, contained in a printed paper circulated in a sale room, previous to the sale of an arbitration bond given by the defendant to the plaintiff as a surety for a third person, and which was advertised as an ordinary money bond, pending a writ of error and a suit in equity,—it appeared, that the printed paper charged the plaintiff with an intention of extorting money by threats, and spoke of the sale as a "wicked expedient." And it also appeared, that the plaintiff, before the writing of the paper, said, on the refusal of the defendant to pay him a certain sum, which he demanded, that he would advertise the bond, and the defendant should see the advertisement under his nose at breakfast. It was left to the Jury at *Nisi Prius*, to say whether, under all the circumstances, the defendant was acting *bona fide*, and the objectionable remarks were relevant, and exceeding only from warmth of feeling the bounds of moderation, or whether they were wholly irrelevant, and he went out of his way purposely to slander the plaintiff. The Jury found for the defendant; but the Court of Common Pleas granted a new trial, on the ground, that the defendant's expressions went far beyond the limits of a privileged communication, and must be considered as clearly libellous, without any proof of express malice. *Robertson v. Macdougall*. 259
6. Whatever is fairly written of a work, and can be reasonably said of it or of its author, as connected with it, is not actionable, unless it appear that the party, under the pretext of criticising the work, takes an opportunity of attacking the character of its author. In cases of libel, a subsequent publication, brought out even after issue joined, may be evidence to show the motives of the party. An admission signed by the defendant's attorney, consenting to admit the defendant to be editor of a periodical work called "The Lancet," is no evidence that the defendant was editor on a day subsequent to the date of such admission. *Macleod, M. D. v. Wakley*. 311
7. If a master, in giving the character of a servant in a letter, state certain facts, the master, in the defence of an action brought by the servant for libel, is not bound to prove the truth of every fact he stated: it is enough, that he give such evidence as convinces the Jury that he wrote what he said with an honest belief of its truth. *Semble*—that a character of a servant, if given *bona fide*, is a privileged communication, although it had not been applied for. *Pattison v. Jones*. 383
8. If in an action for a libel, the defendant plead justifications, without pleading the general issue, and the affirmative of the issue be on the defendant, he is entitled to begin, and the plaintiff has not, in such case, a right to begin, with a view of proving the amount of his damages. *Cooper v. Wakley*. 474
9. If a defendant, in an action for libel, imputing want of skill to a surgeon, plead that the plaintiff did want skill, and that he performed an operation in an unsurgeonlike manner, occupying unnecessary time, and causing unnecessary pain, these are all affirmatives on the part of the defendant. *Ibid.*
10. In an action for a libel, the defendant cannot, under the general issue, give evidence of any fact in mitigation of damages, which would be evidence to prove a justification of any part of the libel. He ought to justify as to that part. *Vessey v. Pike*. 512

LIEN.

- A livery-stable keeper has a lien for the keep and exercise of a horse sent to him for the purpose of being trained. *Bevan v. Waters*. 530

LIMITATION, STATUTE OF.

See ANNUITY, 1.

1. If one of two partners has become bankrupt,

and obtained his certificate, and after that he acknowledges a debt due to the plaintiff by his partner and himself; this acknowledgment is not sufficient to take the case out of the statute of limitations, in an action against him and his partner for such debt, if his partner plead the statute of limitations, and he plead his bankruptcy. *Martin v. Bridges and Elmore.* 83

2. A party borrowing money gave the lender a paper in the following form:—"I owe you one hundred pounds, Charles Roberts, 30th July, 1821." Underneath was written, "August 17th, received fifty pounds, Charles Roberts": Held, in an action by the lender, to which the statute of limitations was pleaded, that the latter memorandum, which was within the six years, did not constitute such an acknowledgment of the existence of the debt mentioned in the former, as to take it out of the operation of the statute. *Roberts v. Roberts.* 296
3. It has frequently been held at *Nisi Prius*, that the 1st sect. of the 9th Geo. 4, c. 14, applies to parol acknowledgments made before its provisions came into operation:— and *semble*, that from its wording such construction is the right one. *Ansell v. Ansell.* 563

LIVERY-STABLE KEEPER.

See LIEN, 1.

LONDON.

See ANCIENT LIGHTS.

LUNACY.

See INSANITY, 1. PROMISSORY NOTE, 1.

MAINTENANCE OF ILLEGITIMATE CHILD.

See ILLEGITIMATE CHILD, 1.

MALICIOUS ARREST.

See ARREST, 1.

In a declaration for a malicious arrest, the termination of the former suit was alleged thus:—"That the defendants did not prosecute their suit, but therein wholly failed and made default, and thereupon it was considered that they should take nothing by their bill, and that their pledges should be in mercy, and the plaintiff go thereof without day," *prout patet per recordum*: Held, that this allegation was not proved by the production of a rule to discontinue on payment of costs, and the proof of the payment of such costs:—

Held, also, that the Court cannot reject the allegation of the judgment of *nonpross*, as, without that, it would not be shown how the suit was terminated:—

Held, also, that this was not a variance amendable under the stat. 9 Geo. 4, c. 15. *Webb v. Hill.* 485

MANSLAUGHTER.

1. A party, causing the death of a child by giving it spirituous liquors, in a quantity quite unfit for its tender age, is guilty of manslaughter. *Rex v. Martin.* 211
2. An indictment for manslaughter described the deceased, who was a Peer of Ireland, as "H. S., Baron M. of C., in the county of R., in that part of the United Kingdom called Ireland." It was proved that H. was his Christian name, S. his family surname, and Baron M., &c., his title: Held, no variance, and that the Court was not bound to construe H. S. to be one Christian name. *Rex v. Brinklett.* 416
3. If a person, *bono fide* and honestly exercising his best skill to cure a patient, perform an operation which causes the patient's death, he is not guilty of manslaughter; and it makes no difference whether such person be a regular or an irregular surgeon, nor whether he has had a regular medical education or not. *Rex v. Van Butchell.* 629
4. A person in the habit of acting as a midwife, tore away a part of the prolapsed uterus of one of his patients, supposing it to be a part of the placenta, by means of which the patient died: Held, that this person was not indictable for manslaughter, unless he was guilty of criminal misconduct, arising either from the grossest ignorance, or the most criminal inattention. *Rex v. Williamson.* 635

MARRIAGE.

See PROMISE OF MARRIAGE.

MASTER AND SERVANT.

1. If a master sends his servant on an errand without providing him with a horse, and the servant takes one, and rides it in the doing of such errand, and an injury happens in consequence, the master is not liable in an action for damages by the party injured. *Goodman v. Kennell.* 167
2. If the contract between master and servant be the usual one for a year, determinable at a month, the servant, if turned away improperly, cannot recover on a count stating the contract to be for an entire year; and he cannot, on the common count for wages, recover for any further period than that during which he had served. *Archard v. Hornor.* 340
3. A servant being engaged for a year at thirty guineas and a suit of clothes, was provided with a livery suit on his entering the service. He was wrongfully turned away within the year: Held, that he could not maintain trover for the clothes, that not being the proper form of action. *Crocker v. Molyneux.* 376

MAYOR'S COURT, LORD.

See ESCAPE, 1.

MONEY HAD AND RECEIVED.

See BANKRUPT, 1. INTEREST. SURVEYOR OF HIGHWAYS, 2.

- A. was indebted to B. in a sum of 868*l.*, for which he was arrested. C., who was clerk to B.'s attorney, directed him to be discharged on paying 700*l.* only. B. threatened to complain to C.'s employers; to prevent which, C. advanced 100*l.*, B. agreeing that it should be repaid whenever the balance of 168*l.* should be recovered from A. After the death of B. and C., the balance was recovered: Held, that the representatives of C. might recover the 100*l.* from the representatives of B., on a count for money had and received to their use, and that there was no necessity to declare specially. *Platts v. Loan.* 561

MURDER.

See LARCENY, 1.

1. If game-keepers attempt to apprehend a gang of night poachers, and one of the game-keepers be shot by one of the poachers, this will be murder in all the poachers, unless it be proved that either of them separated himself from the rest, so as to show that he did not join in the act. *Res v. Edmonds.* 390
2. Where game-keepers had seized two persons who were poaching in the night, and they (having surrendered) called to a third, who came up and killed one of the game-keepers, this is murder in all, though the two struck no blow, and though the game-keepers had not announced in what capacity they had apprehended them. *Res v. Whitborne.* 394
3. An inquisition for murder, charging that the prisoner upon a new-born female child did make an assault, and the said new-born child, with "both her hands, in a certain piece of flannel, of no value, then and there feloniously, wilfully, and of her malice aforethought, did wrap up and fold, by means of which said wrapping up and folding the said new-born female child in the piece of flannel aforesaid, she the said new-born female child was then and there suffocated and smothered, of which said suffocation," &c. she instantly died; is good, although the inquisition does not go on to allege that the flannel was folded over the child's mouth, or inclosed the head, or the like.

It is no objection to the laying of the time in a coroner's inquisition, that the offence is stated to have been committed on the "26th day June," omitting the word "of." *Res v. Huggins.* 414

MUSIC ROOM.

1. The stat. 25 Geo. 2, c. 36, relating to places for public dancing, music, &c., extends to licensed taverns and hotels: and it is no defence, that the company frequenting the performances were respectable, or that the admission money was not received

for the benefit of the keeper of the house. The 13th sect. of that stat. which gives a form of declaration, extends to common informers. *Green v. Botherwyd.* 471

2. Form of declaration. B.

NEGLIGENCE.

See DOCK COMPANY, 1. MASTER AND SERVANT, 1. SHIP, 2.

1. If trustees under a paving act sign checks drawn by the clerk of the person who is clerk to the trust, those checks being drawn so as to be alterable from small sums to larger, the trustees cannot charge the clerk to the trust for negligence, if these are altered, as it was their duty not to sign checks drawn in such a form: nor can they charge him for misconduct of his clerk, which would have been prevented if the trustees had done their own duty in the way in which the clerk to the trust had fair reason to expect they would.

A count charging a clerk with negligence in suffering his employers to be defrauded of sums of money, without specifying any in particular, is bad.

If, by a private act of Parliament, forty-eight trustees are appointed (not being a corporation), of whom sixteen are to go out annually by rotation; and, by the same act, the trustees are to sue and be sued in the names of their treasurers for the time being: an action for money had and received may be maintained in the names of the present treasurers, although both they and the present trustees came into office since the time when the money was received by the defendant to the use of the trust. *Whitmore v. Wilks.* 364

2. Though the rule of the road is not to be adhered to, if, by departing from it, an injury can be avoided; yet, in cases where parties meet on the sudden, and an injury results, the party on the wrong side should be held answerable, unless it appear clearly that the party on the right had ample means and opportunity to prevent it. *Chaplin v. Hawes.* 554

NEW TRIAL.

See RULE, GENERAL, 1.

NOTICE.

See BANKRUPT, 9, 10. BILL OF EXCHANGE, 10.

1. Notice served on the attorney at 9 o'clock on Saturday night to produce papers at a trial in London on Wednesday, his client being absent in Scotland, is too late. *Vice v. Dow. Vice. Anson.* 19
2. A party took possession of premises on the 1st of August, and at the Michaelmas following paid the half quarter's rent, and continued afterwards to pay quarterly, on the usual feast days: Held, that in such case a notice to quit at Michaelmas was

sufficient, and that although the landlord had at first given a notice expiring with the half quarter, it was not necessarily to be presumed from that circumstance that the tenancy was one from year to year, commencing with the half quarter. *Doe dem. Savage v. Stapleton.* 275

NOTICE OF ACTION.

See SURVEYOR OF HIGHWAYS, 1. TRESPASS, 2. TROVER, 1.

OBSTRUCTING ANCIENT LIGHTS.

See ANCIENT LIGHTS.

ORDINARY.

See COLONIES, 1.

PARTICULAR OF CHARGES.

See EMBEZZLEMENT, 1.

PARTNERS.

See BANKRUPT, 8. GOODS SOLD, 1. LIBEL, 3. LIMITATIONS, STAT. OF, 1.

PATENT.

1. If the shearing of cloth from list to list by shears be known, and the shearing it from end to end by means of rotary cutters be also known, and a person construct a machine to shear from list to list by means of rotary cutters; this is a new invention, and will entitle the inventor to maintain a patent for it.

If A., in 1818, take out a patent for "improvements in a machine for which J. L. took out a patent in 1815," it is necessary for A., on the trial of an action for the infringement of his patent, to put in J. L.'s patent and specification; but it is not material whether a machine made according to the specification of J. L. would be useful or not, if it be shown that a machine constructed according to A.'s specification would be so. *Lewis v. Davis.* 502

2. If one take out a patent, and in his specification state certain improvements in the mechanical parts of his apparatus, which it appears he has invented after the taking out of the patent: this will not invalidate the patent, as the public ought to have the advantage of all improvements down to the time of the specification.

A specification of an invention, for which a patent had been granted, stated the invention to be an improved apparatus to extract gas from pit-coal, tar, or any other substance from which gas, capable of being used for illumination, could be extracted by heat: Held, that the words "other substance" must mean substance *ejusdem generis*, and that oil was not meant to be included in it, it being shown, that, at the time in question, oil was considered much too expensive to be used for the mak-

ing of gas for the lighting of streets and buildings, though it was known to afford an inflammable gas.

If in the specification of an improved gas apparatus no direction is given respecting a condenser, which is a necessary part of every gas apparatus; this will not invalidate the patent, if it appear, that every one capable of constructing a gas apparatus must know that a condenser must form a part of it. *Crossley v. Beverley.* 513

3. A patent was granted for a machine to sharpen knives and scissors, and in the specification this was directed to be done by passing their edges backwards and forwards in an angle formed by the intersection of two circular files—and in the specification, it was also stated, that other materials might be used according to the delicacy of the edge. It was proved that, for scissors, there ought to be one circular file, and a smooth surface, but that two Turkey stones might also succeed: Held, that the specification was bad, as it neither directed the machines for scissors to be made with Turkey stones, nor to be made with one circular file and a smooth surface. *Fellon v. Greaves.* 611

PAYMENT.

See ANNUITY, 1.

PERJURY.

See VARIANCE, 1.

1. A cause was referred by a Judge's order to C. D., and by the order it was directed that the witnesses should be sworn before a Judge, "or before a commissioner duly authorized." A witness was sworn before a commissioner for taking affidavits, and examined *vide voce* by the arbitrator: Held, that a witness so sworn was not indictable for perjury. *Rea v. Hanks.* 419

2. To support an indictment for perjury committed on a trial at the Quarter Sessions, three witnesses, who heard the party examined, stated what he swore on that trial; and the party was convicted of perjury, although neither of the witnesses took down the evidence as it was given, and neither of them professed to state the whole of the evidence that he gave.

To show that the perjury was wilful and corrupt, evidence may be given of expressions of malice used by the party towards the person against whom he gave the false evidence. *Rea v. Munton.* 498

3. An indictment for perjury, tried before the Lord Chief Justice, at Westminster, charged the perjury to have been committed on a trial at *Nisi Prius*, at the King's Bench Sittings. The prosecutor, to prove the trial at *Nisi Prius*, put in the *Nisi Prius* record, with the minute of the verdict indorsed on it by the associate. There was no *postea* drawn up, and the associate stated that none could be drawn up, as a rule for a new trial was pending: Held,

to be sufficient proof of the trial at *Nisi Prius*. *Rez v. Brown*. 572

PILOT.

In an action against the captain and owner of a steam vessel for an injury resulting from the improper management of the vessel, if it appear that the pilot had the control, such pilot is not a witness for the defendant without a release, though the defendant himself was on board at the time. *Hutkins v. Finlayson*. 305

PLEA.

1. If one of two defendants plead a plea of bankruptcy *puis darrein continuance*, the plaintiff cannot, at *Nisi Prius*, confess this plea to be true, and go on with the case as to the other defendant. *Pascall v. Horaley*. 372
2. An affidavit to verify a plea *puis darrein continuance*, at the Assizes, sworn at the assize town on the commission-day of the assizes before a commissioner for taking affidavits, is not good. It should be sworn before one of the Judges of Assize. However, the Judge at *Nisi Prius* will allow it to be re-sworn before him. *Earllett v. Leighton*. 408

PLEADING.

See AGREEMENT, 2. BANKRUPT, 13. BILL OF EXCHANGE, 9. ESCAPE, 2. EXECUTORS AND ADMINISTRATORS, 1. GUARANTEE, 2. LIBEL, 7, 8, 9. MALICIOUS ARREST, 1. MONEY HAD AND RECEIVED, 1. NEGLIGENCE, 1. SERVANT, 2.

1. If a declaration aver, that in pursuance of an agreement, an action was discontinued, evidence that, since the agreement, no step had been taken in the cause, is not sufficient to support the allegation. *Panshaw v. Heard*. 190
2. A declaration, which alleges that A. B. broke and entered the dwelling-house of the plaintiff, and made a disturbance therein, and broke open part of the lands and roof of the said dwelling-house, is not supported by proof of breaking an external rail fence, and trespassing on lands forming the roof of a counting-house, occupied by A. B., but used as an easement to the house of the plaintiff. *Mudie v. Bell and others*. 331
3. Form of declaration for keeping an unlicensed music-room. 471, n.
4. Form of pleading a recovery against a trespasser. 489, n.
5. Replication that the recovery was only part of the trespass. 491, n.
6. Form of plea, by a petitioning creditor before choice of an assignee. 506, n.
7. Replication denying the act of bankruptcy. 510, n.
8. If, in an action on a bond against a surety, non-payment by the principal after a notice in writing required by the condition, be averred in the declaration, and the defendant suffer judgment by default, it is not

necessary to give evidence of the notice, because the allegations of the declaration are not put in issue. If the breach be assigned under the statute on the record after judgment, *semble*, that it would be otherwise. *Barwise v. Russell*. 608

PLEDGING.

See FACTOR 1.

POSTPONING A TRIAL.

If the trial of an indictment for felony be postponed at the instance of the prisoner, on account of the illness of a witness, the prisoner is never required to pay the costs of the prosecutor. Where the trial of a case of felony is postponed, the Court will not make any order for the prosecutor's expenses till after the trial has actually taken place. *Rez v. Hunter*. 591

PRACTICE.

See BANKRUPT, 13. EJECTMENT, 1. INDICTMENT, 1, 2. LEGITIMACY, 2. LIBEL, 8, 9. POSTPONING A TRIAL. TRESPASS, 3. WITNESS, 4.

1. If a party sue on a bill, and, after the action is commenced, another bill accepted by the same defendant, of which he is holder, is dishonoured, and he bring a second action on that: A Judge at chambers would, on application being made, direct the two actions to be consolidated. *Oldershaw v. Tregwell*. 58
2. If the defendant's counsel take an objection, and the plaintiff's counsel answer it, and, in replying on the objection, the defendant's counsel cite a case, the plaintiff's counsel will be allowed to observe on the case so cited. *Fairlie v. Deuton and another, Gents, two, &c.* 103
3. After the Jury have had the case summed up to them, and have retired, the Court will not permit them to see a treatise on the law of the subject, even with consent of parties, as they should state their difficulty to the Judge, and receive his direction as to the law. *Burrows, Gent., v. Unwin*. 310
4. It being questionable whether a particular count in an indictment for felony was not bad on demurrer, upon an objection that would be aided by verdict, and this being pointed out to the Judge before plea pleaded—His Lordship, to save the public time, directed the trial to proceed, saying, that if the prisoner should be convicted on evidence, which, in his opinion, was applicable to this count only, he would consider it as demurred to, and allow the demurrer to be argued, putting the prisoner in the same situation as if that count had been demurred to in the first instance. *Rez v. Cordy*. 425
5. If certain parts of a book are used to refresh the memory of a witness for the plaintiff, and the defendant's counsel, in his address to the Jury, observes upon the general state of the book, and refers to other

- parts of it, such observations do not give the plaintiff's counsel the right of reply. *Pullen v. White.* 434
6. Plea in abatement that the promises were "made jointly with A." Replication that they were not made jointly with A. On the trial of this issue the defendant begins. *Fowler v. Coster.* 463
But see LIBEL, 8 & 9. BANKRUPT, 13. TRESPASS, 3, as to the right to begin.
7. In an action for a malicious arrest, the plaintiff's counsel had closed his case, and the defendant's counsel had begun to address the Jury, when the Lord Chief Justice said, he would nonsuit, on the ground that there was no evidence of malice. The plaintiff's counsel wished to adduce further evidence, but was not permitted, the Lord Chief Justice observing, that the rule of not permitting a party to adduce fresh evidence, after such party had closed his case, had been already too much relaxed. *George v. Radford.* 464
8. The Court will direct money found upon a prisoner to be restored to him before trial, if it appear by the depositions that it is in no way material to the charge on which he is to be tried. *Rez v. Barnett.* 600

PRINCIPAL AND AGENT.

See AGENT.

An agent authorized to sell goods has (in the absence of advice to the contrary) an implied authority to receive the proceeds of such sale. *Capel v. Thornton.* 352

PRIVILEGED COMMUNICATION.

See EVIDENCE, 6, 9. LIBEL.

PROCESS, SERVICE OF.

See EVIDENCE, 2.

PROMISE OF MARRIAGE.

Evidence that the defendant said to the plaintiff that he would marry her *in July*, and that he would marry her sooner were it not that he had arrangements to make which would be completed by July, *if not before*; and also that he said to her once, in the month of May, on taking leave, "I hope *in a few weeks* to take you home," is sufficient in an action for breach of promise of marriage to support a count on a *general* promise. *Phillips v. Crutchley.* 178

PROMISSORY NOTE.

See BILL OF EXCHANGE.

1. If a person perfectly imbecile in mind is imposed upon and induced to sign a promissory note, which is drawn in an unusual form, such note is bad, even in the hands of an indorsee. *Sentance v. Poole.* 1
2. If the declaration in an action against the

maker of a promissory note, state, that the defendant made it "*his own proper hand being thereon subscribed,*" and it appears that the note was drawn by his son in his name and by his authority, the variance will not prevent the reading of the note, but the allegation may be rejected as surplusage. *Booth v. Grover.* 335

3. If an action be brought on a note, and for business done as an attorney, the note not tallying in its amount with the business done at the date of it, and no evidence being given as to the consideration for it:—It will be left to the Jury to say whether the note was given in satisfaction of the bill for business done up to the time of its date, or whether it was an entirely distinct transaction. *King v. Masters.* 347

PROMOTIONS, 207, 560, 628.

PROSECUTOR'S EXPENSES.

See POSTPONING A TRIAL.

PUIS DARREIN CONTINUANCE.

See PLEA, 1, 2.

RAPE.

See CROSS-EXAMINATION, 2.

RELEASE.

See ANNUITY, 1. WITNESS, 8.

REPLEVIN.

In an action of replevin against a broker, a person who, at the time of the distress, was in partnership with such broker, but who, at the time of the trial, had ceased to be his partner, is a competent witness for him.

In such action, if it be proved that the landlord employs the attorney to defend the broker, that is sufficient evidence of the broker's authority to distrain in the absence of any written warrant. *Duncan v. Maitland.* 172

REPLY.

See PRACTICE, 5.

ROBBERY.

1. If a gang of poachers attack a game-keeper, and leave him senseless on the ground, and one of them return and steal his money, &c., that one only can be convicted of the robbery, as it was not in pursuance of any common intent. *Rez v. Hawkins.* 392
2. A. had set wires in which game was caught; B., a game-keeper, found them, and took the game and wires for the use of the lord of the manor; A. demanded them with menaces, and B. gave them up:—The Jury found that A. acted under a *bond fide*

impression that the game and wires were his property: Held, no robbery. *Rea v. Hall*. 409

RULE, GENERAL.

As to moving for New Trials, 111

SACRILEGE.

If a church-tower be built higher than the church, and have a separate roof, but have no outer-door, and be only accessible from the body of the church, from which it is not separated by any partition; this tower is a part of the church, within the meaning of the stat. 7 & 8 Geo. 4, c. 29, s. 10. *Rea v. Wheeler*. 585

SALE OF GOODS.

A. agreed to sell and B. to buy a ship, which A. undertook should be fitted similar to another ship. Before the time for completing the fittings, B. repudiated the contract, and refused to take the ship. Previous to this refusal, A. had done extras to the ship, at B.'s desire. A. did not go on with the fittings, but sold the ship, and brought his action against B. for the loss upon the sale. In his declaration he averred, that the ship was fitted "according to the form and effect of the agreement," and also, that it was ready for delivery at the proper time: Held, that he could not recover on the special contract, nor for the extras on the count for work and labour. *Parmer v. Burrell*. 144

SEAMAN.

1. If a seaman's claim for wages is resisted on the ground that he would not do his work, which by the ship's articles is to cause a forfeiture of wages,—it is a good answer to this defence, to show that the refusal to work was caused by the misconduct of the captain, which went to induce the men to incur such forfeitures. If seamen have incurred a forfeiture of their wages, and in a time of distress, when the ship is aground, the captain call on those seamen to assist in getting her off,—this is no waiver of the forfeiture. But if the captain continues them in their work after the peril is over, it is otherwise. *Train v. Bennett*. 3
2. By a clause in the ship's articles of a South-Sea whaler, the seamen serving on board were to lose their wages if they did not return with the ship to the port of London. After serving twenty-seven months, some of the seamen were, with the consent of the captain, exchanged into another ship for others belonging to that ship: Held, that if these seamen lost their wages under the articles, they could recover a reasonable compensation for their services, on the count for work and labour. *Hillyard v. Mount*. 93
3. *Semble*, that a regulation in the seamen's articles of a merchant ship, that "every

seaman committed to custody for the preservation of good order, shall forfeit his wages, together with everything belonging to him on board the ship," is in point of law a good and proper regulation. *Rice v. Haylett*. 534

SEARCH WARRANT.

Officers went with a search warrant, and at the desire of the party gave it to him for his perusal, when he refused to return it: Held, that the officers had a right to take it from him, and even to coerce his person to obtain the possession of it, provided they used no more violence than was necessary. *Rea v. Mitton*. 31

SEWERS.

1. The Jury, who are summoned by the sheriff to make the presentment before Commissioners of Sewers, should come from the body of the county, and not from the district over which the Commissioners have jurisdiction; and where the precept to the sheriff was to summon "good and lawful men of your country, and resident within the Tower Hamlets," that being the district over which the Commissioners had jurisdiction,—It was held bad; and a presentment made by that Jury and all the subsequent proceedings founded on it declared to be void. *Birkett v. Crozier*. 63
2. A Jury, empaneled to inquire and present at a Court of Commissioners of Sewers, presented, that A. was benefited by the Sewers; and he received a summons to show cause why he should not pay. He neglected to traverse the presentment, and a distress was levied for the amount of the rate: Held, at *Nisi Prius*, that these facts were a justification in an action of trespass for taking the distress, as the presentment, if duly made, and not traversed, justified the Commissioners in issuing the warrant of distress. The presentment need not contain the name of every person benefited; if it find "All Fore Street" to be benefited, that is enough to include every one having a house there; and any one so having a house might traverse such presentment, he stating in his traverse, that his property is so situated, and that he is aggrieved by the presentment. The warrant of distress need not recite the presentment. The defendant is not entitled to recover his treble damages under the stat. 23 Hen. 8, c. 5, s. 12, in case of a verdict in his favour, or a nonsuit, unless he claims them on the record. *Warren v. Dix*. 71
3. Form of plea of justification under the warrant of Commissioners of Sewers. 63, n.

SHARES.

If a person purchase certain parchments, purporting to be share certificates of a certain mine, and conceive himself to be a share-

holder in such mine; if it appear that those parchments gave no legal interest in the mine, such person is not liable to pay for goods furnished for the working of such mine, unless they were furnished on his personal credit. *Vice v. Dow. Vice. Anson.* 19

SHERIFF.

See EXECUTION, 1.

In trover by the assignees of a bankrupt, for goods taken by the Sheriff under an execution, it appeared that the goods were taken at about the time of year at which the Sheriffs are changed; and it was proved, that a witness, after the present cause was set down for trial, saw a form of return indorsed on the writ, which had never been returned. This form of return was signed by the defendant as Sheriff: Held, to be sufficient evidence that he was the Sheriff who executed the writ; and that if the writ, when produced at the trial, has his name erased, and the name of the previous Sheriff substituted, it will be a question for the Jury, whether that substitution was made to correct a mistake, or to defeat the plaintiff.

The price at which goods are sold at a Sheriff's sale is not necessarily the measure of damages in trover, if the sale be wrongful; but when the plaintiff is an assignee, as he must have sold the goods if they had come to him, Juries are often induced to find a verdict for no more than the sum at which the Sheriff actually sold.

In an action against the Sheriff, the officer who had given him security is not a competent witness for the defence, even though the officer is indemnified by the execution creditor, and does not employ the attorney. *Whitehouse v. Atkinson.* 344

SHIP.

See SEAMAN.

1. The question, whether a ship, on a voyage from Madras to London, is not seaworthy, if she have no person on board her besides the captain who is capable of navigating her, is a question of fact for the Jury, and not a question of law to be determined by the Judge. *Clifford v. Hunter.* 16
2. If a vessel at sea is going close hauled to the wind, and another meeting her is going free, the rule of the sea is, for the latter vessel to go to leeward; and although such latter vessel may either go to leeward or windward as she best can, yet she ought, as a general rule, to suppose that the vessel going to windward will keep her position. *Handyside v. Wilson.*

STAMPS.

See AGREEMENT, 2.

1. If, when a written agreement is produced, the opposite party object that it contains a greater number of words than the stamp is

proper for, and call a witness who has counted the words in the counterpart: the Judge will direct the officer of the Court to count the words in the original.

Figures are to be counted as words, but an indorsement on the back, and a page of the particulars of sale, containing mere repetition of the description of the property which was described in another page of the same particulars, are not to be counted.

The Judge will not call on another cause, to allow the agreement to be sent to the Stamp Office, to be properly stamped, and the plaintiff must therefore be nonsuited. *Ld. Vis. Dudley and Ward v. Robins.* 26

2. A paper, stating that the party signing it has certain bills in his hands, which he "has to get discounted, or return on demand," does not require an agreement stamp. *Mullett v. Hutchinson.* 92
3. In *assumpsit*, by the indorsee against the drawer of a bill of exchange, the defence was, that time had been given to the acceptor. To meet this defence, a copy of a paper that the defendant had promised to sign, was offered in evidence. By this the defendant consented to the plaintiff's using any means to obtain payment from the acceptor without prejudice of his right to recover from the drawer: Held, that this paper did not require a stamp. *Hill v. Johnson.* 456
4. A. had built a house for B. under a written contract, not admissible in evidence for want of a stamp. A. sued B. for the value of certain works about the house, alleging them to be extras, and not included in the contract: Held, that the Court could not look at the unstamped contract to ascertain whether those works were included in it or not, and that the plaintiff must be nonsuited. *Vincent v. Cole.* 481

SURVEYOR OF HIGHWAYS.

1. In an action on the stat. 13 Geo. 3, c. 78, s. 48, against surveyors of highways, to recover double the amount of a sum not paid over by them to their successors, a notice of action was given, stating that an action would be brought against them, for that they had in their hands a balance of 353*l.* 19*s.* 4*d.* At the trial, it appeared that only 60*l.* 3*s.* 3*d.* was in their hands: Held, that this notice was not sufficient, and that the plaintiff could not recover the double amount. *Hendebourck v. Langton.* 566
2. Whether a succeeding surveyor of the highways can recover a balance in the hands of the two surveyors who preceded him, in an action for money had and received to his use—*Quærs*: but held, that if, in that form of action against both, it be shown that the money came to the hands of one only, the plaintiff must be nonsuited, although it be also shown that the defendants were jointly surveyors. *Ibid.*
3. If several parishioners in vestry sign a resolution in the vestry minute-book, stating that they approve of an action brought by

the surveyor of the highways against A., and that they do thereby guarantee to him all legal expenses that are or may be incurred by him in prosecuting that suit; this binds them personally, and will render each person signing it incompetent to be a witness on the trial of that action. *Ibid.*

SURETY.

See BOND, 8. CONTRIBUTION, 1.

SURGEON.

See MANSLAUGHTER, 3, 4.

Admission as a member of the Royal College of Surgeons does not entitle a man, since the stat. 55 Geo. 3, c. 194, to charge for medicines administered by him while attending a patient suffering under *typhus fever*.

But a surgeon may charge for medicine administered in a surgical case, where the medicine is subservient and subordinate to the discharge of his duty as a surgeon. *Allison v. Haydon.* 246

TALES.

Held at *Nisi Prius*, that, in a special jury cause, the plaintiff's counsel cannot have a tales without the consent of the counsel for the defendant. *Museum, British, v. Whist.* 289

TAXES.

See BOND, 2.

TENDER.

See ASSUMPSIT, 1.

If an attorney send a letter to demand payment, and the debtor make a tender to him, that is a good tender, unless the attorney disclaims his authority at the time; and, if the attorney be absent, he is bound by the acts of those whom he allows to represent him at his office. Therefore, after such a letter being sent, a tender to the clerk of the attorney at his office (the attorney being absent) is good. *Wilmot v. Smith.* 453

TRAVERSE.

If a party has been held to bail, or committed for more than twenty days, on a charge of *felony*, and the Grand Jury ignore the bill for the *felony*, and find a bill for a *misdeemeanour*, in attempting it; the party is entitled to traverse. *Rex v. James.* 222

TREATING.

See ELECTION, 2.

TRESPASS.

See EXECUTION, 1. LANDLORD AND TENANT, 4.

1. If a person who keeps hounds and a hunt-

ing establishment, receive notice not to trespass on the lands of A., and after this his hounds go out, followed by a number of gentlemen who go upon the lands of A., the owner of the hounds is answerable for all the damage they do, though he himself forbear to go on the lands, unless he distinctly desires the gentlemen so out with his hounds not to go on those lands. If a stag hunted by the hounds of B. run into the barn of A., B. and his servants have no right to enter the barn to take his stag; and if they do so they are trespassers. *Baker v. Berkeley, Esq.* 32

2. The 136th section of the 57 Geo. 3, c. xlix, requiring twenty-one days' notice of action, applies to the case of an action brought against a contractor for the removal of dust, &c. appointed by the Commissioners of Sewers for the city of London, for an alleged trespass in seizing a cart supposed to contain dust, and assaulting and imprisoning the driver. *Braddon v. Murphy.* 574

3. In trespass, where there are special pleas of justification, but no plea of the general issue, the defendant is entitled to begin, although the declaration alleges special damage. *Fish v. Travers.* 578

4. If there be a joint action of trespass against six defendants, and the plaintiff prove a joint trespass committed by all, and then go on to prove another act of trespass by three of them, expecting to connect the other three with this also, but fail in so doing, the latter three are entitled to be acquitted before the defence is opened, as the plaintiff must be taken to have elected to waive the joint-trespass, and to have gone on as against those three for the second act of trespass only. *Wynne v. Anderson.* 596

5. If an action be brought against six for a single act of trespass, and the plaintiff by his evidence only fix three of them, the Judge will not direct an acquittal of the other three till all the evidence for the defence is gone through. *Ibid.*

TROVER.

See ATTACHMENT, 1. CONVERSION, 1. GOODS SOLD, 2. MASTER AND SERVANT, 1.

A party cannot maintain trover against a constable for a wrongful taking of goods under a Justice's warrant, without joining the Justice as a defendant, if perusal and copy of the warrant have been given under the stat. 24 Geo. 2, c. 44, s. 6. *Lynn v. Golding.* 586

TRUSTEES.

See TURNPIKE, 2.

TURNPIKE.

1. If the plaintiff subpoena the defendant's attorney to produce books, the latter is not entitled to receive any thing from the plaintiff for expenses or loss of time in attending as a witness. *Pritchard v. Walker.* 212

2. If a person is named in a turnpike-act, as one of the trustees of a turnpike road, and has acted as such, and been recognized as a trustee by the plaintiff, the Judge, at the trial of a cause, in which the goodness of his title to act is not the matter directly in issue, will take him to be a good trustee, and will not allow evidence to be given on the part of the plaintiff, to show that the person has not taken the oath prescribed to be taken by trustees of roads before they act as such. *Ibid.*

USE AND OCCUPATION.

See LANDLORD AND TENANT, 5.

VARIANCE.

See AGREEMENT, 7. BOND, 2. COIN, 1. MALICIOUS PROSECUTION. PROMISE OF MARRIAGE, 1.

1. On an indictment for perjury in a cause at *Nisi Prius*, it is no variance that the *Nisi Prius* record states the trial to have been on a day different from that stated in the indictment.

If the indictment state the trial to have been before one of the Judges (who in fact sat for the Lord Chief Justice), and the *Nisi Prius* record state the trial to have been before the Lord Chief Justice, *semble*, that this is no variance.

If the indictment, in setting out the substance of oral evidence charged to be false, put "Mr." for "Mister," and "Mrs." for "Mistress;" this is no variance, though it should appear that the witness said "Mister" and "Mistress," and not "Mr." and "Mrs." *Rez v. Coppard.* 59

2. The declaration in an action on a bail bond, stated the issuing from the Common Pleas of a writ for the arrest of the principal, by which the sheriff was commanded to have his body, "*before the justices of our said lord the king at Westminster,*" &c., to answer, &c., and also, that he might answer, &c., "*according to the custom of his said Majesty's Court,*" &c., and alleged the condition of the bond to be for the appearance of the principal, "*according to the exigency of the said writ in the said Court,*" &c., and also to answer, &c., "*according to the custom of his said Majesty's Court of Common Bench.*" The condition, as proved at the trial, was for the appearance of the principal, *before our said lord the king at Westminster,*" &c., to answer, &c., and also to answer "*according to the custom of the King's Court of Common Bench.*" Held, that there was not any material variance. *Crofts v. Stockley.* 281

3. A. proposed to B. to give him a certain sum for a *thirty-one years' lease* of a house, with possession on the 25th of July, and a definite answer was to be given within six weeks. B., about three weeks after the proposal, wrote that he accepted it, and would give possession on the 1st of August. A. in a few days wrote, withdrawing his proposal. Some time after this, and just

before the end of the six weeks, B. wrote that it was by mistake he had offered possession on the 1st of August, and stating that he was ready to give it according to the proposal: Held, at *Nisi Prius*, that the letter of B. offering possession in August, was not an acceptance of A.'s proposal, and that A. had a right afterwards to retract his offer; and having done so, the second letter of B., amending the offer of possession, was too late.

The declaration in the first and third counts alleged the possession of the whole interest by B., and in the second, the possession of a contract for it. It appeared that there had been some conversation between B. and the owner of the freehold, about granting a thirty-two years' lease, but there was no written contract, nor did it appear that there was any positive verbal agreement upon the subject. The only interest which B. had in the premises, at the time of the proposal and retraction, was a ten years' interest: Held, both at *Nisi Prius* and in Banc, that there was a material variance between the declaration and the proof. *Routledge v. Grant.* 287

4. In replevin, the defendant, in his avowry, stated, that the distress was for rent arrear, and that the plaintiff held the lands on certain terms. However, on the plaintiff's lease being put in, it appeared that he held on other and different terms: Held, that this variance was not amendable under the stat. 9 Geo. 4, c. 15: Held also, that that act only applies to cases where some particular written instrument is professed to be set out or recited in the pleading. *Ryder v. Malbon.* 594

VENDOR AND VENDEE.

See AGREEMENT, 1.

The particulars of sale at a public auction described two houses as Nos. 3 and 4, and stated, that the taxes of No. 3 were paid by the tenant. The houses ought to have been described as Nos. 2 and 3, but the names of the occupiers were correct; and it should have been stated that the taxes of No. 3 were farmed by the landlord. The houses, Nos. 2 and 4, were of the same rate: but No. 4 was in the best state of repair: Held, that these misdescriptions were not cured by a condition, which provided, that if any error or mis-statement should be found in the particular, it should not vitiate the sale. *Leach v. Mullett and another.* 115

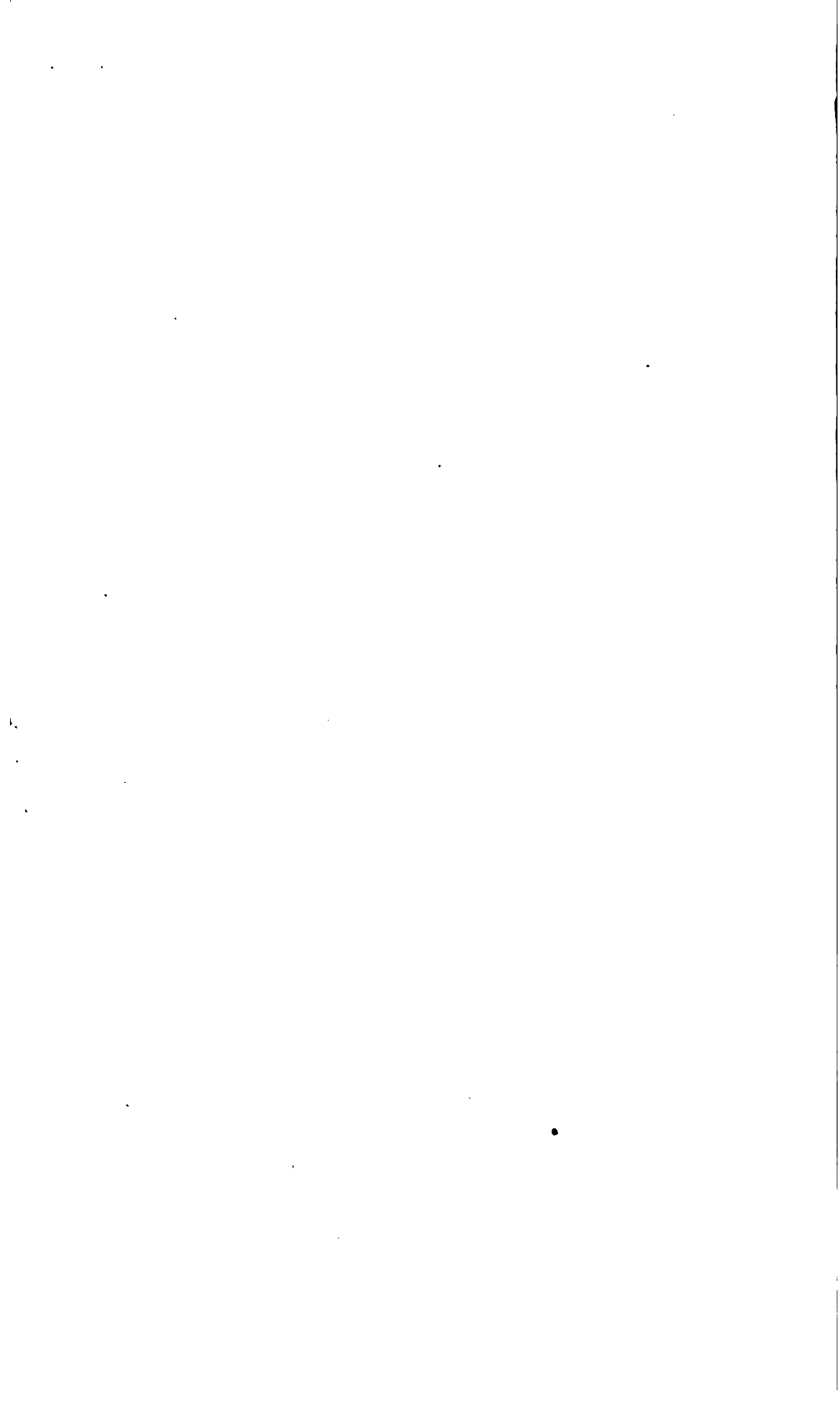
WARRANTY.

See INSURANCE, 1.

WITNESS.

See ADMISSION, 1. BAIL, 2. BILL OF EXCHANGE, 7. CROSS-EXAMINATION, 1. FORGERY. PILOT. SHERIFF. SURVEYOR OF HIGHWAYS, 3. TURNPIKE, 1.

1. If a party having failed, and assigned his











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